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# Women

## A Feminist Perspective

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*Edited by*  
**Jo Freeman**



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# The Revolution for Women in Law and Public Policy

Jo Freeman

INSTITUTIONS  
OF SOCIAL  
CONTROL

A REVOLUTION IN PUBLIC policy toward women happened in the 1960s and 1970s. Beginning with passage of the equal pay act in 1963 and the prohibition against sex discrimination in employment in 1964, Congress added numerous laws to the books that altered the thrust of public policy toward women from one of protection to one of equal opportunity. While implementation is incomplete, and equal opportunity by itself will not eradicate women's secondary position in society, the importance of this fundamental change should not be underestimated.

Parallel to this development the Supreme Court fundamentally altered its interpretation of women's position in society. Until 1971, the judicial approach to women was that their rights and responsibilities, opportunities and obligations, were essentially determined by their position in the family—the role of wife and mother. Women were viewed first and foremost as members of a dependent class whose individual rights were subservient to their class position. From this perspective virtually all laws that classified by sex were constitutional. Today most such laws have been found unconstitutional. The remaining laws and practices that treat the sexes differently are subject to more searching scrutiny than in the past, and the Court is particularly disapproving of rationalizations for them that encourage dependency.

## *The Tradition of Institutionalized Dependence*

Until the 1930s the primary locus of governmental activity was in the states, not the federal government. Most of the laws that heavily affected people's lives were state laws. Article I, § 8 of the Constitution limits the areas in which the federal government may act, and the Tenth Amendment reserves all other powers to the states or to the people. Federal laws take precedence when there is a conflict, but it is only in the last fifty years that the Supreme Court has interpreted the Constitution to allow an expansion of federal authority. In the mid 1960s Congress elaborated on the means available to it to influence state policy, such as tying federal funds to the passage of specific laws. Despite this expansion, many policy arenas are still reserved to the states.<sup>1</sup>

The state legislature is not the only source of state law. This country inherited from Great Britain a large body of "common law," which was essentially the collective wisdom of individual judges deciding individual cases over hundreds of years, as collected and commented on by several great British

jurists. This common law has remained operative in every state and any policy arena in which a state legislature has not passed a superceding statute. Although all new law is now supposed to be statutory in origin, the power of individual judges to interpret statutes as well as to reinterpret the original common law, and their willingness to adapt both to changing circumstances, has created an American common law in each state.

#### FAMILY LAW

Under the English common law a woman lost her legal identity upon marriage; it *merged* into that of her husband under the feudal doctrine of *coverture*. The result was succinctly stated by Justice Black in 1966 as resting “on the old common-law fiction that the husband and wife are one . . . [and] that . . . one is the husband.”<sup>2</sup> The consequences were described by Edward Mansfield when he wrote the first major American analysis of *The Legal Rights, Liabilities and Duties of Women* in 1845.

It appears that the husband’s control over the person of his wife is so complete that he may claim her society altogether; that he may reclaim her if she goes away or is detained by others; that he may use constraint upon her liberty to prevent her going away, or to prevent improper conduct; that he may maintain suits for injuries to her person; that she cannot sue alone; and that she cannot execute a deed or valid conveyance without the concurrence of her husband. In most respects she loses the power of personal independence, and altogether that of separate action in legal matters.<sup>3</sup>

The merger of husband and wife into one person resulted in many common law principles that seem strange today. In the criminal law a husband and wife could not be guilty of conspiring together or of stealing one another’s property. Husbands could not rape their wives. If a wife committed a criminal act in her husband’s presence, it was assumed to be under his direction; he was the guilty party, not her. In the civil law, neither spouse could maintain a tort action (a civil wrong) against the other, nor could either testify against the other. A husband, but not a wife, could sue a third party for loss of consortium (services, society, companionship, and affection) resulting from injuries to the spouse.<sup>4</sup>

At common law these marital disabilities were offset by spousal obligations. The fundamental basis of the marital relationship was that husbands and wives had reciprocal—not equal—rights. The husband had to support the wife and children, and the wife had to render services as a companion, housewife, and mother in return. This doctrine did not mean wives could sue husbands for greater support, since by definition she did not have a separate legal existence. Nor did it give her a right to an allowance, wages, or income of any sort. But it did permit wives to obtain “necessaries” from merchants on their husbands’ account. Even after all the states passed Married Women’s Property Acts in the nineteenth century, permitting wives to retain control of their separate property, husbands were still obligated to pay their wives’ debts when incurred for family necessities.<sup>5</sup> This spousal obligation continued after death or divorce. On marriage a wife obtained a *dower* right to the use, for her natural life, of one-third of the husband’s property after his death, regardless



of any will to the contrary. She retained that right even if he sold the property before he died, unless she specifically relinquished it to the purchaser. If the marriage ended in divorce, she was entitled to continued support, though not to the custody or guardianship of the children, unless she was at fault for the demise of the relationship.

Eight states that were originally controlled by France or Spain—California, Idaho, Texas, Washington, Arizona, Louisiana, Nevada, and New Mexico—did not inherit the English common law and thus followed rules developed in continental Europe. Under their *community property* systems each spouse is considered owner of half of the earnings of the other, and all property acquired during marriage (other than gifts and inheritances) is jointly owned by both spouses, regardless of who paid for it or whose name it is in. However, the result was often the same because the husband was considered to be the head of the household and as such could manage and dispose of the community property as he wished.

In 1979 Louisiana became the last state to give both spouses the legal right to manage the community property. The case that led to its revocation is a good example of how little protection joint ownership really gave to a wife. Louisiana's "head and master" law permitted a husband the unilateral right to dispose of jointly owned community property without his wife's knowledge or consent. In 1974 Joan Feenstra had her husband incarcerated for molesting their minor daughter. To pay the attorney who represented him in this action, he executed a mortgage on their home. Louisiana law did not require the husband to get his wife's permission to do this or even to inform her of his action, although the house had been paid for solely out of her earnings. After the charges were dropped, a legal separation was obtained, and the husband left the state, the attorney foreclosed on the mortgage, and Joan Feenstra challenged the constitutionality of the statute in federal court. During legal proceedings Louisiana changed the law to permit equal control, but only prospectively. However, the Supreme Court declared that the original statute had been unconstitutional and invalidated the mortgage.<sup>6</sup>

Several of the common law property states have occasionally adopted some of the community property rules. In the 1940s several passed laws to allow one-half of a husband's earnings to be considered as his wife's income in order to obtain more favorable income tax rates for married couples. When the federal government created joint filing in 1948 so couples could split their income, these states returned to common law rules.<sup>7</sup> In 1983 the Commission on Uniform State Laws proposed a Uniform Marital Property Act, which created a modern form of community property. Wisconsin adopted this with modifications in 1984, making it the ninth real community property state.<sup>8</sup>

Family law varies considerably from state to state because it is not an area in which the Constitution permits the federal government to act and thus impose uniformity. Between 1917 and 1947, thirty-three constitutional amendments were proposed to give Congress that authority, and twelve bills were introduced to provide for uniform marriage and divorce laws should such an amendment be ratified. None of these proposals were even voted on, let alone passed by Congress, and the idea faded. Nonetheless, states often follow each other's lead in changing their laws, and model laws are often proposed

by nongovernmental entities and adopted by several states. After Mississippi passed the first Married Women's Property Act in 1839, the other states passed similar acts throughout the nineteenth century. These eventually removed the worst of women's legal disabilities. After Suffrage the National Woman's Party and the League for Women Voters proposed changes in the many state laws that affected men and women differently, though only a few were passed.

What was left prior to the beginning of the contemporary feminist movement in the mid 1960s was something of a patchwork quilt of common law dictates and statutory changes. In most states married women did not have the legal right to retain their own name or maintain a separate domicile. Husbands remained liable for support of their families, but a wife was responsible if the husband had no property and was unable to support them, or himself. Paternal preference in guardianship and custody of children had gradually shifted to the standard of what was in the best interests of the child, though several states provided that, all else being equal, the mother should be preferred if the child was of tender years and the father if the child was old enough to require education or preparation for adult life. Some states gave husbands a right equivalent to that of "dower," in effect requiring his permission before a wife could sell her separate property, just as hers was necessary for him to completely convey his. Half of the community property states provided that a wife could control her own earnings. In virtually all states wives could contract and sue independently of their husbands, though some states still required a husband's permission for a married woman to participate in an independent business, and a few denied wives the legal capacity to become a surety or a guarantor.<sup>9</sup> Indeed, in the 1920s Miriam Ferguson, elected governor of Texas after her husband had been impeached, had to secure a court order relieving her of her marital disabilities so there would be no doubt about the legality of her acts as governor.<sup>10</sup> And in the 1960s a married Texas woman successfully defended against the United States government's efforts to collect a judgment against her for an unpaid Small Business Administration loan on the grounds that her disability to bind her separate estate by contract had not been removed by court decree as required by Texas law.<sup>11</sup>

#### PROTECTIVE LABOR LEGISLATION

Protective labor legislation refers to numerous state laws that restricted the number of hours women could work, the amount of weight they could lift, occasionally provided for special privileges such as rest periods, and often excluded them entirely from night work or certain occupations. The first effective law, enacted in Massachusetts in 1874, limited the employment of women and children to ten hours a day. By 1900 fourteen states had such laws, and by the mid 1960s every state had some form of protective labor legislation.<sup>12</sup> There were two forces behind the drive for this legislation. One was organized labor, which saw women workers as competitors. Their policy was explicitly stated by President Strasser of the International Cigar Makers Union in 1879: "We cannot drive the females out of the trade, but we can restrict this daily quota of labor through factory laws."<sup>13</sup> The other was social

reformers, who found the Supreme Court unreceptive to protective laws that applied to both sexes.

In 1905 the Supreme Court declared unconstitutional a New York law that prohibited bakers from working longer than ten hours a day or sixty hours a week. In *Lochner v. New York* the Court said that "the limitation necessarily interferes with the right of contract between the employer and employee . . . [which] is part of the liberty of the individual protected by the Fourteenth Amendment."<sup>14</sup> Three years later it upheld an Oregon law that restricted the employment of women in factories, laundries, or other "mechanical establishments" to ten hours a day on the ground that women's

physical structure and a proper discharge of her maternal functions—having in view not merely her own health but the well-being of the race—justify legislation to protect her. . . . The limitations which this statute places upon her contractual powers . . . are not imposed solely for her benefit, but also largely for the benefit of all. . . . The reason . . . rests in the inherent difference between the two sexes, and in the different functions in life which they perform.<sup>15</sup>

With this precedent, the drive for protective legislation became distorted into a push for laws that applied to women only on the principle that half a loaf was better than none. Reformers eventually persuaded the Supreme Court that maximum hours and other forms of protective labor legislation were valid health measures for men as well as women,<sup>16</sup> but the opposition of organized labor to protective legislation for men focused their efforts on securing it for women. The 1938 Fair Labor Standards Act eventually provided federal protection for both sexes, but by then sex-specific laws governing the conditions under which women could work had gained a momentum of their own. The effect of these laws on women was controversial when they were passed and continued to be so long after they were in place. Those who supported them, particularly the Women's Bureau of the Department of Labor, claimed they effectively reduced the economic exploitation of women. Those who opposed them, including the National Woman's Party and the National Federation of Business and Professional Women, argued that they mostly protected men from female competition. These laws kept women out of jobs requiring night work and from promotions into positions requiring overtime or lifting more than the proscribed weights. During World War II protective labor laws were suspended to allow women to work in war industries and were reimposed after the war, when women were forced to leave.<sup>17</sup>

#### CIVIL AND POLITICAL RIGHTS

It is a common myth that when the Nineteenth Amendment extended suffrage to women on the same basis as men in 1920, all other civil and political rights automatically followed. In reality, few followed easily. Most required continual struggle. In the first few years after Suffrage there were even attempts to keep women from running for public office on the grounds that the right to vote didn't bring with it the right to be voted on.

One of the first uses to which women put their new right to vote was to change federal law to give women equal rights to citizenship with men.

Although the English common law allowed married women to retain their citizenship when they married foreign nationals, in the nineteenth century both Britain and the United States adopted the idea that a married woman's nationality should be that of her husband. In 1907 the United States made this principle automatic regardless of where the couple lived or the intentions of the husband to become a U.S. citizen. The first decade of the twentieth century was a period of heavy immigration, and the consequences of this law to native-born American women who married immigrants were quite onerous. Many states prohibited aliens from inheriting or buying real property or closed them out of some professions (e.g., law, medicine, teaching). During World War I, many American women married to foreign nationals found themselves classified as enemy aliens and their property confiscated.

Feminists achieved one of their first legislative successes in 1922, when Congress passed the Cable Act, separating a married woman's citizenship from that of her husband. However, it did not create equal citizenship rights or completely rectify major injustices. For example, in 1928 Ruth Bryan Owen's election to Congress was challenged by her opponent on the grounds that she had not met the constitutional requirement of seven years of citizenship. Owen, daughter of frequent Democratic Presidential candidate William Jennings Bryan, had lost her citizenship in 1910 when she married a British army officer. The 1922 act did not automatically restore her citizenship but only gave her the right to be renaturalized. The requirements were so burdensome that she was not renaturalized until 1925. This injustice, and continual lobbying by women's organizations, prompted several revisions in the law, until citizenship rights were finally equalized in the 1930s.<sup>18</sup>

The longest battle was over jury service, which feminists felt was an important indicia of citizenship, even though potential jurors are often less than enthusiastic over being called to serve. Traditionally, under the common law, juries were composed only of men, except in certain situations involving a pregnant woman. In this country the First Judiciary Act of 1789 mandated that federal jurors should have the same qualifications as those of the state in which the federal court was sitting, and no state permitted women to sit as jurors until Utah did so in 1898. In 1880 the Supreme Court found that the exclusion of blacks from jury service was unconstitutional but noted that this was not true of women.<sup>19</sup> Only twelve states conferred jury duty with enfranchisement. In the rest, many decades of trench warfare in the legislatures were necessary just to achieve the right to be in the jury pool; equal obligation to serve was the exception. By 1965 Alabama, Mississippi, and South Carolina still completely excluded women, and in only twenty-one states were women eligible on the same basis as men. In eighteen states and the District of Columbia, women were exempted based solely on their sex; in eight states, the exemption was limited to women with family responsibilities. It was not until the Civil Rights Act of 1957 that all citizens were deemed qualified to sit on federal juries, regardless of state law, and even this law was not implemented until the Federal Jury Selection and Service Act of 1968 specifically prohibited exclusion on the basis of race, color, religion, sex, national origin, or economic status.<sup>20</sup>

Women have often found employment opportunities in the state and federal civil service that they did not find in the private sector, but they have

also found these opportunities limited by the law and by official rulings. In 1919, all federal civil service examinations were finally opened to women, but each department head could specify the sex of those he wished to hire for any position. This was not changed until 1962. Ironically, the right to specify sex was *not* opposed by most women in government. Civil service rules gave veterans preference over nonveterans, and since few women were veterans, many were concerned that they would not be hired for even the lowest level clerical jobs if sex could not be specified.

However, women were all opposed to laws and administrative rulings that prohibited both spouses from holding government jobs; even when the rulings did not explicitly state that the wife would be the spouse to lose her job, that was the practice. The first attempt to remove married women from the federal civil service was made in 1921. This effort failed, but a similar one was finally successful in 1932. Since federal employees included school teachers in the District of Columbia and military draftees, a teacher married to an army private could find herself dependent solely on his income. Many other states followed suit during the Depression, in the belief that hard times required that jobs be distributed as widely as possible. One job per family was the demand; removal of women was the outcome. Teachers were the hardest hit; by 1931 most school systems would not hire married women and would not retain women when they married. Although the federal law was repealed in 1937 and pressure on married women eased with World War II, when these women were needed in the labor force, state laws limiting their employment in government positions still existed as late as the 1950s.<sup>21</sup>

### *Sex and the Supreme Court*

For many decades the courts made it clear that the traditional concern of public policy with women's family role went far beyond her legal rights and obligations within the marital relationship. Indeed, her family role formed the basis of her legal existence. The earliest case challenging a discriminatory law to reach the Supreme Court was instigated by Myra Bradwell, who objected to the refusal of Illinois to admit women to the practice of law. She and other women looked upon the newly ratified Fourteenth Amendment as an opportunity to remove some onerous legal barriers. In 1873 the Supreme Court rejected her argument that admission to the bar was a privilege and immunity of citizenship that could not be abridged by the states. Most telling was a concurring opinion by three justices which explained that

[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it 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. . . .

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state,

but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator, and the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.<sup>22</sup>

This rationale continued for almost a century. As late as 1961 Court decisions reflected a refusal to see women as individual people in preference to their identity as members of a class with a specific social role. That year a unanimous Court rejected a request by a Florida woman to overturn her conviction by an all-male jury for murdering her husband with a baseball bat during a "marital upheaval." Florida did not completely exclude women from jury service, but it was one of seventeen states that exempted women solely on the basis of their sex. This exemption took the form of assuming women did not wish to serve unless they registered a desire to do so with the court clerk, an assumption not made for men. Consequently, when Gwendolyn Hoyt's trial took place in 1957, only 220 women out of forty-six thousand eligible registered female voters had volunteered, and only ten of these were among the ten thousand people on the jury list constructed by the court clerk. The Court rejected her argument that "women jurors would have been more understanding or compassionate than men in assessing the quality of [her] act and her defense of 'temporary insanity.'" Instead it ruled that

the right to an impartially selected jury . . . does not entitle one . . . to a jury tailored to the circumstances of the particular case, . . . It requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusions. . . .

. . . Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities. . . .

This case in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service. [cites omitted] There is present here neither the unfortunate atmosphere of ethnic or racial prejudices which underlay the situations depicted in those cases, nor the long course of discriminatory administrative practice which the statistical showing in each of them evinced.<sup>23</sup>

#### THE FOURTEENTH AMENDMENT

To understand the logic of the Court and to appreciate the significant change in orientation that the Supreme Court began in 1971, one has to understand the structure of legal analysis that has developed around the Fourteenth Amendment. The most far-reaching of the Civil War Amendments, the simple language of Section I imposed restrictions on State action that had previously

only been imposed on the Federal government by the Fifth Amendment. These were that

no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court ruled very early that the "privileges and immunities" clause did not convey any rights that had not previously existed and thus shut that avenue of legal development. When Virginia Minor demanded suffrage as a right of citizenship, the Court said that since voting was not a privilege or immunity of national citizenship before the Fourteenth Amendment, it did not become one afterward.<sup>24</sup> The due process clause was for many decades used to undermine state economic regulations such as those found unconstitutional in *Lochner* as well as most of the New Deal legislation prior to 1937. This doctrine was called "substantive due process." Consequently, the quest for equality focused on the "equal protection" clause. Until 1971 this quest was a futile one for women. Initially the courts ruled that race and only race was in the minds of the legislators when the Fourteenth Amendment was passed. "We doubt very much whether any action of a state not directed by way of discrimination against negroes as a class or on account of their race will ever be held to come within the purview of this provision."<sup>25</sup> The prohibition on racial discrimination was soon expanded to include national origin<sup>26</sup> and alienage.<sup>27</sup> Fundamental rights, such as voting, travel, procreation, criminal appeals, or those protected by the First Amendment, were eventually brought under the protective umbrella of the Fourteenth Amendment as well.<sup>28</sup>

This umbrella did not protect everyone or every right. Instead, in the post-New Deal era, two tiers of equal protection analysis emerged.<sup>29</sup> Not all legal discrimination was prohibited, only *invidious* discrimination. If a *compelling* state interest can be shown, distinct laws or state practices—such as those necessary to integrate school districts—based on race or nationality are permitted. The essence of this approach is that certain classifications are "suspect" and thus subject to "strict scrutiny" by the courts. Unless there is a "compelling state interest," they will be struck down. Classifications that are not suspect are not subject to the same searching inquiry. The state need only show that there is a *rational basis* for their existence, and the court will defer to the legislature.

In practice, classifications that are subject to strict scrutiny are almost always invalidated as unconstitutional. Classifications for which only a rational basis need be shown have almost always survived. The courts have shown great deference to the state legislatures and have gone out of their way to construct rationalizations for legal distinctions that to the untrained eye might seem to have only the flimsiest of reasons. For example, in 1948 the Court upheld a Michigan law that prohibited women from working in bars unless they were the wives or daughters of a male owner. Six justices felt this was an easy case to decide.

The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long

practiced does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. . . .

While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason. . . . Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. . . . We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.<sup>30</sup>

The development of the two-tier system of jurisprudence meant that the outcome was determined by the level of analysis chosen rather than the reason for the classification. The "strict scrutiny" test was usually fatal, while the "rational basis" test was usually meaningless. Thus, in order to eliminate a legal classification, one has to convince the courts that it should be subject to strict scrutiny.

#### THE TURNING POINT: REED AND FRONTIERO

It was not until 1971 that the Court demonstrated displeasure at a State's "drawing a sharp line between the sexes,"<sup>31</sup> when it unanimously held unconstitutional an Idaho statute giving preference to males in the appointment of administrators of estates. In *Reed v. Reed* the Court found the "administrative convenience" explanation of the preference for males to have no rational basis.<sup>32</sup> Although unexpected, this development was not unforeseeable. During the previous few years the Court had been adding a bit of bite to the rational basis test by looking more closely at state rationalizations as they applied to *some* statuses or *some* interests that did not trigger strict scrutiny.<sup>33</sup> In the previous two years the emerging women's movement had become publicly prominent, and the Equal Rights Amendment had been battling its way through Congress.<sup>34</sup> Despite the Court's assertion that "the Constitution does not require legislatures to reflect sociological insight, or shifting social standards,"<sup>35</sup> the Court itself often does just that. A still stronger position was taken seventeen months later, when Air Force Lieutenant Sharon Frontiero challenged a statute that provided dependency allowances for males in the uniformed services without proof of actual economic dependency but permitted them for females only if they could show they paid one-half of their husband's living costs. Eight members of the Court found the statute unconstitutional, but they split as to the reason. Four applied strict scrutiny, using language very different from that of previous cases.



There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage. . . .

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ." *Weber v. Aetna Casualty Surety Co.*, 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of indvidously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.<sup>36</sup>

Three justices found the statute unconstitutional on the authority of *Reed*—that administrative convenience was not a rational basis—while deliberately avoiding the characterization of sex as a suspect classification.<sup>37</sup> They gave as the compelling reason for such avoidance the fact that

the Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, . . . the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems . . . that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.<sup>38</sup>

#### INTERMEDIATE SCRUTINY

In cases after *Reed* and *Frontiero* the Court applied a "strict rational basis" standard with greater and greater scrutiny, until in 1976 a new standard, subsequently referred to as one of "intermediate scrutiny," was articulated. On the surface, *Craig v. Boren* did not appear to be a potentially momentous case. It concerned an Oklahoma law that prohibited the selling of "3.2" beer to men under twenty-one but allowed its sale to women over eighteen. The state's rationale for this law was that more than ten times as many males as females between eighteen and twenty-one were arrested for drunk driving. The Court found the law unconstitutional, holding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." It was not satisfied that "sex represents a legitimate, accurate proxy for the regulation of drinking and driving."<sup>39</sup>

After *Craig* the Court no longer wrote plurality opinions in which some justices supported use of strict scrutiny in gender cases and others concurred

or dissented on a different basis. Instead, the "heightened scrutiny" of the new intermediate standard was applied consistently, though not unanimously, to strike down laws that made distinctions by sex in half the cases that came before the Court.<sup>40</sup> Yet even before *Craig* the language of the post-*Reed* decisions reflected a very different approach by the Court to women's status than that of previous cases. No longer was a woman's family status determinant of her legal status. Instead the very articulation by a State of the desirability of economic dependency or women's unique responsibility for family obligations to justify a sex-discriminatory law was viewed as irrational. Two cases decided in the spring of 1975 illustrate this profound transformation from the assumptions of *Hoyt* and earlier cases.

*Weinberger v. Wiesenfeld* challenged a provision of the Social Security Act that provided benefits for the surviving widow and minor children of a working man covered by the act but for only the minor children of a covered woman. Wiesenfeld's wife was the primary earner in the family. When she died in childbirth, he received fewer benefits than she would had he been the one to die. The unanimous opinion of the Court pointed out that

since the Constitution forbids . . . gender-based differentiation premised upon assumptions as to dependency . . . [it] also forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men.

The Court further recognized the father's as well as the mother's responsibility for child care.

It is no less important for a child to be cared for by its sole surviving parent when the parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the "companionship, care, custody, and management" of "the children he has sired and raised."<sup>41</sup>

A month later the Court went further in *Stanton v. Stanton*, a Utah case in which a divorced father ceased paying child support to his daughter when she reached age eighteen but continued to pay child support for his son on the grounds that in Utah girls were no longer minors after eighteen, but boys were until age twenty-one. The Court found that

no longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . [I]f the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.<sup>42</sup>

The Supreme Court continued to strike down state statutes that reinforced role-typing and economic dependency or rested on "archaic and overbroad generalizations." In doing so it invalidated statutes that provided for Social Security benefits payable to widows but not to widowers,<sup>43</sup> alimony for wives but not for husbands,<sup>44</sup> welfare benefits to families with unemployed fathers but not unemployed mothers,<sup>45</sup> and worker's compensation death benefits to widows, but to widowers only if they could prove economic dependency.<sup>46</sup>

## JURY SERVICE

Even though intermediate scrutiny was not in place until 1976, by 1975 the Supreme Court was ready to take a new look at some state laws it had previously upheld. One of these concerned jury service. In the years since *Hoyt* more women had been added to the jury roles, and no state excluded them totally, but they did not serve equally everywhere.<sup>47</sup> Alabama's total exclusion was found unconstitutional under the Fourteenth Amendment by a three-judge federal district court in 1966.<sup>48</sup> That same year, the Supreme Court of Mississippi ruled that "the legislature has the right to exclude women so that they may continue their service as mothers, wives and homemakers, and also to protect them . . . from the filth, obscenity and noxious atmosphere that so often pervades a courtroom during a jury trial."<sup>49</sup> Mississippi's law was changed by the legislature in 1968, and South Carolina's by a voter referendum in 1967. The state of Louisiana had a statute limiting women's jury service that was virtually identical to the Florida statute upheld in *Hoyt* in 1961. Taylor had been sentenced to death for aggravated kidnapping by a jury chosen from an all-male pool of 175. Even before he was tried he claimed he was denied his Sixth Amendment right to a fair trial by "a representative segment of the community." This time the Court agreed. While it did not specifically overrule *Hoyt*, it did say it was out of date. Substantiating its position with a lengthy footnote on women's labor force participation, the Court concluded that "[i]f it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed."<sup>50</sup>

It was nineteen years before the Supreme Court decided another case on on gender discrimination in jury service. When it did so in 1994, it followed the path it had cut on race discrimination a few years earlier. In selecting a jury, both sides of every case have the right to challenge a certain number of individuals in the jury pool without giving a reason. These are called peremptory challenges. In four cases decided between 1986 and 1992 the Supreme Court ruled that race cannot be the basis of a peremptory challenge not only because defendants are entitled to a jury selected without the taint of race discrimination, but because potential jurors have a right to jury selection procedures that are free from stereotypes and "historical prejudices."<sup>51</sup>

The federal courts of appeal disagreed on whether peremptory challenges could be used to systematically eliminate all men or all women from a jury. In 1993 the Supreme Court granted certiorari to an Alabama man who was being sued for child support by a state agency. After the State used its peremptory challenges to remove 9 men, a jury of 12 women declared him to be the father. The State supported its action on the grounds that "men otherwise totally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child."<sup>52</sup>

Justice Blackmun, writing for the Court, expressed surprise that the State would so freely rely on "the very stereotype the law condemns." He went on to declare

Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice which motivated the discriminatory selection of the jury will infect the entire proceedings. (cites omitted) The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.<sup>53</sup>

The decision's sweeping language hid some fears that the traditional role of peremptory challenges—to limit jury bias by allowing both parties to remove jurors they did not feel good about even when a reason could not be articulated—was being eroded. Justice O'Connor voted with the majority reluctantly and urged that the decision be limited to the state as a party, not private litigants. Justices Rehnquist, Scalia, and Thomas dissented, on the grounds that the "heightened scrutiny" standard for sex cases was not the "strict scrutiny" required for race. Rehnquist went on to say that

Unlike the Court, I think the State has shown that jury strikes on the basis of gender "substantially further" the State's legitimate interest in achieving a fair and impartial trial through the venerable practice of peremptory challenges. (cites omitted) The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely "stereotyping" to say that these differences may produce a difference in outlook which is brought to the jury room. Accordingly, use of peremptory challenges on the basis of sex is generally not the sort of derogatory and invidious act which peremptory challenges directed at black jurors may be.<sup>54</sup>

## EDUCATION

Single-sex schools have presented particular challenges. Although most schools are now coeducational, neither the Court nor the Congress has decided that schools segregated by sex hold quite the stigma as those segregated by race. This is partially because sex-segregated schools have never been part of a state policy to denigrate a particular group in the way that racial segregation was. Even when single-sex schools were most common, there were still many coed ones available—though they didn't always offer the same educational advantages or weren't always the most prestigious. There is ambivalence also because of evidence that going to single-sex schools benefits at least some women.<sup>55</sup> Consequently, the judicial response to single-sex schools has been equivocal.

The Supreme Court faced the issue of the constitutionality of single-sex public schools in 1971, 1977, and 1982. In 1971 it merely affirmed without a written opinion the ruling of a District judge that men could not attend South Carolina's female-only state college.<sup>56</sup> The lower court had relied on the rational basis test—eight months before *Reed*. In 1982 the Court finally held that equal protection had been denied, but in a very limited context.

Mississippi University for Women, founded in 1884, had established a Nursing School in 1970. Like the rest of its programs, it was restricted to women only. Men could audit classes and participate as though they were

students, but they could not matriculate. A male registered nurse who lived in the same town as MUW wanted a B.A. degree in nursing but didn't want to move to attend one of the other two schools in Mississippi that offered that degree coeducationally. In a five to four decision written by the newest member of the Court, Justice Sandra Day O'Connor, the Court held that "MUW's policy of excluding males from admission . . . tends to perpetuate the stereotyped view of nursing as an exclusively woman's job" and thus is not consistent with the State's claimed justification that the single-sex admissions policy "compensates for discrimination against women and, therefore, constitutes educational affirmative action." Instead the Court found that the "policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men."<sup>57</sup>

Midway between these two cases a more ambivalent Court had split four to four (Rehnquist didn't participate) on whether or not Philadelphia could maintain sexually segregated public high schools. While the city had many coed schools, it had only two college preparatory high schools for academically superior students—one for boys and one for girls. Susan Vorchheimer did not want to be forced to choose between a coed environment and an academically enriched one. However, the schools were similar in their offerings except for a better science curriculum at the one for boys, and Vorchheimer did not maintain that she wanted to attend the boys high school to avail herself of science courses. The District Court found that the school board could not substantiate "separate but equal" schools, but the circuit court found otherwise. Placing great weight on Vorchheimer's failure to allege any educational deprivation and the fact that attendance at the superior schools was voluntary, it completely ignored the "intangible factors" upon which the Supreme Court had relied in dismantling racially segregated schools. "If there are benefits or detriments inherent in the system, they fall on both sexes in equal measure," it said. By dividing equally on appeal, the Supreme Court left the decision in force but without the precedential value of an affirmation.<sup>58</sup>

By 1992 very few single-sex public schools remained. Two of these were military colleges—the Citadel in South Carolina and Virginia Military Institute. The latter was one of fifteen public colleges in Virginia, most of which had been single-sex at one time. In 1970 the University of Virginia had integrated under threat of a federal District Court order;<sup>59</sup> in 1990 VMI was the only single-sex school left in the state. When VMI's male-only policy was challenged that year, the parties reflected a growing consensus that, whatever the benefits of single-sex education might be, it was not good government policy to support such schools. The plaintiff was the U.S. government, even though it was headed by a conservative Republican administration. Friend of the Court briefs were filed by over a dozen feminist and liberal organizations. The defendants were the State of Virginia, VMI itself, and its board. But the black Democratic Governor of Virginia and the female State Attorney General wanted no part of the case. Governor Wilder responded to the complaint by stating that "no person should be denied admittance to a state supported school because of his or her gender." VMI had to enlist the aid of an alumnus to act as its pro bono attorney.

Although the federal district court found VMI's male only policy "fully justified," the appeals court was ambivalent. Applying intermediate scrutiny it said that VMI offered a unique educational experience, based on mental and physical stress in a hostile, sexually homogeneous environment that "would be destroyed by coeducation." It also admitted that "[m]en and women are different" and that "it is not the goal of the Equal Protection Clause to attempt to make them the same. . . . [N]o one suggests that equal protection of the laws requires that all laws apply to all persons without regard to actual differences." However, it added, "While the data support a pedagogical justification for a single-sex education, they do not materially favor either sex." Therefore, the court asked, why does the Commonwealth of Virginia offer "the opportunity only to men"? The court could not find a policy statement that answered this question, apart from the Governor's opposition. Since the Constitutional standard required a substantial relation to an important governmental objective, and "evidence of a legitimate and substantial state purpose is lacking," the appeals court sent the case back to the District court to find a solution consistent with the guarantees of the Fourteenth Amendment. Although the appeals court didn't specify what this had to be, it suggested that the state admit women to VMI, set up a "separate but equal" educational opportunity, or "abandon state support of VMI, leaving [it] . . . to pursue its own policies as a private institution." An appeal to the Supreme Court was denied.<sup>60</sup>

VMI chose to fight. When the case was remanded to the District Court it presented a plan for women to take a "parallel program" called the "Virginia Women's Institute for Leadership" at nearby Mary Baldwin College for Women. Although the Justice Department opposed this plan as a poor substitute for VMI's rigorous and highly disciplined military environment, the district court judge who had originally approved VMI's single-sex policy also approved the creation of a separate and admittedly unequal program for women. He said it was "justified pedagogically and . . . not based on stereotyping."

[T]he controlling legal principals in this case do not require the Commonwealth to provide a mirror image of VMI for women. Rather, it is sufficient that the Commonwealth provide an all-female program that will achieve substantially similar outcomes in an all-female environment . . . which takes into account the differences and needs of each sex.<sup>61</sup>

#### NEW PROTECTIONS

The Constitution protects individuals only from action by the state, not from action by private parties. Thus private parties can discriminate on any basis they choose unless the state says otherwise. Many statutes have been passed prohibiting discrimination; sometimes those statutes are challenged as themselves violative of a Constitutional provision. The Supreme Court has heard three cases brought by private associations challenging restrictions on their membership policies as interfering with their First Amendment right of free association. California, Minnesota, and New York City all passed ordinances prohibiting sex (and some other) discriminations by some types of clubs often thought of as private. Their rationale was that many of these clubs were in

fact arenas for the conduct of business or the exchange of information important to people's careers, and that therefore discrimination was "invidious." The Court has unanimously upheld all of these statutes, ruling that any "slight infringement on . . . members' rights of expressive association . . . is justified because it serves the State's compelling interest in eliminating discrimination against women."<sup>62</sup>

#### CURRENT RATIONALES FOR SEX-DISCRIMINATORY LAWS

The Court has relied on two different rationales for sex discriminatory statutes. The first is that women benefit. This was articulated in *Kahn v. Shevin*, which was decided in 1974, before *Craig* but after *Frontiero*. The Court upheld a Florida statute giving widows but not widowers a five-hundred-dollar property tax exemption. The majority ruled that the state law was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden,"<sup>63</sup> without questioning whether there might be some more appropriate indicator than sex of financial incapacity. Even after *Craig* established a more stringent standard than reasonableness, the Court continued to look favorably upon statutes that it felt operate "to compensate women for past economic discrimination." *Califano v. Webster* upheld a Social Security provision that, prior to 1972, permitted women to eliminate more low-earning years from the calculation of their retirement benefits than men because it "works directly to remedy some part of the effect of past discrimination."<sup>64</sup>

*Schlesinger v. Ballard* introduced the second rationale, that men and women are not "similarly situated." Federal statutes that provided more time for female than for male naval officers to attain promotion before mandatory discharge were upheld as being consistent with the goal of providing women equitable career advancement opportunities. The Court found that because women were restricted from combat and most sea duty, it would take longer for them to compile favorable service records than for men. Therefore, "the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead the demonstrable fact that [they] are *not* similarly situated with respect to opportunities for professional service."<sup>65</sup> This explanation was also relied upon to uphold a California statute that made statutory rape a crime that only males could commit against females. The state Supreme Court had already subjected the classification to "strict scrutiny" and found a "compelling state interest" in preventing teenage pregnancies. Applying the lesser standard of "important governmental objectives," the Supreme Court came to the same conclusion, but only by ignoring the dissent's objection that a sex-specific statute was not "substantially related" to the stated goal as long as a gender-neutral one could achieve the same result.<sup>66</sup>

#### THE DRAFT REGISTRATION CASES

This line of cases led inexorably to *Rostker v. Goldberg*, which contested the requirement that males but not females register for a potential draft. Draft registration had been discontinued in 1975, but was reactivated by President

Carter in 1980 as part of his response to the Soviet invasion of Afghanistan. In his request to Congress for funds for this purpose, Carter also asked that the statute be amended to permit registration and conscription of females. After extensive debate, Congress left the statute intact. This activated a lawsuit that had begun in 1971 but been dormant for many years. Three days before draft registration was to begin, a lower federal court found the Act unconstitutional and enjoined the government from further registration. Relying on the intermediate scrutiny test of *Craig*, the court concluded that "military opinion, backed by extensive study, is that the availability of women registrants would materially increase flexibility, not hamper it."<sup>67</sup> The injunction was lifted and registration continued while the Supreme Court pondered the effect of its new approach to gender cases on the oldest bastion of the male establishment. In this effort the Court was caught between the conflicting demands of two institutions to which it had traditionally deferred—the Congress and the military. The Court has always accorded great weight to the decisions of Congress, which had restricted registration to men. It has also deferred to judgments by the executive departments in the area of military affairs, and the military had testified before Congress that women should be registered (though not drafted). However, the Court noted that Congress's thorough consideration of the issue clearly established that its decision to exempt women was not the "accidental byproduct of a traditional way of thinking about females." It concluded that the "purpose of registration . . . was to prepare for a draft of combat troops" and that "[w]omen as a group, . . . unlike men as a group, are not eligible for combat." Because men and women were not "similarly situated" with regard to military service, it was not unconstitutional to distinguish between them. "The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality."<sup>68</sup>

On the surface it might seem desirable for the Court to require equality where men and women are similarly situated but make exceptions apparently in women's favor where they are not. However, since there are very few circumstances in which men and women are similarly situated, this line of thought could easily lead to a return of the inequitable protectionism of the *Muller* era. The different standards that that case legitimated for men and women provided only limited benefits. In the long run women were protected from better jobs, overtime, and the opportunity to compete with men rather than to be dependent on them.

An example of the consequences of protecting women from military service is to be found in *Personnel Administrator of Massachusetts v. Feeney*. While the Federal Government and almost all states give veterans preference for civil service jobs, Massachusetts is one of the few that gives them an absolute preference. After job candidates' scores have been computed on the basis of an examination and an assessment of their training and experience, those who pass are ranked. However, all passing veterans are ranked ahead of all non-veterans. Consequently, nonveteran Helen Feeney had never been able to secure one of the many civil service jobs she took exams for over a twelve-year period, even though she scored very high. During this period she held a lower level civil service job that was abolished in 1975, prompting her lawsuit. A lower federal court held the statute unconstitutional on the grounds that



while it was not intended to discriminate against women, since only 1.8 percent of the veterans in Massachusetts were female the exclusionary impact was so severe that the State should be required to find a less extreme form of rewarding veterans. The Supreme Court found otherwise. Ignoring the fact that women were once restricted to only 2 percent of the armed forces, the Court nonetheless said that a neutral law with an adverse impact is unconstitutional only if discriminatory intent can be shown. It rejected the argument that the exclusion of women was such an inevitable and foreseeable consequence that the Massachusetts legislature must be held responsible for intending it even if that were not its primary objective. Instead the Court said that "the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women."<sup>69</sup>

### PREGNANCY AND PARENTHOOD

Pregnancy and parenthood have presented unique challenges to the Court, and the results have not been uniform. Gender-neutral statutes applying to pregnant persons may have a discriminatory impact on women even though all women do not get pregnant and even fewer are pregnant at any given time. Similarly, parenthood has a social and legal status in addition to its biological one, and the three do not always coincide. The rights of parents are further complicated by the assumption that in cases concerning children, the overriding principle should be the best interests of the child. The delicate balancing acts these conflicting concerns cause has led to inconsistent results and occasionally convoluted reasoning.

In 1974 the Court heard two cases against school boards in Virginia and Ohio that challenged policies that required pregnant teachers to take unpaid maternity leaves beginning several months before birth and continuing for several months afterward. The Court found these requirements to be discriminatory, but not on equal protection grounds. Instead the justices said that the women were denied due process because the rules created an irrebuttable presumption that pregnant teachers and recent mothers were incapable of performing their duties. Such a presumption put too heavy a burden on a woman's decision to have a child.<sup>70</sup> However, that same year it upheld the exclusion of pregnancy from coverage under the California disability insurance system. In *Geduldig v. Aiello* the Court said that the

program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . The program divides potential recipients into two groups—pregnant women and nonpregnant people.<sup>71</sup>

A year later the Court again looked to the due process clause to strike down a Utah statute that denied pregnant women unemployment benefits from twelve weeks before until six weeks after birth. In order to receive benefits from the Unemployment Insurance fund, claimants have to be able and willing to work at their usual occupation. As in the school board cases, it was the

assumption that no woman could work during this period that the Court found unacceptable.<sup>72</sup> In 1976 Congress amended the Unemployment Compensation Act to prohibit denial of claims solely on the basis of pregnancy or termination of pregnancy.<sup>73</sup> This did not resolve the problems of women who quit their jobs because they were pregnant. Unemployment benefits are not given to anyone who quits a job unless it is for "good cause." When a Missouri woman who quit found no job openings after giving birth and was denied benefits, the Court upheld the State's judgment that childbirth was not a "good cause." In analyzing the statute, Justice O'Connor said that it should be construed "as prohibiting disadvantageous treatment, rather than mandating preferential treatment."<sup>74</sup>

By and large the Court has permitted the States to make distinctions between unwed mothers and fathers. A 1972 case appeared to be part of the emerging trend to look more closely at gender distinctions, but it was temporary. In *Stanley v. Illinois* a father who had intermittently lived with and supported his three children and their mother for eighteen years protested their automatic removal from his custody by the state after the mother's death. He demanded the same hearing on his fitness as a parent that the state accorded married fathers and all mothers. The state courts declined to give him this until the Supreme Court said the Constitution entitled him to equal protection with married fathers.<sup>75</sup> But in five subsequent cases only one more statute was invalidated. In 1977 the Court upheld an immigration statute giving preferred status to the children of unmarried mothers but not unmarried fathers.<sup>76</sup> It also upheld two Georgia statutes permitting unwed mothers but not unmarried fathers to veto the adoption<sup>77</sup> or sue for the wrongful death of a child.<sup>78</sup> Since fathers who subsequently legitimated their children had the same legal rights as other parents, the court found that the actual distinction in the law was not one of gender but one between fathers who did and did not legitimate their children.

In two New York cases raising the same issue—whether an unmarried father could block the adoption of his child—the Court split. The prospective adoptive parent in both cases, as in the Georgia one, had married the children's mother and wished to adopt her children over the objection of the biological father. The Court had to balance the traditional preference for "the best interests of the child" against claims of gender discrimination. In 1979 the Court ruled in favor of the biological father by five to four.<sup>79</sup> But in 1983 it returned to its earlier reasoning that the state had met its due process obligations by providing a means by which the father could legitimate his child and that a father who did not do so had no rights.<sup>80</sup> As legal doctrine, these decisions on the rights of unwed fathers are not consistent; the divided Court reflects the competing priorities it had to sort out and justify. However, if one reads the facts of the cases apart from the legal analysis, the crucial factor appears to be the kind of relationship the father had with his children and their mother. The more closely it approximated the social norm at some prior time—i.e., how long the father lived with the mother and supported the children—the more likely the Court was to rule in his favor.

## ABORTION

The movement to change restrictive abortion laws began independently of and earlier than the women's liberation movement, but when that movement emerged it quickly captured the abortion issue as its own, energizing and publicizing it along the way. It was the impetus of the feminist movement that led to *Roe v. Wade*, the 1973 Supreme Court decision that eliminated most state abortion laws, after only a few years of public debate and state action on abortion. In some ways the Court was ahead of its time, because public debate had not yet created a consensus. The Court's sweeping removal of a century of legal restriction sparked massive efforts to reduce and reverse its effects. The legal and political controversy has become so polarized that it borders on civil war. It has also tainted many issues that are not obviously related to abortion, with the result that some legislation that might have passed or passed sooner has been stymied. The state battles over ratification of the ERA were infected by opponents' claims that restrictions on abortion would be precluded by it as a denial of equal rights on account of sex.<sup>81</sup> The Court decisions and legislative initiatives that followed *Roe v. Wade* can only be understood within a political context. Rather than reflect changes in legal doctrine that often follow social change, as exemplified by the reinterpretation of the Equal Protection Clause, new decisions and laws are best seen as the victories and defeats of an ongoing political struggle.

Laws prohibiting abortion were largely passed during the middle decades of the nineteenth century. Prior to that time the rules of the English common law prevailed, and those rules permitted abortion until the fetus moved. This was called quickening and occurred between the sixteenth and eighteenth weeks of pregnancy, or well into the second trimester. The movement for state laws prohibiting all abortions (except to save the life of the mother) was part of a larger movement by medical practitioners to institutionalize and professionalize their occupation.<sup>82</sup> Ironically, the medical profession also spearheaded the movement for legal reform in the middle of the twentieth century. By the 1950s several hundred thousand illegal abortions were being performed each year, with several thousand ending in death. Many physicians felt their ability to help their patients was limited by the strict laws; they sought ways of liberalizing them.

In 1967 Colorado became the first state to adopt a law permitting therapeutic abortions if the life or mental health of the mother was threatened, if pregnancy occurred from rape or incest, or if the fetus was deformed. That same year several referral services were set up by nonphysicians to direct women to safer illegal abortions. The public debate over abortion laws became more vociferous, and in the next couple years another ten states adopted therapeutic exceptions. Four states—Alaska, Hawaii, New York, and Washington—went further and repealed virtually all restrictions on abortion. Both of these developments were boosted by the women's movement and the injection into the medical debate of the idea that reproductive freedom was a woman's right. Cases began to reach the lower courts in the late 1960s.

Initially these just chipped away at the legal restrictions. Then, in 1969 and 1970, the California Supreme Court and several federal district courts declared their states' laws unconstitutional. In 1971 the Supreme Court granted certiorari to two cases from Texas and Georgia; seven justices heard oral argument in 1971, but the Court asked for a rehearing in 1972 with a full Court. Its decision was announced on January 22, 1973.<sup>83</sup>

Justice Blackmun, writing the majority opinion in *Roe v. Wade* and *Doe v. Bolton*, did not stick to legal analysis. Recognizing the "sensitive and emotional nature of the abortion controversy," he surveyed medical, religious, moral, and historical material before concluding that "this right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . or, . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." While asserting "that the word 'person,'" as used in the Fourteenth Amendment, "does not include the unborn," the Court did recognize that "a State may properly assert important interests in safeguarding health, in maintaining medical standards and in protecting potential life."<sup>84</sup> Therefore it adopted the medical division of pregnancy into three trimesters.

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.<sup>85</sup>

Antiabortion forces organized and tested *Roe's* limits by passing laws and bringing test cases. One group of laws restricted the use of public funds for abortions. Called the "Hyde Amendments" for their most outspoken sponsor, Cong. Henry Hyde (R. Ill.), these attachments to annual appropriations bills deny any federal money authorized by these bills to be used for abortions. Included are restrictions on abortions for military personnel, Peace Corps volunteers, Indians served by federal health programs, health benefits for federal employees, and foreign assistance programs for which abortion is a family planning method. These laws exempt abortions to save the life of the mother; some of them also exempt pregnancies from rape or incest. All of these laws have stimulated acrimonious conflict.

The most controversial have been the restrictions on federal funds for Medicaid recipients—poor people. Several states responded to *Roe* by refusing to pay for Medicaid abortions. In 1977 the Court held that the States did not have to fund abortions for Medicaid-eligible women and could choose to fund only "medically necessary" abortions without violating the Equal Protection

clause.<sup>86</sup> The first Hyde Amendment passed Congress in 1976; it reached the Supreme Court in 1980. The Court held that the federal government had no constitutional or statutory obligation to fund abortions even when they were medically necessary.<sup>87</sup> As a result of the Hyde Amendments, the number of federally funded abortions went from 294,600 in 1977 to 165 in 1990. States still have the option of paying for the procedure with state money. In 1990 thirteen states spent sixty-five million dollars for 162,418 abortions. The District of Columbia used to be one of the biggest state funders of abortions, but because much of its budget comes from the federal government, it is subject to Congressional control. Since 1988 Congress has amended the annual appropriations bills to forbid the District to use locally raised funds for abortions.<sup>88</sup>

The other set of cases have tested the extent to which states can regulate the performance of abortion. The success of state restrictions has varied with the composition of the Court, which changed significantly during the Reagan and Bush administrations. Initially the Court affirmed *Roe* and applied strict scrutiny to state regulations. It upheld requirements that a doctor inform a woman about abortion and obtain written consent, but only if the requirements did not interfere with the physician-patient relationship. It found spousal consent statutes unconstitutional but parental notification requirements acceptable if a minor could present her request to a judge when a parent would not agree. Reporting requirements about abortions to the State were constitutional, but mandatory hospitalization and twenty-four-hour waiting periods were not. Advertising could not be restricted, and fetal protection statutes could apply only to viable fetuses.<sup>89</sup>

By 1989 enough conservatives had been added to the Court for the balance of opinions to shift. On July 3, 1989, the Court upheld Missouri's prohibition of abortions on public lands or by public employees and its requirement that viability tests be done on women more than twenty weeks pregnant by five to four. While it did not overrule *Roe*, the multiple opinions in *Webster* gave the states much more room for regulation than they had had before.<sup>90</sup> Several states quickly passed laws prohibiting or strictly regulating abortion in anticipation that this Court would overrule *Roe* when given the opportunity to do so. The Court agreed to hear only one of the three cases appealed to it and on June 29, 1992, declined to overrule *Roe*, again by five to four. Three of the Reagan appointees, O'Connor, Kennedy, and Souter, wrote the joint opinion in which they opted to follow the judicially conservative tradition of sticking to precedent. "The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed." However, this decision did away with the trimester framework and dropped strict scrutiny as the standard by which regulations must be judged. Instead it held that the state's interest in protecting human life extends throughout pregnancy; it may regulate at any stage provided that the regulation does not impose an "undue burden" on a woman's right to obtain an abortion.<sup>91</sup>

*Lower Federal and State Cases*

Not all cases challenging gender-based laws reach the Supreme Court. Sometimes the losing side decides not to appeal an adverse decision to the highest court because the costs of doing so are high and expectations of success may be low. Even if they do appeal, the Supreme Court, unlike the lower courts, can decide whether or not to grant certiorari, i.e., whether it wants to hear an appeal. Since *Reed* hundreds of cases have been resolved by lower or state courts. In most cases the Federal courts, following the lead of the Supreme Court, have held gender-based distinctions to be invalid. Sometimes they have not done so, and the case has not been appealed to the Supreme Court or it has denied review. When this happens, the geographical area over which that court has jurisdiction must abide by its decision, but courts elsewhere are free to formulate their own interpretation (though they are often influenced by other courts). Some courts have held laws to be constitutional that forbid a person of one sex to massage that of another, girls (but not boys) from soliciting patrons for drinks, topless female (but not male) dancers, and mothers from signing the driver's license applications of minors if the father was alive and had custody. A Maryland law that made it more difficult for husbands than wives to prove libel if accused of extramarital sexual activity was also upheld. Laws that have been held to be unconstitutional include those that denied a wife the right to sue a third party for loss of her injured husband's consortium, prohibited some bars from serving beverages to women, established different ages for males and females to be tried in juvenile court or different sentences for convicts, and required that the prefix "Miss" or "Mrs." appear before a woman's name on her voter registration affidavit.<sup>92</sup>

When State courts have had to rule on gender-based laws or other state actions, they have generally looked to the Supreme Court and its current equal protection analysis even when state ERAs might have provided a different standard. Fourteen states have added some form of equal rights provision to their State Constitutions or included it in a general Constitutional revision since 1968. Eight use language similar to that of the proposed Federal amendment. Most of the others have clauses patterned after the Equal Protection clause of the Fourteenth Amendment with sex included as a category. The ERA states are Alaska (1972), Colorado (1972), Connecticut (1974), Hawaii (1972), Illinois (1971), Maryland (1972), Massachusetts (1976), Montana (1973), New Hampshire (1974), New Mexico (1973), Pennsylvania (1971), Texas (1972), Virginia (1971), and Washington (1972). Utah and Wyoming included similar provisions in their original constitutions when they became states in 1896 and 1890, respectively. The judicial decisions are highly varied. Washington and Pennsylvania courts have taken an even stricter approach than the Supreme Court, striking down virtually all gender-based statutes, including ones that excluded women from contact sports dominated by men.<sup>93</sup> Several state supreme courts have avoided interpreting their ERA by deciding cases on other grounds or refusing to review them at all. Utah, Louisiana, and Virginia have followed a traditional "rational basis" standard and have found virtually all sex-based laws to be reasonable. Several states have applied the "strict scrutiny" standard,<sup>94</sup> and others have relied on lesser standards (usually

derived from the latest Supreme Court language) or not articulated a specific standard. Thus laws that have been held violative of the ERA in some states have been upheld in others. Even in states where the highest court has held sex to be a suspect class, such as Illinois, lower state courts have applied the rule inconsistently, with the result that statutes invalidated in one jurisdiction are upheld in another.<sup>95</sup>

Of those states that do not have ERAs, only California and Oregon have declared sex to be a suspect class, and California did so a few months before *Reed*.<sup>96</sup> Oregon did not even rely on the Federal Constitution; in 1982 the state supreme court interpreted a long-standing state constitutional prohibition against granting any citizen or class of citizens special privileges to invalidate legal classifications by sex.<sup>97</sup> Several others have followed the Supreme Court in finding many sex-based statutes to be unreasonable. Yet even these states have found statutes to be rationally related to reasonable goals such as those permitting wives to share in their husband's property after divorce but not vice versa<sup>98</sup> and prohibiting girls from having paper routes before age eighteen.<sup>99</sup>

Some issues, such as maternal preference in custody cases, have provoked extremely varied responses. The Utah Supreme Court found it "wise" that children should be in the care of their mother. Maryland permits the use of maternal preference as a tiebreaker. But in New York, where voters rejected a state ERA, a court held the maternal preference rule violated the Fourteenth Amendment.<sup>100</sup>

While courts acting under a state ERA are not limited to standard equal protection analysis, few have chosen to break new paths. Those with ERAs are likely to apply a stricter standard than those without, but most tend to follow the lead of the Supreme Court. Judges also respond to legislative history, the political culture of their own geographic area, current public debate, and their perception of the customs and mores about proper sex roles. The decisions interpreting state ERAs demonstrate that the courts are not institutions removed from society responding only to legislative dictate and abstract legal analysis. The law is neither static nor apolitical. Instead it is a tool, viable only when it is actively used and often reflecting the views of those who use it. The changes in judicial attitude of the last two decades have not occurred in a vacuum. They have been as much a response to the women's liberation movement as the many legislative changes have been.

### *Legislative Gains*

The legislative changes in public policy have been as vast as the judicial changes, but they began earlier.

#### EQUAL PAY

As early as 1923 equal pay was required in the federal civil service, but the federal government did not mandate it for the private sector until passage of the 1963 Equal Pay Act. First proposed in 1868 at the National Labor Union Convention, equal pay for equal work did not become a national issue until World War I. During the war women held jobs previously held by men,

creating concern that they would depress the wage rates and men would be forced to work at the lower rates after the war. Montana and Michigan enacted the first state equal pay laws in 1919, but it was not until after World War II that a major bill covering 61 percent of the labor force was placed before Congress, and another fifteen years before it was passed.<sup>101</sup>

Passage was preceded by a great deal of debate on exactly what "equal pay" and "equal work" meant, but it took the federal courts to flesh out the meaning of the law. Federal courts ruled that work did not need to be identical, only "substantially equal." For example, male orderlies could not be paid more than female nurses' aides because they occasionally had to perform additional tasks such as tending to the intimate needs of male patients. However, the Equal Pay Act does permit differences in pay when based on seniority, merit, productivity, or "any other factor other than sex." Thus men selling men's clothes could be paid more than women selling women's clothes because the former were more profitable.<sup>102</sup> The Court has ruled that wage differentials created by prior compliance with protective labor laws or collective bargaining agreements were a violation of the Equal Pay Act. It was not enough to abolish separate seniority lists and pay scales; the base pay of the disadvantaged women workers must also be increased.<sup>103</sup> However, wage differentials based on the going market rate for the job, even when that market rate is affected by the sex of the workers, do not have to be equalized.

#### TITLE VII AND THE EEOC

When Congress debated the 1964 Civil Rights Act, one of the most controversial sections in it was Title VII, which prohibited discrimination in employment. At the urging of the National Woman's Party, Rep. Howard W. Smith of Virginia, an ERA supporter but a civil rights opponent, proposed a floor amendment to add "sex" to "race, religion, color, and national origin." While this provision was strongly supported by the women of the House, most of the House liberals opposed it, as did the Women's Bureau of the Labor Department. They were concerned that this additional responsibility would dilute enforcement efforts for minorities. Nonetheless, neither side felt strongly enough about it to spend more than a few hours in debate, and little of this was serious. Sex was added to Title VII through the combined votes of Republican supporters and southern Democratic opponents of the civil rights bill.<sup>104</sup> The Equal Employment Opportunity Commission, created to enforce Title VII, responded to this ambiguous mandate by ignoring the sex provision. This led several people within the EEOC, and many without, to feel that it was necessary to create an organized group supporting women's rights to put pressure on the government. As government employees they could not organize such a group, but they spoke privately with those whom they thought could do so, including Betty Friedan and many members of the state commissions on the status of women. Partially as a result of their efforts, the National Organization for Women was formed in 1966 and directed a good portion of its initial energies at changing the guidelines of the EEOC and supporting legal cases to obtain favorable court rulings.<sup>105</sup>



Initially the EEOC supported protective labor laws, largely because organized labor had fought for them for decades and argued that they were a necessary protection for women. Despite this lack of support, many blue-collar women, who felt their denial of job opportunities was justified by employers on the basis of state protective laws, saw Title VII as an opportunity to take their cases to court. The court decisions were repeatedly in their favor. Within a few years virtually all such laws were rendered void or were subsequently applied to men as well.<sup>106</sup>

Even with protective laws out of the way, there were many long-standing practices that treated women differently than men. The initial court decisions were not as consistently in women's favor. For example, Martin-Marietta Corporation would not employ the mothers of preschool children on its assembly lines, even though it would hire the fathers of those children. Since the company did in fact hire lots of women, the lower federal courts ruled that it did not discriminate. Although the Supreme Court rejected this "sex-plus" theory, it did not do so unequivocally. Instead it remanded the case to a lower court to ascertain whether having preschool children actually interfered with a woman's job performance.<sup>107</sup> Despite this ambiguity, the Court's rejection of "sex-plus" was used by lower courts to relieve women of burdens not imposed on male employees even when the job was restricted to women. Flight attendants, for example, had to be not only female but also unmarried and under thirty-two, and they could not wear glasses or be even slightly overweight. Several federal courts ended these restrictions as well as the prohibition on men.<sup>108</sup>

Other traditional practices that channeled women into sex-typed jobs were overturned after several years of struggle. For example, newspapers once listed Help Wanted ads separately by sex. Early EEOC guidelines were silent on this practice, though the EEOC forbade newspapers to advertise by race, religion, and national origin. When the agency finally ruled, it permitted sex-segregated ads provided a nondiscriminatory disclaimer was placed at the beginning of each heading. In *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, the Supreme Court rejected the newspaper's argument that placement of the ads was a form of speech protected by the First Amendment. Instead the Court said it was at best commercial speech, which could be regulated, and furthermore speech that furthered the illegal activity of sex discrimination.<sup>109</sup>

One of the biggest hurdles for feminist litigators was an exception put in Title VII for jobs for which sex was a *bona fide occupational qualification* (bfoq). If defined broadly, the bfoq would become a very large loophole. Early decisions were mixed. The courts ruled that men could be flight attendants<sup>110</sup> but women could not be guards in male prisons.<sup>111</sup> However, under pressure from feminists, the EEOC defined the bfoq narrowly, and the federal courts largely followed suit. Although assessing if sex was a bfoq for a particular job had to be done on a case-by-case basis, by 1991 the Supreme Court had repudiated the last vestiges of protection. Johnson Controls, Inc., would not employ women in its battery-manufacturing operations unless they were beyond childbearing age or could prove they were sterile. The company was concerned that exposure to lead would harm any fetus carried by a female employee before she knew she was pregnant. In *UAW v. Johnson Controls* the

Court ruled that the Pregnancy Disability Act, which had amended Title VII in 1978 to require that pregnant women be treated like other women, precluded potentially pregnant women from being singled out for discrimination. Since only women were required to prove infertility, the company's policy was therefore in violation of Title VII.

Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents or the courts.<sup>112</sup>

For several years women tried to use the Equal Pay Act and Title VII to combat wage disparities between male- and female-dominated jobs before the courts finally refused to extend these laws that far. It is practically a truism that male-dominated jobs pay more than female-dominated jobs, regardless of the job's content, location, or working conditions. This leaves open the questions of *why* this is so and how it can be remedied. During the 1980s, women and labor unions demanded "equal pay for work of equal value," otherwise known as comparable worth or pay equity. Assessing the relative value of different jobs to an employer in order to establish equitable pay rates was not a new idea. During World War II, under pressure from the War Labor Board to stabilize wages and avoid strikes, many large companies turned to systems of job evaluation to determine wages. They hired consultants to evaluate jobs in their plants and assign them points based on the skill, effort, responsibility, and working conditions involved. Relative wages were determined by each job's relative point value.<sup>113</sup>

These job evaluation systems generally showed that male-dominated jobs paid 20 to 40 percent more than female-dominated jobs of equal point values. Since jobs were often segregated by sex, some plants even had separate pay scales that deliberately set the rate for women's jobs below men's jobs with equal points. During the 1970s labor unions began to argue that pay rates should be equalized. They did this because their usual demands for higher wages through collective bargaining were stymied by the poor economic climate. Demands for pay equity, with the possibility of a lawsuit lurking in the background, were one of the few ways available to improve at least some of their members' compensation without a strike. The leaders in making comparable worth claims and filing suits have been the unions of government employees, particularly the American Federation of State, County and Municipal Employees. This is partially because government jobs are heavily female and partially because political pressure could be put on governors and state legislatures to do the job evaluation studies necessary to illuminate wage disparities by sex. During the more affluent 1980s most states commissioned studies, and many raised wages as a result. There were some strikes and some litigation. When it looked like these cases might succeed in incorporating pay equity claims into Title VII law, the Reagan administration threw the weight

of the Justice Department behind the opposition, with both the EEOC and the Civil Rights Commission joining the chorus. The ironic outcome was that pay equity was stopped at the national level even while it was succeeding at the state and local levels.<sup>114</sup>

#### THE EQUAL RIGHTS AMENDMENT

The Equal Rights Amendment was first introduced into Congress in 1923 at the instigation of the National Woman's Party. Many sex-specific laws were on the books, and the NWP felt that another constitutional amendment was the quickest and most thorough way to remove them. During World War II the NWP instigated a major campaign for congressional passage and rewrote the original language to read "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." It was voted on by the Senate three times—in 1946, 1950, and 1953. The first time the ERA passed the Senate by thirty-eight to thirty-five, without the two-thirds necessary to be sent to the states. In 1950 and 1953 the ERA received more than two-thirds of the votes, but only after a "rider" was added that "the provisions of this article shall not be construed to impair any rights, benefits or exemptions conferred by law upon persons of the female sex." This gutted the ERA, so supporters did not ask the House to vote on it.

The primary opposition to the ERA had always been from social reformers and labor unions, who feared it would eradicate protective labor laws. By 1970 federal court decisions on Title VII had mooted this issue. When the emerging feminist movement turned its attention to the ERA, the only major opposition was fading from the field. After a two-year battle led by Martha Griffiths (D. Mich.) in the House and Birch Bayh (D. Ind.) in the Senate, involving a potpourri of feminist, women's, establishment, and liberal organizations, the Equal Rights Amendment was sent to the states for ratification on March 22, 1972.

Initially the states rushed to ratify; twenty-two did so by the end of the year, and eight more in 1973. However, the ERA stimulated a backlash from the right, which had been looking on the growing feminist movement with apprehension. The ERA became a symbolic issue on which the right projected its worst fears about the goals of the new movement and mobilized public sentiment against it. Over time, support for the ERA faded; by 1978 only thirty-five of the needed thirty-eight states had ratified. On October 20, 1978, Congress passed a joint resolution extending the seven-year deadline for ratification. This bought more time, but not more states; the ERA expired on June 30, 1982.<sup>115</sup>

#### OTHER LEGISLATION

Although the ERA was not ratified, the two-year battle had some very beneficial side effects. It created a climate in Congress that there was a serious constituent interest in women's rights and established liaisons between feminist organizations and Congressional staff. With this impetus the 92nd Congress,

which sent the ERA to the states, passed a bumper crop of women's rights legislation in 1971-72. In addition to the ERA there were laws that (1) expanded the coverage of Title VII and the enforcement powers of the EEOC; (2) prohibited sex discrimination in all federally aided education programs (Title IX); (3) added sex discrimination to the jurisdiction of the U.S. Commission on Civil Rights; (4) prohibited sex discrimination in state programs funded by federal revenue sharing; (5) provided free day care for children of poor families and a sliding fee scale for higher income families (which was vetoed by President Nixon); (6) provided for a child care tax deduction for some parents; (7) added prohibitions against sex discrimination to a plethora of federally funded programs, including health training, Appalachian redevelopment, and water pollution.

Subsequent Congresses have also been active. New laws included the Equal Credit Opportunity Act; the Women's Educational Equity Act, which provides grants to design programs and activities to eliminate stereotyping and achieve educational equity; creation of the National Center for the Control and Prevention of Rape; an amendment to the Foreign Assistance Act requiring particular attention be given to programs, projects, and activities that tend to integrate women into the national economies of foreign countries; prohibitions of discrimination in the sale, rental, or financing of housing; an amendment to Title VII to include pregnancy in employment disability insurance coverage; admission of women to the military academies; and the addition of still more antidiscrimination provisions to federally funded programs such as small business loans.

The States have also been active arenas. Laws have been passed in most states prohibiting sex discrimination in employment, housing, and credit and in some states prohibiting discrimination in insurance, education, and public accommodations. Most states now have no-fault divorce provisions; all but four have equal custody and support laws (two others have equal custody but provide support for only the wife). The changes have been partially a result of pressure from feminist and other public interest groups and partially in response to changes in federal legislation and Supreme Court decisions. Many states have followed the lead of the Federal government in conducting studies to identify gender-based distinctions in their laws and recommend changes. Most of these studies were in response to efforts to adopt a state ERA or ratify the federal amendment.

#### THE FAMILY—AGAIN

Toward the end of the 1980s both the federal and state governments turned their attention toward the family, which had undergone profound changes in the previous two decades. Although family law was traditionally a state prerogative, it had never been completely off limits to the federal government. Acts to abolish polygamy and punish those who engaged in it—largely aimed at Mormons—were passed between 1862 and 1887.<sup>116</sup> Immigration and citizenship laws have always taken family relationships into account, though not consistently. The Federal income tax law had to contend with the different

ways the common law and community property states viewed marriage, with the result that income tax rates vary by marital status. But the primary stimulus behind the federalization of family law was welfare. As the federal government took more responsibility for the welfare of children, it paid more attention to the composition and regulation of the family.<sup>117</sup>

In 1935 the Social Security Act provided funds for Aid to Families with Dependent Children (AFDC), though it generally required that one parent be missing. As the welfare rolls rose, the states were required to establish programs to determine a child's paternity in order to locate and obtain funds from the missing father. By 1974 AFDC recipients were required to cooperate in identifying and locating the father in order to obtain benefits. Where there were court orders for support, the government could use the IRS to find the father and garnish the wages of federal and military employees. Further amendments expanded this to include families not receiving welfare and to increase the reach of the government into the income of the noncustodial parent.<sup>118</sup>

In 1990 Congress finally got serious about providing child care to working parents. For decades child care had a negative connotation as something resorted to by poor women who *had* to work. The federal government subsidized some child care during World War II when it wanted women in the factories so the men could go to war, but those funds were eliminated after the war. In 1971 President Nixon vetoed a two-billion-dollar child care bill because of its "family-weakening implications." Presidents Ford and Carter also expressed disapproval of bills in Congress during their Presidencies, though in 1976 some funds were made available to the States that could be used for day care. Finally, in 1988, after four decades of increasing labor force participation by mothers of young children, Congress proposed a major child care bill. It quickly became embroiled in turf battles between committees and conflicts over church and state (e.g., should federal money be used for church-sponsored day care). These were resolved by 1990, and Congress passed a five-year program of tax credits and state grants that President Bush signed into law on November 5, 1990.<sup>119</sup>

The President was not as enthusiastic about signing a bill to mandate unpaid leave for employees on the birth or adoption of a child or illness of a family member. His concern about increasing the costs to business outweighed his commitment to "family values," even though the United States was the only major industrialized country that did not provide such benefits. President Bush vetoed bills passed by Congress in 1990 and 1992 after eight years of wrangling; he said he would support only voluntary leave. However, once a new administration was elected, Congress rushed to pass H.R. 1, the Family and Medical Leave Act, which President Clinton signed on February 5, 1993.<sup>120</sup>

"Family values" also delayed government intervention into family violence. Traditionally, how a family conducted its internal affairs has been considered a private matter. Despite growing evidence of child and spousal abuse, it was many years before legislatures overcame opposition to mandate action where there was abuse of children, and even more before services were created for spouses—virtually always wives. By 1984, when Congress passed the Family

Violence Prevention and Services Act,<sup>121</sup> thirty-two states had domestic violence programs, usually funding for emergency shelters and other programs run by nonprofit organizations. Today virtually all states have such programs, though funding is inadequate.

Another development during the 1980s was the recognition of a pension as marital property rather than that of just the spouse who earned it. At one time the earning spouse kept a pension upon divorce and unilaterally decided if there should be a survivor's benefit upon death. Several federal laws passed during the 1980s made a survivor's annuity automatic for federal employees unless waived in writing by both partners. Some laws provided that a pro rata share of the pension goes to the nonearning spouse on divorce; others recognized court orders dividing pensions.<sup>122</sup>

Social Security benefits were also amended. When first enacted in 1935, the pension provisions of the Social Security law assumed everyone married and no one divorced; husbands worked but wives did not, at least not very much; and wives survived husbands. By the 1970s these assumptions were no longer true, and the Supreme Court was forcing the removal of blatant inequities. However, the new reality of working wives and frequent divorce still left wives earning much less in their lifetimes than husbands. Neither marriage nor earning patterns were stable enough for a truly equitable Social Security system to be created; some group was always penalized. Consequently, the eligibility rules were adjusted frequently to meet the latest political demands and fiscal mandates.<sup>123</sup>

During the 1980s courts and legislatures continued to alter the common law rules on the marital relationship. Economic obligations have become more equal. Some make both spouses equally liable for each other's debts. Some make the contracting spouse primarily liable and the other secondarily liable. Some have retained the common law rule with exceptions for specific circumstances.<sup>124</sup> Others found that "neither husband nor wife is liable for necessities supplied to the other."<sup>125</sup> Most states now allow the criminal prosecution of a husband for raping his wife. Interspousal immunity for conspiracy and from lawsuits has been largely abolished. Immunity from testifying against a spouse is now at the option of the witness, except for "privately disclosed [information] in the confidence of the marital relationship."<sup>126</sup> Virtually all states permit both husband and wife to sue third parties for loss of consortium.

The federal courts have also moved into the realm of family law, but largely to prohibit rather than condone state invasions into family life. The primary vehicle for this was the Court's recognition of individual constitutional rights that superceded and abolished state laws. In 1965 the Supreme Court said married couples could not be sent to jail for using birth control.<sup>127</sup> In 1967 it found unconstitutional laws that prohibited interracial marriage.<sup>128</sup> In 1968 it overturned those that discriminated against the children of extramarital unions<sup>129</sup> or reduced the welfare benefits of needy children whose mothers were illicitly cohabiting.<sup>130</sup> In 1971 it said a State cannot provide grants to traditional families (i.e., married couple and related child) while denying such support to other family forms.<sup>131</sup> In 1976 it rejected an absolute parental veto over a minor's wish to obtain an abortion.<sup>132</sup> And in 1977 it decided that local zoning laws could not discriminate against extended families.<sup>133</sup> Most of these

decisions relied on a modern form of "substantive due process"—the same doctrine that was used to overturn state labor laws earlier in the century. Just as prior Courts had read a "liberty to contract" into the Fourteenth Amendment's Due Process clause that preempted state regulation, this Court found a "right to privacy" in it which had the same effect.<sup>134</sup> As then, this is a right that inures to *individuals*, not groups. Thus the Court's more recent decisions do not further "family rights" so much as the rights of individuals to make family arrangements suitable to them.

There are exceptions to this trend. Federal Medicaid regulations "deemed" a portion of a spouse's income available to an applicant in determining eligibility. This regulation applied even when the spouses were separated and any support was purely hypothetical. In 1981 the Supreme Court did not apply a Constitutional standard but instead looked at the legislative history to determine what Congress had intended when it passed the Medicaid laws. It concluded that "deeming" was part of the legal scheme, even when no support was likely.<sup>135</sup>

### *The Challenges Ahead*

The contemporary feminist movement finished the drive to remove discriminatory laws begun after Suffrage. It also altered public perceptions and public policy on the role of women to one that favors equality of opportunity and individual choice. This is reflected in the addition of "sex" to the pantheon of laws that prohibit discrimination in private conduct and in the Court decisions that recognize women's right to equal protection and due process. These changes, which largely occurred during the decade of the 1970s, are nothing less than a revolution in public policy. As late as 1963, the President's Commission on the Status of Women cautioned that "[e]xperience is needed in determining what constitutes *unjustified* discrimination in the treatment of women workers."<sup>136</sup>

As is true of any revolution, the changes that were made created new problems in their wake. Once equal opportunity became a possibility, the fact that it by itself would not lead to equality became clearer. Essentially this policy means that women who are like men should be treated equally with men. It accepts as standard the traditional male life-style, and that standard in turn assumes that one's primary responsibility should and can be one's job, because one has a spouse (or spouse surrogate) whose primary responsibility is the maintenance of house and family obligations. Women whose personal life-style and resources permit them to fit these assumptions could, in the absence of sex discrimination, succeed equally with men.

Most women cannot, however, because our traditional conception of the family, and women's role within the family, makes this impossible. Women still bear the primary responsibility for home and child care whether or not they are married and regardless of what their spouse does. The typical woman has more tasks to perform in a typical day than a typical man and thus has less time. Couples who equalize family responsibilities, or singles who take them all on, pay a price for deviancy. And women who spend the greater part of their lives as dependent spouses often find their "career" ended by death or divorce with little to show for it.

What is necessary is a total social reorganization that abolishes institutionalized sex role differences and the concept of adult dependency. It needs to recognize the individual as the principal economic unit, regardless of what combinations individuals do or do not choose to live in, and to provide the necessary services for individuals to support themselves and help support their children. In pursuit of these goals, programs and policies need to make participation by everyone in the labor force to the full extent of their abilities both a right and an obligation. They should also encourage and facilitate the equal assumption of family responsibilities without regard to gender, as well as develop ways to reduce conflict between the conduct of one's professional and private lives. While transition policies are necessary to mitigate the consequences of adult dependency, the goal should be abolition of the sexual division of labor. They should not be ones that permanently transfer dependency from "bread-winners" (male earners) to society in general, nor should they be ones that encourage dependency for a major portion of one's life by extolling its benefits and minimizing its costs. Instead, transitional policies should be ones that educate women to the reality that they are ultimately responsible for their own economic well-being but are entitled to the opportunities to achieve it.

This too is not enough. Even while the revolution was in process, the feminist movement was generating new public policies to address problems not solved by the mere removal of discriminatory laws and practices. The pervasiveness of violence, the degradation of pornography, and the lack of affordable, available child care are burdens particularly borne by women that equal opportunity programs do not address. As women moved into positions of power, feminist inquiry disclosed new or hidden discriminations, such as the "glass ceiling" and inadequate research into women's health needs. As the family became open to public inspection, a host of problems that more heavily affected women, such as incest, sexual abuse, and domestic violence, became apparent. As science created new ways of reproducing, it compelled reconsideration of the concept of motherhood. And as people diversified their ways of living together, the nature of the family was questioned.

Not all of the new problems can be mitigated by changes in law and public policy. But many can be. As the consequences of the legal revolution ripple throughout society, one task will be to identify where the law can be a useful tool for more social change and to devise appropriate policies to achieve it.

#### NOTES

1. For a discussion of the changing state of national/state relations, see the symposium on "Federalism: Aftermath of the 1980s and Prospects for the 1990s," in 26:2 *P.S.: Political Science and Politics*, June 1993, pp. 172-95.

2. *United States v. Yazell*, 382 U.S. 341, 361 (1966) (Black, J., dissenting).

3. Edward Mansfield, *The Legal Rights, Liabilities and Duties of Women* (Salem, MA: Jewett and Co., 1845), p. 273.

4. Leo Kanowitz, *Women and the Law: The Unfinished Revolution* (Albuquerque: University of New Mexico Press, 1969), Chapter 3.

5. 41 *American Jurisprudence Second*, 348. A husband was not chargeable for any debts other than necessities. There are many state court decisions on what constitutes a necessity and what proof must be offered that a husband failed to supply it.



6. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

7. H.R. Rep. No. 1274, 80th Cong. 2nd Sess, pp. 241, 2258-59 (1948). Revenue Act of 1948, §§ 301-5, 62 Stat. 114-16 (1948), now Int. Rev. Code of 1954, § 6013. This is discussed in Kenneth M. Davidson, Ruth B. Ginsburg, and Herma Hill Kay, *Sex Based Discrimination: Text, Cases and Materials* (St. Paul, MN: West Publishing Co., 1974), pp. 528-33.

8. Harry D. Krause, *Family Law* (St. Paul, MN: West Publishing Co., 1988), p. 113. The Wisconsin statute is at Wis. Stat. Ann. § 766.001-766.97.

9. Since these laws have changed over time, there is no single source. The *Handbook on Women Workers*, published by the Women's Bureau of the Department of Labor every few years since its inception in 1920, usually has a section on state laws. In the early 1960s state commissions on the status of women compiled the laws of their states. Leo Kanowitz summarized their status in *Women and the Law* as it existed in the mid 1960s. Various legal reference works, such as *American Jurisprudence Second*, regularly compile and annotate state court decisions on different aspects of the law, including those affecting women. *Family Law Quarterly* publishes an annual compilation of "Family Law in the Fifty States."

10. *Equal Rights*, Nov. 8, 1924, p. 307; Jan. 31, 1925, p. 403.

11. *United States v. Yazell*, 382 U.S. 341 (1966).

12. Elizabeth Baker, *Technology and Women's Work* (New York: Columbia University Press, 1964), pp. 91-96.

13. Quoted in Alice Henry, *The Trade Union Woman* (New York: Appleton and Co., 1915), p. 24.

14. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

15. *Muller v. Oregon*, 208 U.S. 412, 422 (1908).

16. *Bunting v. Oregon*, 243 U.S. 426 (1917). An exception was minimum wage legislation, which the Supreme Court would not uphold for either men or women until Justice Roberts's dramatic reversal of his opposition to Roosevelt's New Deal legislation in 1937 shifted the direction of the five to four decisions. Compare *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

17. Baker, pp. 401-4.

18. J. Stanley Lemons, *The Woman Citizen: Social Feminists in the 1920s* (Urbana: University of Illinois Press, 1973), pp. 63-68, 235-36. The House Committee on Elections responded favorably to Owen's eloquent appeal and condemnation of the limitations of the 1922 Cable Act. It recommended she be seated, and the House concurred.

19. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).

20. The common law doctrine was appropriately called "propter defectum sexus," or a "defect of sex." Lemons, pp. 69-73. William Blackstone, 2 *Commentaries* 362. The *Handbook of Women Workers* also lists the statutes on jury service. Federal law is at 28 U.S.C. § 1861.

21. Lemons, p. 79. Susan Ware, *Holding Their Own: American Women in the 1930s* (Boston: Twayne, 1982), p. 28; Lois Scharf, *To Work and to Wed: Female Employment, Feminism and the Great Depression* (Westport, CT: Greenwood Press, 1980), Chapter 4.

22. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-42 (1873), (J. Bradley, concurring). See also *Ex parte Lockwood*, 154 U.S. 116 (1893).

23. *Hoyt v. Florida*, 368 U.S. 57, 59, 61, 62, 68 (1961).

24. *Minor v. Happersett*, 21 Wall. 162 (1875), relying on the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873).

25. *Slaughter House Cases*.

26. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

27. *Truax v. Raich*, 239 U.S. 33 (1915).

28. Laurence H. Tribe, *American Constitutional Law* (New York: The Foundation Press, 1978), pp. 1002-1110.

29. Judith A. Baer, *Women in American Law* (New York: Holmes and Meier, 1991), pp. 28-35.

30. *Goesaert et al. v. Cleary, et al., Members of the Liquor Control Commission of Michigan*, 335 U.S. 464 (1948).

31. *Ibid.*

32. *Reed v. Reed*, 368 U.S. 57 (1971).

33. Tribe, p. 1082. For example, in 1968 the Court overturned a Louisiana statute that denied children born out of wedlock the right to recover for the wrongful death of their mother. By six

to three, the Court held that the state's rationale that such a statute promoted morality and discouraged nonmarital births was not sufficient to deny the orphaned children the equal protection of the laws. *Levy v. Louisiana*, 391 U.S. 68 (1968).

34. Jo Freeman, *The Politics of Women's Liberation* (New York: McKay, 1975), pp. 147-48, 213-20.

35. *Goesaert* at 466.

36. *Frontiero v. Richardson*, 411 U.S. 677, 684, 686-87 (1973). This opinion was subscribed to by Justices Brennan, Douglas, White, and Marshall.

37. The three were Powell, Burger, and Blackmun. Justice Stewart concurred without joining either opinion, and Justice Rehnquist dissented for the reasons stated in the district court opinion, *Frontiero v. Laird*, 341 F.Supp. 201 (1972), that administrative convenience was a rational basis. If Stewart had joined the four justices who wrote the plurality opinion, sex would have become a "suspect" classification. This would have changed many subsequent judicial decisions, particularly by state and lower federal courts, and perhaps made the state and federal ERAs legally unnecessary.

38. *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973).

39. *Craig v. Boren*, 429 U.S. 190, 197, 204 (1976).

40. Between 1971 and 1984 the Supreme Court applied equal protection analysis to twenty-five cases of sex-based classifications and found thirteen of them to be unconstitutional. Of the eight cases decided before *Craig*, five sex-specific statutes were struck. In the sixteen post-*Craig* cases the Court split evenly. Susan Gluck Mezey, *In Pursuit of Equality: Women, Public Policy and the Federal Courts* (New York: St. Martin's Press, 1992), has a summary chart of these cases on pp. 22-23.

41. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645, 652 (1975).

42. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).

43. *Califano v. Goldfarb*, 430 U.S. 199 (1977).

44. *Orr v. Orr*, 440 U.S. 268 (1979).

45. *Califano v. Westcott*, 443 U.S. 76 (1979).

46. *Wengler v. Druggists Mutual Insurance Company*, 446 U.S. 142 (1980).

47. According to the 1975 *Handbook of Women Workers*, at that time six states exempted women solely on the basis of sex, and ten allowed only women to be excused due to family responsibilities; p. 366.

48. *White v. Crook*, 251 F.Supp. 401 (M.D. Ala. 1966).

49. *State v. Hall*, 187 So.2d 861, 863 (Miss.), appeal dismissed 385 U.S. 98 (1966).

50. *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975). Seven justices joined in the opinion. Burger concurred and Rehnquist dissented. Because the decision rested on the Sixth Amendment establishing the rights of criminal defendants, it applied only to women's participation in criminal juries. However, both criminal and civil juries are drawn from the same pool, so the practical effect of *Taylor* was to remove all sex-specific restrictions from all jurors.

51. *Batson v. Kentucky*, 475 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *Georgia v. McCollum*, 505 U.S. ---, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

52. Brief for Respondent at 10 cited in *J.E.B. v. State of Alabama ex rel. T.B.*, 62 USLW 4219 (1994).

53. *J. E. B. v. State of Alabama ex rel. T. B.*, 62 USLW 4219 (1994).

54. *Ibid.*

55. This is argued by Janella Miller, "The Future of Private Women's Colleges," *Harvard Women's Law Journal* 7 (1984). See also Alexander W. Astin, *Four Critical Years: Effects of College on Beliefs, Attitudes and Knowledge* (San Francisco, CA: Jossey-Bass, 1977).

56. *Williams v. McNair*, 401 U.S. 951 (1971), affirming 316 F.Supp. 134 (D.S.C. 1970). Three lower federal courts upheld challenges to sex-segregated schools but under circumstances that did not lead to Supreme Court review. *Kirstein v. Rectors and Visitors of the University of Virginia*, 308 F.Supp. 184 (E.D. Va. 1970); *Bray v. Lee*, 337 F.Supp. 934 (D. Mass. 1972); *Berkelman v. San Francisco Unified School District*, 501 F.2d 1264 (9th Circ. 1974).

57. *Mississippi University for Women et al. v. Joe Hogan*, 458 U.S. 718 (1982). However, since Congress in Title IX of the 1972 Educational Amendments Act had specifically authorized the continuance of single-sex public undergraduate institutions that "traditionally and continually from

its establishment has had a policy of admitting only students of one sex," 20 U.S.C. § 1681(a), this ruling applied only to the School of Nursing and not to the entire University.

58. *Vorchheimer v. School District of Philadelphia*, 430 U.S. 703 (1977), 532 F.2d 880, 886 (3rd Cir. 1976), overturning 400 F.Supp. 326 (E.D. Pa. 1975).

59. *Kirstein v. Rectors and Visitors of the University of Virginia*, 308 F.Supp. 184 (E.D. Va. 1970).

60. *United States v. Virginia Military Institute*, 976 F.2d 980, 895, 897-900 (4th Cir. 1992), cert. denied, 113 S.Ct. 2431, 124 L.Ed.2d 651 (1993). On March 2, 1993, a lawsuit was filed against the Citadel by Shannon Richey Faulkner, who had been provisionally admitted by having references to her sex omitted from her high school transcript. The Citadel rejected her after discovering she was female. The Justice Department has joined the suit. *New York Times*, May 2, 1993, p. 24:5. The Fourth Circuit Court of Appeals ordered that she be allowed to attend day classes while the court considered her case [114 S.Ct. 87, 1994 WL 5621 (4th Cir. 1994), 210 F.3d 226 (4th Cir. 1993)].

61. *United States v. Commonwealth of Virginia*, 1994 WL 172275 at 10 (W.D.Va., April 29, 1994). This time the Commonwealth of Virginia, now under a Republican administration, supported VMI. The previous fall the Democratic state attorney general had lost her campaign for governor. *Washington Post*, February 10, 1994, p. A-10.

62. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987). *New York State Club Association Inc., v. City of New York*, 487 U.S. 1 (1988). See *New York Times*, Dec. 8, 1991, p. 38:1, for a review of the impact of these decisions.

63. *Kahn v. Shevin*, 416 U.S. 351, 355 (1974).

64. *Califano v. Webster*, 430 U.S. 313, 318 (1977). Because Congress eliminated this exception in 1972, it applied only to men who reached age sixty-two before that time. The Court held similarly in *Heckler v. Matthews*, 465 U.S. 728 (1984), which concerned a technicality in the Social Security law that benefited women between 1977 and 1982.

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

66. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 472 (1981). Most states have gender-neutral statutory rape laws. Prior to this case three circuit courts had struck down gender-based statutory rape laws, and the Supreme Court had declined a request for review of one of them. See *Navedo v. Preisser*, 630 F.2d 636 (8th Cir. 1980), *U.S. v. Hicks*, 625 F.2d 216 (9th Cir. 1980), *Meloon v. Helgemoe*, 564 F.2d 602 (1st Cir. 1977), cert. denied 436 U.S. 950 (1978).

67. *Rostker v. Goldberg*, 509 F.Supp. 586, 603 (E.D. Pa. 1980).

68. *Rostker v. Goldberg*, 453 U.S. 57, 74, 76, 79 (1981). Until 1993 women were restricted from combat in the navy and air force by statute, 10 U.S.C. § 6015 and § 8549, and in the army and marine corps by internal policy. In April of that year Secretary of Defense Les Aspin lifted the ban on women in aerial combat and asked Congress to alter the law to permit women to serve on warships. *New York Times*, April 28, 1993, p. 1:6.

69. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 280 (1979), overturning 451 F.Supp. 143 (Mass. 1978). In 1993 women were 11.5 percent of those in the active duty armed forces. *New York Times*, May 2, 1993, p. 4:4:5.

70. *Cohen v. Chesterfield County School Board* and *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974). Almost all of the lower courts that had heard similar cases found these rules to be discriminatory. See n. 8 for a list.

71. *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n. 20 (1974).

72. *Turner v. Department of Employment Security*, 423 U.S. 44 (1975).

73. 90 Stat. 2667 (1976).

74. *Wimberly v. Labor and Industrial Relations Commission*, 479 U.S. 272, 281 (1987).

75. *Stanley v. Illinois*, 405 U.S. 645 (1972).

76. *Fiallo v. Bell*, 430 U.S. 787 (1977).

77. *Quilloin v. Walcott*, 434 U.S. 246 (1978).

78. *Parham v. Hughes*, 441 U.S. 347 (1979).

79. *Caban v. Mohammed*, 441 U.S. 380 (1979).

80. *Lehr v. Robertson*, 463 U.S. 248 (1983).

81. Gilbert Y. Steiner, *Constitutional Inequality: The Political Fortunes of the Equal Rights Amendment* (Washington, DC: Brookings Institution, 1985).

82. James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (New York: Oxford University Press, 1978), is the definitive study of this movement.

83. Leslie Goldstein, *The Constitutional Rights of Women: Cases in Law and Social Change* (New York: Longman, 1979), pp. 272-74. Lawrence Lader, *Abortion II: Making the Revolution* (Boston: Beacon Press, 1973), Chapter 13.
84. 410 U.S. 113, 153 (1973).
85. *Id.* at 164-65.
86. *Beal v. Doe*, 432 U.S. 438 (1977), *Maher v. Roe*, 432 U.S. 464 (1977), *Poelker v. Doe*, 432 U.S. 519 (1977) (per curiam).
87. *Harris v. McRae*, 448 U.S. 297 (1980).
88. Rachel Benson Gold and Daniel Daley, "Public Funding of Contraceptive, Sterilization and Abortion Services, Fiscal Year 1990," *Family Planning Perspectives* 23:5 (Sept./Oct. 1991), pp. 198-99.
89. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *H.D. v. Matheson*, 450 U.S. 398 (1981); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Association of Kansas City, Missouri Inc. v. Ashcroft*, 462 U.S. 476 (1983); *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1989); *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. 2972 (1989).
90. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).
91. *Planned Parenthood of Southeastern Pennsylvania v. Casey*. 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The Court declined to hear appeals from Louisiana and Guam, where laws banning most abortions had been found unconstitutional by lower federal courts. It also declined to hear a Mississippi case challenging restrictions similar to the Pennsylvania ones upheld in *Casey*.
92. These cases and others are reviewed by Daniel A. Per-Lee, "Validity, Under Equal Protection Clause of Fourteenth Amendment, of Gender-Based Classifications Arising by Operation of State Law—Federal Cases," 60 *Lawyer's Edition Second* (1979), p. 1188.
93. However, even Washington upheld the denial of a marriage license to two males on the grounds that both sexes were affected equally by the requirement that legal marriages be heterosexual. *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974). It also supported statutes requiring election of an equal number of men and women to Democratic party committees as a rational means to achieve desired equality. *Marchioro v. Chaney*, 90 Wash. 2d 298, 582 P.D. 487 (1978).
94. But this has not prevented them from upholding school regulations restricting the length of boys' but not girls' hair, *Mercer v. The Board of Trustees*, 538 S.W.2d 201 (Tex. Civ. App. 1976), or prison regulations that required women visitors to male prisons to wear brassieres, *Holdman v. Olim*, 581 P.2d 1164 (Hawaii 1978).
95. Comment, "Equal Rights Provisions: The Experience Under State Constitutions," *California Law Review* 65 (1977), pp. 1086-1112; Paul M. Kurtz, "The State Equal Rights Amendments and Their Impact on Domestic Relations Law," *Family Law Quarterly* 11 (1977), pp. 101-50; Dawn Marie Driscoll and Barbara J. Rouse, "Through a Glass Darkly: A Look at State Equal Rights Amendments," *Suffolk University Law Review* 12 (1978), pp. 1282-1311; Philip E. Hassman, "Construction and Application of State Equal Rights Amendments Forbidding Determination of Rights Based on Sex," *American Law Reports Third* 90 (1979), pp. 158-216.
96. *Sail'er Inn v. Kirby*, 5 Cal. 3rd 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), invalidated a state statute prohibiting women from tending bar.
97. *Hewett v. State Accident Insurance Fund Corporation*, 294 Or. 33, 653 P.2d 970 (1982).
98. *M. v. M.*, 321 A.2d. 115 (Del. Sup. Ct. 1974).
99. *Warshafsky v. Journal Co.*, 63 Wis.2d 130, 216 N.W.2d 197 (Wis. 1974).
100. Compare *Cox v. Cox*, 532 P.2d 994 (Utah 1975); *Cooke v. Cooke*, 21 Md. App. 376, 319 A.2d 841 (Md. 1974); *State ex. rel. Watts v. Watts*, 77 Misc.2d 178, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973).
101. Cynthia Harrison, *On Account of Sex: The Politics of Women's Issues, 1945-1968* (Berkeley: University of California Press, 1988), Chapters 3 and 6.
102. *Schultz v. Wheaton Glass Company*, 421 F.2d 259 (3rd Cir. 1970); *Schultz v. American Can Co.*, 424 F.2d 356 (8th Cir. 1970); *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719 (5th Cir. 1970); *Hodgson v. Robert Hall Clothes*, 473 F.2d 589 (3rd Cir. 1973).
103. *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).
104. Jo Freeman, "How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy," *Law and Inequality: A Journal of Theory and Practice* 9:2 (March 1991), pp. 163-84. 110 *Congressional Record*, February 8, 1964, pp. 2577-84. The vote was 168 to 133 but was not a roll-call vote. Rep. Martha Griffiths (D. Mich.), who helped count the vote, identified its composition.

105. Freeman, 1975, p. 54.

106. The actual transition from protective labor laws to equal employment opportunity took several years; a few such laws still remain on the books. See U.S. Dept. of Labor, Women's Bureau, *State Labor Laws in Transition: From Protection to Equal Status for Women*, 1976, and compare it with *Time of Change: 1983 Handbook on Women Workers*, Bulletin 298 (Washington, DC: Government Printing Office), Chapter 7. The most important cases were *Weeks v. Southern Bell Telephone & Telegraph*, 408 F.2d 228 (5th Cir. 1969); *Rosenfeld v. Southern Pacific*, 293 F.Supp. 1219 (C.D. Cal. 1968), 444 F.2d 1219 (9th Cir. 1971); *Bowe v. Colgate*, 416 F.2d. 711 (7th Cir. 1969). See also Judith A. Baer, *The Chains of Protection: The Judicial Response to Women's Labor Legislation* (Westport, CT: Greenwood Press, 1978), pp. 166, 174, n. 137.

107. *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971).

108. This is discussed in Baer, 1991, pp. 83-84.

109. *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

110. *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971).

111. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

112. *UAW v. Johnson Controls Inc.*, 111 S.Ct. 1196, 1207 (1991).

113. Sara M. Evans and Barbara J. Nelson, *Wage Justice: Comparable Worth and the Paradox of Technocratic Reform* (Chicago: University of Chicago Press, 1989), pp. 24-26.

114. Evans and Nelson, pp. 32-41. The most successful pay equity case was *AFSCME v. State of Washington*, 578 F. Supp. 846 (W.D. Wash. 1983). It was reversed by the Ninth Circuit Court of Appeals in 770 F.2d 1401 (9th Cir. 1985). See Mezey, pp. 99-107, for more on the legal convolutions.

115. Janet K. Boles, *The Politics of the Equal Rights Amendment: Conflict and the Decision Process* (New York: Longman, 1979). Jane J. Mansbridge, *Why We Lost the ERA* (Chicago: University of Chicago Press, 1986). New resolutions have been introduced in each successive Congress. The House voted on one of these on November 15, 1983, but it did not receive the necessary two-thirds majority.

116. These were the Morrill Anti-Bigamy Act of 1862, 12 Stat. 501, the Edmunds Anti-Polygamy Act of 1882, 22 Stat. 30, and the Edmunds-Tucker Act of 1887, 24 Stat. 635. The latter annulled Utah laws allowing illegitimate children to inherit property and revoked woman suffrage in the Utah Territory on the premise that it increased the voting strength of Mormon husbands. Woman suffrage was restored by the Utah constitutional convention of 1895; Utah entered the Union in 1896 as the third full suffrage state. See Jean B. White, "Women's Place Is in the Constitution: The Struggle for Equal Rights in Utah in 1895," 42 *Utah Historical Quarterly* (Fall 1974), pp. 344-69.

117. Eva R. Rubin, *The Supreme Court and the American Family* (Westport, CT: Greenwood Press, 1986), pp. 12-13.

118. Social Security Act of 1935; 49 Stat. 620. Social Security Amendments of 1967; 81 Stat. 821. Social Service Amendments of 1974; 88 Stat. 2337. Child Welfare Act of 1980; 94 Stat. 500. Omnibus Reconciliation Act of 1981; 95 Stat. 357. Tax Equity and Fiscal Responsibility Act of 1982; 96 Stat. 324. Child Support Enforcement Amendments of 1984; 98 Stat. 1305.

119. 1990 *Congressional Quarterly Almanac* (Washington, DC: CQ Press, 1991), pp. 547-51.

120. *CQ Weekly Report*, Feb. 6, 1993, pp. 267-69.

121. P.L. 98-457.

122. Foreign Service Act (1980); 94 Stat. 2071. Central Intelligence Agency Appropriations Act (1982); 96 Stat. 1142. Department of Defense Appropriation Act (1982); 96 Stat. 718. Civil Service Spouse Retirement Equity Act (1984); 98 Stat. 3195. Retirement Equity Act (1983); 98 Stat. 494. Tax Reform Act (1986); 100 Stat. 2085. FY87 Department of Defense Military Functions and Personnel Levels Authorization Act (1985); 99 Stat. 583.

123. Social Security Amendments (1977); 91 Stat. 1509. Social Security Amendments (1983); 97 Stat. 65.

124. Jay M. Zitter, "Modern Status of Rule That Husband is Primarily or Solely Liable for Necessaries Furnished Wife," 20 *American Law Reports Fourth* 196.

125. *Condore v. Prince George's County*, 289 Md. 516, 425 A.2d 1011 (1981). Also, *Schilling v. Bedford County Memorial Hospital*, 225 Va. 539, 303 S.E.2d 905 (1983).

126. *Trammel v. United States*, 445 U.S. 40 (1980).

127. *Griswold v. Connecticut*, 381 U.S. 497 (1965).

128. *Loving v. Virginia*, 388 U.S. 1 (1967).

129. *Levy v. Louisiana*, 391 U.S. 68 (1968).

130. *King v. Smith*, 392 U.S. 309 (1967).

131. *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973).

132. *Planned Parenthood v. Danforth*, 428 U.S. 53 (1976).
133. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).
134. Tribe, 1978, Chapter 13.
135. *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981).
136. Margaret Mead and Frances Balgley Kaplan, *American Women: The Report of the President's Commission on the Status of Women and Other Publications of the Commission* (New York: Charles Scribner's Sons, 1965), p. 49; my emphasis.

CRITICAL  
**RACE**  
FEMINISM

*A Reader*

**Edited  
by  
Adrien  
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Wing**



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# 4

## Racism, Civil Rights, and Feminism

*Kathleen Neal Cleaver*

The roots of the extraordinary protest movement culminating with the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act reach deep into the century-long struggle blacks waged to end slavery and secure full citizenship.<sup>1</sup> Feminists have drawn inspiration and legal ammunition<sup>2</sup> from those passionate struggles during both the nineteenth and twentieth centuries. Yet despite appropriating legal gains paid for in blood during the civil rights era, and benefiting in great numbers from legislation banning employment discrimination, white women who represent the dominant voice of American feminists seem nearly inaudible in their opposition to racism. The perceptions that motivated the radical feminists, Third World feminists, and progressive women devoted to ending racial oppression have become peripheral among leading feminist authors.

This silence, which seems especially paradoxical to me in light of the crucial role women played in the modern civil rights movement, demonstrates how profound efforts at collective transformation can remain trapped within deeply entrenched boundaries. For in many ways, the Southern-based struggle to end segregation during the 1950s and 1960s, which can be seen as a human rights movement, a struggle for community empowerment, or a collective effort to expand democracy, was a women's movement. If it were not for black women, there would have been no Montgomery Bus Boycott, few voting rights campaigns, far less marvelous educational impact—in short, the civil rights movement as we know it could not have occurred.

Black women supported the churches that sustained the movement; raised money for the National Association for the Advancement of Colored People (NAACP), the Southern Christian Leadership Conference (SCLC), and other groups; encouraged their children to become plaintiffs in desegregation suits, and fed and sheltered the young student activists who took the challenge against white supremacy to the countryside. Women sat in at lunch counters, boarded the buses that became Free-

dom Rides, walked in the boycott lines, marched in demonstrations, went to jail, and became civil rights leaders in their communities. The visual record always documents the presence of women, but in the printed texts of academic accounts women's participation tends to fade. Yet it was the women in the movement who insisted on the more radical approaches, showed the most determination, and kept the fires for radical change lit. And it was black women in the movement whose example transformed white women's understanding of what women could do.<sup>3</sup>

Ella Baker, whose lifelong civil rights career spanned the NAACP, the Urban League, the SCLC, and the Student Nonviolent Coordinating Committee, has stated that "the number of women who carried the movement is much larger than the number of men."<sup>4</sup> Baker, raised in North Carolina by grandparents who had been enslaved, continued that spirited resistance that animated the struggle against slavery in her lifework. And it was that concrete, real-time devotion to the destruction of oppression, which I think characterized the socialization of daughters in many Southern black families, that accounted for their deep attraction to the civil rights struggle. For the movement of that era was about *Freedom*—praying, singing, marching, planning, reaching, and organizing for freedom. And in Southern black communities it was patently obvious that freedom was not withheld simply because of gender, but denied to every man, woman, and child who was black.

What the women who financed, mobilized, and joined civil rights campaigns knew, what those whose community work empowered the charismatic leaders who rose to represent the civil rights cause knew was that the price of black women's freedom was freedom for the entire community. Historical accounts concentrate largely on national leadership figures, but most of the mass protests and insurgencies that exploded during the 1950s and 1960s were grassroots movements that emerged with little direction from national organizations or leaders.<sup>5</sup> And where there were grassroots, there were women, as Kay Mills wrote in her biography of Fannie Lou Hamer.<sup>6</sup> The intertwining of the concerns of women and the struggle to end black oppression have a long history. As far back as 1892, the African American feminist, scholar, and human rights activist Anna Julia Cooper wrote that "only the *Black Woman* can say 'when and where I enter, in the quiet, undisputed dignity of my womanhood, without violence and without suing or special patronage, then and there the whole Negro race enters with me.'" <sup>7</sup>

I was in high school when I first saw defiant young women engaged in civil rights protest. Those students who went to jail in Albany, Georgia, during the early voter registration campaigns impressed me immensely. The courage it took for them to challenge white racist laws and their determination not to let jail or mob violence turn them away were awe-inspiring. I learned what heroism and leadership meant from Diane Nash, who led student demonstrations in Nashville, Tennessee, and later organized Freedom Rides, from Gloria Richardson, who mobilized the black community to fight segregation in Cambridge, Maryland, and from Ruby Doris Robinson, who helped coordinate the 1964 Mississippi Summer Project. It never once entered my head that women could not be civil rights leaders or organizers.

Like hundreds of women of my generation, I was thrilled to get a chance to join the

movement. Shortly after the Meredith March, which galvanized national attention on the cry of "Black Power" in the summer of 1966, I began working at the Student Nonviolent Coordinating Committee's office in New York. I moved on to the national office in Atlanta, where I helped organize a black student conference held at Fisk University. Eldridge Cleaver was invited to speak at the conference. We fell in love and were married at the end of 1967. I became the communications secretary of the Black Panther Party and devoted most of my effort to our campaign to prevent Huey Newton, the defense minister of the Black Panther Party, from going to the gas chamber on charges of murdering an Oakland policeman.

My involvement with the Black Panther Party began during a turbulent era marked by frequent urban rebellions, profound dissent over the Vietnam War, and extremist political violence. Leaders with progressive views—from the Democratic president Kennedy to the NAACP leader Medgar Evers to Malcolm X to Black Panther Fred Hampton—were all assassinated because their eloquent pleas for change inspired a generation. The Black Panthers were being subjected to constant police surveillance, harassment, and terrorism. By that I mean people were followed, our telephones were tapped, our mail was opened, our homes were raided, our offices were shot up, and our organization was infiltrated. Members were frequently arrested and jailed, our leaders were framed, and our organization was sabotaged by a secret counterintelligence program spearheaded by the director of the FBI.<sup>8</sup> The news media were enlisted to portray Black Panthers as dangerous criminals instead of young people engaged in a struggle for self-determination. We sought power for the people, and in return the power of the state came crashing down on our heads.

Such conditions made it obvious to women within the Black Panther Party that liberation was not something we could obtain separately, nor would consciousness-raising groups serve as an appropriate channel for our rage. Of course, as in the larger community, conflicts occurred between men and women, and sexism was an issue that Panthers struggled to confront. Yet we could see how these conflicts arising from sexism within our community were subordinate to the overwhelming violence of the domination imposed on our community by the armed representatives of the state.

The women's liberation movement was coalescing around this same time, but women in the Black Panther Party did not believe that the discussions white women were launching would derive solutions to the difficulties we faced. While white women were addressing the specific form of oppression they experienced within the dominant culture, we came to fight side by side with men for black liberation. In fact, the way we engaged the culture in our struggle against racism deeply encouraged white women to strike out against sexism.

As revolutionaries, we rejected the conventional definition of our economic, political, and social relationship to the dominant society as "second-class citizenship." That citizenship extended after the Civil War continued the subjugation historically enforced during slavery, and we analyzed the regime of segregation as a variant of colonialism. Instead of being separated by land, as was Angola from Portugal, for example, black colonies were dispersed throughout the American "mother country"

in separate communities that police controlled like occupying armies. Under international human rights law, we saw blacks as colonial subjects just as entitled to fight for human rights and self-determination as Africans, Asians, and Latin Americans who were waging revolutionary wars against imperialist domination.

The first point in the Black Panther Party Ten Point Program stated, "We want power to determine the destiny of our own black community." Our colonized status was the basis on which we organized for liberation; therefore all members of the Black Panther Party were drawn from the colonized community. We worked with other peoples and groups on the principle of coalition, not combination within the same organization. We formed coalitions with the electoral Peace and Freedom Party, which was predominantly white, with the Chicano Brown Berets, with the Puerto Rican Young Lords, and with the Asian Red Guards. We challenged racism with solidarity, and violence with self-defense.

While the ultimate domination that we all struggled to destroy during that era may have been the same, that did not mean its distinct historical and social articulations were interchangeable. The ancient dynamic that elevated white men over white women was not rooted in the same historical economic processes that allowed them to extract forced labor from African slaves and their descendants in North America. Although both unequal power relationships were embedded within hierarchical structures of authority, the barbarism involved in constructing New World slave societies transcended the bounds of patriarchy and laid the foundation for imperialist domination of the world.<sup>9</sup> Nothing has so profoundly chiseled the contours of our national heritage as those formative centuries of American slavery. The central paradox of American history is that the rise of liberty and equality was accompanied by the rise of slavery.<sup>10</sup> And the stigma of that social death inherent in the slave condition has imprinted itself on the entire cultural fabric.<sup>11</sup>

When Supreme Court justice Roger Taney, a former slaveowner, refuted Dred Scott's claim to freedom in the middle of the nineteenth century, he wrote that blacks were "beings of an inferior order . . . altogether unfit to associate with the white race in either social or political relations."<sup>12</sup> Their social position was so degraded, Taney wrote, "that they had no rights which the white man was bound to respect."<sup>13</sup> He did not support his assertion with legal citations, but instead pointed to the fact that "the negro [was] justly and lawfully . . . reduced to slavery for his benefit. He was bought and sold and treated as an ordinary article of merchandise . . . whenever a profit could be made by it."<sup>14</sup>

In a society defined by its creation of a class of human property, gender has maintained the demarcation that race historically imposed between those who owned that property and those who became property. The alleged benefits of the cult of femininity did not accrue to the black woman, who was neither protected within the white patriarchal structure nor excluded from the market.<sup>15</sup> When the slave woman's children, her labor, and her person legally became a commodity, white women were both protected and subordinated by the authority, autonomy, and property of their fathers or husbands. An irony of the system that extracted the greatest labor benefits conceivable from its workers was that it released enslaved women from the conven-

tions evoked by gender among the dominant group. But, as Angela Davis has cautioned, the onerous nature of this brutal equality with black men should never be overlooked.<sup>16</sup>

Eliminating gender discrimination in itself does not remove the contortion blighting the lives of women whose color, race, national origin, or economic marginalization causes them such pain. As a rule, the subtleties of entrenched racism are no better understood by whites, women or men, than sexual harassment is by men, whether they are black or white, rich or poor. Until white feminists discover how to see the insidious way that racism constricts the lives of millions of women, they cannot oppose it. Worse, they may blindly fail to perceive how their ancestry positions them to benefit passively from racism's perpetuation, and remain oblivious to the racialized nature of gender.<sup>17</sup> Cultural, political, and economic institutions that mask deeply entrenched patterns of thought and action sustain white superiority almost automatically, as they have sustained male power. This enables racism to function with very little conscious individual attention.

Educated, well-meaning whites will insist, "I am not a racist," which is quite true if one accepts their fragmentary definition of "racist."<sup>18</sup> But what is the source of those slights, remarks, insults, or overt behavior that blacks interacting with them interpret as revealing a belief in black inferiority? What explains the gross media stereotypes that pervert the image of blacks? Why are blacks singled out for suspicious or fearful treatment because of their appearance, even in the hallowed halls of the Ivy League? How did it happen that over 80 percent of white Americans live where they have no black neighbors?

Just like sexism, racist behaviors flourish unless conscious, systematic, organized opposition to their manifestation, including but not limited to administrative and legal regulation, is in place. Thirty years of civil rights law have not eliminated those social conditions molded by three centuries of black subjugation. Feminism does not inoculate women against racism, because gender for black women has represented a category differentiated from white women,<sup>19</sup> whose race reserved them a place within the dominant society from which black women were barred.<sup>20</sup> Not only did gender limit the earning power of black women pushed to the lowest rungs of the economic ladder, but it left them outside the realm of glorified white womanhood. Patriarchal norms, economic exploitation, and racial denigration give a polydimensional character to the sexism that oppresses black women, which one-dimensional feminism cannot combat. Instead, the feminism appropriate to African Americans requires a complex recognition of the gendered dimension of racial subjugation.

The social isolation, economic deprivation, and blatant terrorism meted out to blacks make it difficult for many to appreciate the subtler subordination and intimidation that women within the dominant community endure. Lacking an appreciation of these women's realities, many black people fail to recognize that women whom they perceive as privileged may in fact feel weak, and therefore they discredit the validity of the feminist movement. Further, the sexist attitudes that belittle and exclude women's contributions from major black institutions, including churches, colleges, and reform organizations, is rarely given the public acknowledgment and

condemnation it deserves. The presence of a significant underclass, masses of solid working people, and an affluent middle class among blacks shows that we are neither liberated nor integrated, but have become a fragmented population, scattered through all levels of society from the Pentagon to the prison yard. To elevate awareness of feminist concerns within black communities requires facing hostile opposition and uncomprehending denial. Yet this work may become a new focus for black women's activism. Concern for gender equity knows no color line, and women of every community desperately need more respect.

Unless we intend to remain locked up in self-righteous boxes, it is time to replace cross-racial silence and hostility on gender with communication. But no one can speak truth to power until they find out what is true. The weaknesses, aspirations, and histories that divide as well as unite us need to be examined, understood, and demythologized. That may get us to the starting gate to look for the solution that seems to elude us. Those progressive organizations that advocate on behalf of black concerns must adopt stronger antisexist positions if they intend to mobilize their constituencies and retain their relevance. More attention must be devoted to problems facing black women, particularly those juggling poverty and motherhood, fending off domestic violence and community crime waves.

These changes may take place before mainstream feminists become motivated to develop antiracist positions, because whites have a stake in failing to examine the interplay of racism with their cultural identity. During the heyday of European imperialism, when race became elevated to the primary indicator of cultural achievement, the hierarchical theory of race placed whites at the pinnacle of historical development.<sup>21</sup> Masterfully fabricated justifications in science, religion, industry, politics, and art that entitled whites to live on the labor and property of the inferior colored peoples of the world distinguished the nineteenth century.<sup>22</sup> Everything great, everything fine, everything really successful in human culture was seen as white.<sup>23</sup> As that legacy has yet to be repudiated entirely, it abets American feminist scholarship in which race remains peculiarly invisible.

The analytical task is to include gender and race within the same critique instead of polarizing them. If these constructs are extracted separately from the cultural matrix that defines them both, each category loses layers of its coherence. As we look back on the twentieth century, we see that W. E. B. Du Bois was prophetic when he wrote in 1903 that the problem of the twentieth century was the problem of the color line.<sup>24</sup> Race, particularly in the United States, has come to serve as a "metalanguage" for the construction of social relations.<sup>25</sup> Not only is race manipulated to subsume gender and class, but it blurs, disguises, and suppresses their interplay, precluding unity within gender and permitting cross-class solidarity.<sup>26</sup> Without an understanding of the complex encoding that our mutual and interdependent identities acquire within racism's language, those women who seek to engage America in social reconstruction will be left whistling in the dark.

## NOTES

1. See Vincent Harding, *There Is a River: The Black Struggle for Freedom in America* (1981).

2. Title VII of the Civil Rights Act of 1964 prohibited discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-17 (1990). The Equal Employment Opportunity Act of 1972 amended Title VII to extend its protection to employees of state, local, and federal governments and expanded its coverage to include businesses of more than fifteen employees. 42 U.S.C. §§ 2000e(b) and 2000e-16 (1990). Title IX of the Educational Amendments to the Civil Rights Act of 1964 prohibited sex discrimination in any educational program or activity that received federal financial assistance. 20 U.S.C. §§ 1681-1688 (1990). Under the Civil Rights Act of 1991, Title VII was amended along with numerous other statutes affecting employment discrimination to further enable victims of discrimination to obtain redress.

3. Feminist author Sara Evans wrote about this early change in consciousness in *Personal Politics*:

The daring of younger women, the strength and perseverance of "mamas" in local communities, the unwavering vision, energy, and resourcefulness of an Ella Baker, opened new possibilities in contrast to the tradition of the "southern lady." Having broken with traditional culture, young white women welcomed the alternative they represented. For them these black women became . . . new models of womanhood.

Sara Evans, *Personal Politics* 53 (1980).

4. Paula Giddings, *When and Where I Enter: The Impact of Black Women on Sex and Race in America* 284 (1984).

5. Carson, *African American Leadership and Mass Mobilization*, *Black Scholar*, Fall 1994, at 2.

6. Kay Mills, *This Little Light of Mine* 45 (1993).

7. Anna Julia Cooper, *A Voice from the South by a black Woman from the South* (1892), in *The Schomburg Library of Nineteenth Century Black Women Writers* 31 (1988).

8. In his book *Racial Matters: The FBI's Secret File on Black America, 1960-1972*, Kenneth O'Reilly describes the FBI activities against the Black Panthers as "outrageous." According to O'Reilly, "only the Martin Luther King case rivaled the Panther case in its ferocity with FBI officials pursuing the most prominent proponents of violent resistance to white racism with the same zeal that had characterized their pursuit of the most prominent proponent of nonviolence." Kenneth O'Reilly, *Racial Matters* 293 (1989).

9. See, e.g., John Henrik Clarke, *Notes for an African World Revolution* 44 (1991). In the chapter *The Nineteenth Century Origins of the African and African American Freedom Struggle*, Clarke concluded that "the wealth obtained from African slave labor made the . . . Industrial Revolution possible and also created the basis for modern capitalism." In his study of the economic evolution of slavery predominantly in the West Indies, Eric Williams wrote that the discovery of America helped make international trade the central feature of the seventeenth and eighteenth centuries, and the slave trade was the parent of that prosperous triangular trade between Europe, Africa, and the Americas. "The profits obtained [in the triangular trade] provided one of the mainstreams of that accumulation of capital in England

which financed the Industrial Revolution." Eric Williams, *Capitalism and Slavery* 51-52 (1961).

10. Edmund Morgan, *American Slavery, American Freedom* 4 (1975).

11. See Orlando Patterson, *Slavery and Social Death* (1982), particularly chap. 2, *Authority, Alienation and Social Death*, at 35-76.

12. *Scott v. Sanford*, 60 U.S. 393, 407 (1856).

13. *Id.*

14. *Id.*

15. See Angela Davis, *Reflections on the Black Woman's Role in the Community of Slaves*, *Black Scholar*, Dec., 1971, at 3-15.

16. Davis examined what the "brutal status of equality" meant for a slave woman:

she could work up a fresh content for that deformed equality by inspiring and participating in acts of resistance of every form and color. She could turn the weapon of equality in struggle against the avaricious slave system which had engendered the mere caricature of equality in oppression. The black woman's activities increased the total incidence of anti-slavery assaults. But most important, without consciously rebellious black women, the theme of resistance could not have become so thoroughly intertwined in the fabric of daily existence. The status of black women within the community of slaves was definitely a barometer indicating the overall potential for resistance.

This process did not end with the formal dissolution of slavery. Under the impact of racism, the black woman has been continually constrained to inject herself into the desperate struggle for existence. She—like her man—has been compelled to work for wages, providing for her family as she was previously forced to provide for the slaveholding class. (*Id.* at 15)

17. The social dominance of whites allows them to relegate their racial distinctiveness to the realm of the subconscious, according to legal scholar Barbara Flagg. "Whiteness is the racial norm. . . . Once an individual is identified as white . . . his distinctive racial characteristics need no longer be conceptualized in racial terms; he becomes effectively raceless in the eyes of other whites." Barbara Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953, 970-71 (1993).

18. White Americans prefer to think of a racist as an individual motivated by a virulent hatred toward an "outcast" group. It is rare to find acceptance of a broader definition that would account for more of the manifest social hierarchies that racism promotes. Such a definition of a racist would be a person who subscribed to any set of beliefs that attributed a socially relevant quality to real or imagined genetic characteristics that made the ranking and discrimination of groups defined by their race necessary. See Pierre L. Van Den Berghe, *Race and Racism: A Comparative Perspective* 11 (1978).

19. Historian Evelyn Brooks Higginbotham wrote in her seminal article, *African American Women and the Metalanguage of Race*, that "in a society where racial demarcation is endemic to [the] sociocultural fabric . . . to laws, . . . economy . . . and everyday customs . . . gender identity is inextricably linked to . . . racial identity." Evelyn Higginbotham, *African American Women and the Metalanguage of Race*, that "in a society where racial demarcation is endemic to [the] sociocultural fabric . . . to laws, . . . economy . . . and everyday customs . . . gender identity is inextricably linked to . . . racial identity." Evelyn Higginbotham, *African American Women and the Metalanguage of Race*, 17 *Signs* 251, 254 (1992).



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20. During the century of segregated public accommodations, separate toilet facilities were provided for "White Ladies" and "Colored Women."

21. In an early work elaborating the theory of race as the primary explanation of development, Robert Knox, M.D., asserted the rank inferiority of Negroes and darker peoples, who, he wrote, had been "slaves of their fairer brethren" since "the earliest of times." Robert Knox, *The Races of Men* 150 (1850).

22. See W. E. B. Du Bois, *The White Masters of the World, in The World and Africa* 16-43 (1969).

23. *Id.* at 20.

24. In his introduction to *The Souls of Black Folk*, W. E. B. Du Bois wrote that he intended to reveal the strange meaning of being black at the dawning of the twentieth century, which was important because "the problem of the twentieth century is the problem of the color line."

25. Higginbotham, *supra* note 19, at 255.

26. *Id.*

# **PLEASURE and DANGER: exploring female sexuality**

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**Edited by  
Carole S. Vance**



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To the memory of my father, William  
T. Vance, and to my mother, Madlyn  
L. Vance

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3 Reported in *Female Circumcision, Excision and Infibulation: The Facts and Proposals for Change*, Rep. no. 47, Minority Rights Group, London, 1980. (See also Abdalla, Raziya, *Sisters in Affliction: Circumcision and Infibulation of Women in Africa*, Zed Press, London, 1980.)

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# Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality

Gayle Rubin

## I The sex wars

Asked his advice, Dr. J. Guerin affirmed that, after all other treatments had failed, he had succeeded in curing young girls affected by the vice of onanism by burning the clitoris with a hot iron. . . . I apply the hot point three times to each of the large labia and another on the clitoris. . . . After the first operation, from forty to fifty times a day, the number of voluptuous spasms was reduced to three or four. . . . We believe, then, that in cases similar to those submitted to your consideration, one should not hesitate to resort to the hot iron, and at an early hour, in order to combat clitoral and vaginal onanism in little girls.

Demetrius Zambaco<sup>1</sup>

The time has come to think about sex. To some, sexuality may seem to be an unimportant topic, a frivolous diversion from the more critical problems of poverty, war, disease, racism, famine, or nuclear annihilation. But it is precisely at times such as these, when we live with the possibility of unthinkable destruction, that people are likely to become dangerously crazy about sexuality. Contemporary conflicts over sexual values and erotic conduct have much in common with the religious disputes of earlier centuries. They acquire immense symbolic weight. Disputes over sexual behavior often become the vehicles for displacing social anxieties, and discharging their attendant emotional intensity. Consequently, sexuality should be treated with special respect in times of great social stress.

The realm of sexuality also has its own internal politics, inequities, and modes of oppression. As with other aspects of human behavior, the concrete institutional forms of sexuality at any given time and place are products of human activity. They are imbued with conflicts of interest and political maneuvering, both deliberate and incidental. In that sense, sex is always political. But there are also historical periods in which sexuality is more sharply contested and more overtly politicized. In such periods, the domain of erotic life is, in effect, renegotiated.

In England and the United States, the late nineteenth century was one such era. During that time, powerful social movements focused on "vices" of all sorts. There were educational and political campaigns to encourage chastity, to eliminate prostitution, and to discourage masturbation, especially among the young. Morality crusaders attacked obscene literature, nude paintings, music halls, abortion, birth control information, and public dancing.<sup>2</sup> The consolidation of Victorian morality, and its apparatus of social, medical, and legal enforcement, was the outcome of a long period of struggle whose results have been bitterly contested ever since.

The consequences of these great nineteenth-century moral paroxysms are still with us. They have left a deep imprint on attitudes about sex, medical practice, child-rearing, parental anxieties, police conduct, and sex law.

The idea that masturbation is an unhealthy practice is part of that heritage. During the nineteenth century, it was commonly thought that "premature" interest in sex, sexual excitement, and, above all, sexual release, would impair the health and maturation of a child. Theorists differed on the actual consequences of sexual precocity. Some thought it led to insanity, while others merely predicted stunted growth. To protect the young from premature arousal, parents tied children down at night so they would not touch themselves; doctors excised the clitorises of onanistic little girls.<sup>3</sup> Although the more gruesome techniques have been abandoned, the attitudes that produced them persist. The notion that sex *per se* is harmful to the young has been chiseled into extensive social and legal structures designed to insulate minors from sexual knowledge and experience.

Much of the sex law currently on the books also dates from the nineteenth-century morality crusades. The first federal anti-obscenity law in the United States was passed in 1873. The Comstock Act - named for Anthony Comstock, an ancestral anti-porn activist and the founder of the New York Society for the Suppression of Vice - made it a federal crime to make, advertise, sell, possess, send through the mails, or import books or pictures deemed obscene. The law also banned contraceptive or abortifacient drugs and devices and information about them.<sup>4</sup> In the wake of the federal statute, most states passed their own anti-obscenity laws.

The Supreme Court began to whittle down both federal and state Comstock laws during the 1950s. By 1975, the prohibition of materials used for, and information about, contraception and abortion had been ruled unconstitutional. However, although the obscenity provisions have been modified, their fundamental constitutionality has been upheld. Thus it remains a crime to

make, sell, mail, or import material which has no purpose other than sexual arousal.<sup>5</sup>

Although sodomy statutes date from older strata of the law, when elements of canon law were adopted into civil codes, most of the laws used to arrest homosexuals and prostitutes come out of the Victorian campaigns against "white slavery." These campaigns produced myriad prohibitions against solicitation, lewd behavior, loitering for immoral purposes, age offenses, and brothels and bawdy houses.

In her discussion of the British "white slave" scare, historian Judith Walkowitz observes that: "Recent research delineates the vast discrepancy between lurid journalistic accounts and the reality of prostitution. Evidence of widespread entrapment of British girls in London and abroad is slim."<sup>6</sup> However, public furor over this ostensible problem

forced the passage of the Criminal Law Amendment Act of 1885, a particularly nasty and pernicious piece of omnibus legislation. The 1885 Act raised the age of consent for girls from 13 to 16, but it also gave police far greater summary jurisdiction over poor working-class women and children... it contained a clause making indecent acts between consenting male adults a crime, thus forming the basis of legal prosecution of male homosexuals in Britain until 1967... the clauses of the new bill were mainly enforced against working-class women, and regulated adult rather than youthful sexual behaviour.<sup>7</sup>

In the United States, the Mann Act, also known as the White Slave Traffic Act, was passed in 1910. Subsequently, every state in the union passed anti-prostitution legislation.<sup>8</sup>

In the 1950s, in the United States, major shifts in the organization of sexuality took place. Instead of focusing on prostitution or masturbation, the anxieties of the 1950s condensed most specifically around the image of the "homosexual menace" and the dubious specter of the "sex offender." Just before and after World War II, the "sex offender" became an object of public fear and scrutiny. Many states and cities, including Massachusetts, New Hampshire, New Jersey, New York State, New York City and Michigan, launched investigations to gather information about this menace to public safety.<sup>9</sup> The term "sex offender" sometimes applied to rapists, sometimes to "child molesters," and eventually functioned as a code for homosexuals. In its bureaucratic, medical, and popular versions, the sex offender discourse tended to blur distinctions between violent sexual assault and illegal but consensual acts such as sodomy. The criminal justice system incorporated these concepts when an epidemic of sexual psychopath laws swept through state legislatures.<sup>10</sup> These laws gave the psychological professions increased police powers over

homosexuals and other sexual "deviants."

From the late 1940s until the early 1960s, erotic communities whose activities did not fit the postwar American dream drew intense persecution. Homosexuals were, along with communists, the objects of federal witch hunts and purges. Congressional investigations, executive orders, and sensational exposés in the media aimed to root out homosexuals employed by the government. Thousands lost their jobs, and restrictions on federal employment of homosexuals persist to this day.<sup>11</sup> The FBI began systematic surveillance and harassment of homosexuals which lasted at least into the 1970s.<sup>12</sup>

Many states and large cities conducted their own investigations, and the federal witch-hunts were reflected in a variety of local crackdowns. In Boise, Idaho, in 1955, a schoolteacher sat down to breakfast with his morning paper and read that the vice-president of the Idaho First National Bank had been arrested on felony sodomy charges; the local prosecutor said that he intended to eliminate all homosexuality from the community. The teacher never finished his breakfast. "He jumped up from his seat, pulled out his suitcases, packed as fast as he could, got into his car, and drove straight to San Francisco. . . . The cold eggs, coffee, and toast remained on his table for two days before someone from his school came by to see what had happened."<sup>13</sup>

In San Francisco, police and media waged war on homosexuals throughout the 1950s. Police raided bars, patrolled cruising areas, conducted street sweeps, and trumpeted their intention of driving the queers out of San Francisco.<sup>14</sup> Crackdowns against gay individuals, bars, and social areas occurred throughout the country. Although anti-homosexual crusades are the best-documented examples of erotic repression in the 1950s, future research should reveal similar patterns of increased harassment against pornographic materials, prostitutes, and erotic deviants of all sorts. Research is needed to determine the full scope of both police persecution and regulatory reform.<sup>15</sup>

The current period bears some uncomfortable similarities to the 1880s and the 1950s. The 1977 campaign to repeal the Dade County, Florida, gay rights ordinance inaugurated a new wave of violence, state persecution, and legal initiatives directed against minority sexual populations and the commercial sex industry. For the last six years, the United States and Canada have undergone an extensive sexual repression in the political, not the psychological, sense. In the spring of 1977, a few weeks before the Dade County vote, the news media were suddenly full of reports of raids on gay cruising areas, arrests for prostitution, and investigations into the manufacture and distribution of pornographic materials. Since then, police activity against the gay

community has increased exponentially. The gay press has documented hundreds of arrests, from the libraries of Boston to the streets of Houston and the beaches of San Francisco. Even the large, organized, and relatively powerful urban gay communities have been unable to stop these depredations. Gay bars and bath houses have been busted with alarming frequency, and police have gotten bolder. In one especially dramatic incident, police, in Toronto raided all four of the city's gay baths. They broke into cubicles with crowbars and hauled almost 300 men out into the winter streets, clad in their bath towels. Even "liberated" San Francisco has not been immune. There have been proceedings against several bars, countless arrests in the parks, and, in the fall of 1981, police arrested over 400 people in a series of sweeps of Polk Street, one of the thoroughfares of local gay nightlife. Queerbashing has become a significant recreational activity for young urban males. They come into gay neighborhoods armed with baseball bats and looking for trouble, knowing that the adults in their lives either secretly approve or will look the other way.

The police crackdown has not been limited to homosexuals. Since 1977, enforcement of existing laws against prostitution and obscenity has been stepped up. Moreover, states and municipalities have been passing new and tighter regulations on commercial sex. Restrictive ordinances have been passed, zoning laws altered, licensing and safety codes amended, sentences increased, and evidentiary requirements relaxed. This subtle legal codification of more stringent controls over adult sexual behavior has gone largely unnoticed outside of the gay press.

For over a century, no tactic for stirring up erotic hysteria has been as reliable as the appeal to protect children. The current wave of erotic terror has reached deepest into those areas bordered in some way, if only symbolically, by the sexuality of the young. The motto of the Dade County repeal campaign was "Save Our Children" from alleged homosexual recruitment. In February 1977, shortly before the Dade County vote, a sudden concern with "child pornography" swept the national media. In May, the *Chicago Tribune* ran a lurid four-day series with three-inch headlines, which claimed to expose a national vice ring organized to lure young boys into prostitution and pornography.<sup>16</sup> Newspapers across the country ran similar stories; most of them worthy of the *National Enquirer*. By the end of May, a congressional investigation was underway. Within weeks, the federal government had enacted a sweeping bill against "child pornography" and many of the states followed with bills of their own. These laws have reestablished restrictions on sexual materials that had been relaxed by some of the important

Supreme Court decisions. For instance, the Court ruled that neither nudity nor sexual activity *per se* were obscene. But the child pornography laws define as obscene any depiction of minors who are nude or engaged in sexual activity. This means that photographs of naked children in anthropology textbooks and many of the ethnographic movies shown in college classes are technically illegal in several states. In fact, the instructors are liable to an additional felony charge for showing such images to each student under the age of 18. Although the Supreme Court has also ruled that it is a constitutional right to possess obscene material for private use, the child pornography laws prohibit even the private possession of any sexual material involving minors.

The laws produced by the child porn panic are ill-conceived and misdirected. They represent far-reaching alterations in the regulation of sexual behavior and abrogate important sexual civil liberties. But hardly anyone noticed as they swept through Congress and state legislatures. With the exception of the North American Man/Boy Love Association and the American Civil Liberties Union, no one raised a peep of protest.<sup>17</sup>

A new and even tougher federal child pornography bill has just reached House-Senate conference. It removes any requirement that prosecutors must prove that alleged child pornography was distributed for commercial sale. Once this bill becomes law, a person merely possessing a nude snapshot of a 17-year-old lover or friend may go to jail for fifteen years, and be fined \$100,000. This bill passed the House 400 to 1.<sup>18</sup>

The experiences of art photographer Jacqueline Livingston exemplify the climate created by the child porn panic. An assistant professor of photography at Cornell University, Livingston was fired in 1978 after exhibiting pictures of male nudes which included photographs of her seven-year-old son masturbating. *Ms. Magazine*, *Chrysalis*, and *Art News* all refused to run ads for Livingston's posters of male nudes. At one point, Kodak confiscated some of her film, and for several months, Livingston lived with the threat of prosecution under the child pornography laws. The Tompkins County Department of Social Services investigated her fitness as a parent. Livingston's posters have been collected by the Museum of Modern Art, the Metropolitan, and other major museums. But she has paid a high cost in harassment and anxiety for her efforts to capture on film the uncensored male body at different ages.<sup>19</sup>

It is easy to see someone like Livingston as a victim of the child porn wars. It is harder for most people to sympathize with actual boy-lovers. Like communists and homosexuals in the 1950s, boy-lovers are so stigmatized that it is difficult to find defenders for their civil liberties, let alone for their erotic orientation. Conse-

quently, the police have feasted on them. Local police, the FBI, and watchdog postal inspectors have joined to build a huge apparatus whose sole aim is to wipe out the community of men who love undraged youth. In twenty years or so, when some of the smoke has cleared, it will be much easier to show that these men have been the victims of a savage and undeserved witch-hunt. A lot of people will be embarrassed by their collaboration with this persecution, but it will be too late to do much good for those men who have spent their lives in prison.

While the misery of the boy-lovers affects very few, the other long-term legacy of the Dade County repeal affects almost everyone. The success of the anti-gay campaign ignited long-simmering passions of the American right, and sparked an extensive movement to compress the boundaries of acceptable sexual behavior.

Right-wing ideology linking non-familial sex with communism and political weakness is nothing new. During the McCarthy period, Alfred Kinsey and his Institute for Sex Research were attacked for weakening the moral fiber of Americans and rendering them more vulnerable to communist influence. After congressional investigations and bad publicity, Kinsey's Rockefeller grant was terminated in 1954.<sup>20</sup>

Around 1969, the extreme right discovered the Sex Information and Education Council of the United States (SIECUS). In books and pamphlets, such as *The Sex Education Racket: Pornography in the Schools and SIECUS: Corrupter of Youth*, the right attacked SIECUS and sex education as communist plots to destroy the family and sap the national will.<sup>21</sup> Another pamphlet, *Pavlov's Children (They May Be Yours)*, claims that the United Nations Educational, Scientific and Cultural Organization (UNESCO) is in cahoots with SIECUS to undermine religious taboos, to promote the acceptance of abnormal sexual relations, to downgrade absolute moral standards, and to "destroy racial cohesion," by exposing white people (especially white women) to the alleged "lower" sexual standards of black people.<sup>22</sup>

New Right and neo-conservative ideology has updated these themes, and leans heavily on linking "immoral" sexual behavior to putative declines in American power. In 1977, Norman Podhoretz wrote an essay blaming homosexuals for the alleged inability of the United States to stand up to the Russians.<sup>23</sup> He thus neatly linked "the anti-gay fight in the domestic arena and the anti-communist battles in foreign policy."<sup>24</sup>

Right-wing opposition to sex education, homosexuality, pornography, abortion, and pre-marital sex moved from the extreme fringes to the political center stage after 1977, when right-wing strategists and fundamentalist religious crusaders discovered that



these issues had mass appeal. Sexual reaction played a significant role in the right's electoral success in 1980.<sup>25</sup> Organizations like the Moral Majority and Citizens for Decency have acquired mass followings, immense financial resources, and unanticipated clout. The Equal Rights Amendment has been defeated, legislation has been passed that mandates new restrictions on abortion, and funding for programs like Planned Parenthood and sex education has been slashed. Laws and regulations making it more difficult for teenage girls to obtain contraceptives or abortions have been promulgated. Sexual backlash was exploited in successful attacks on the Women's Studies Program at California State University at Long Beach.

The most ambitious right-wing legislative initiative has been the Family Protection Act (FPA), introduced in Congress in 1979. The Family Protection Act is a broad assault on feminism, homosexuals, non-traditional families, and teenage sexual privacy.<sup>26</sup> The Family Protection Act has not and probably will not pass, but conservative members of Congress continue to pursue its agenda in a more piecemeal fashion. Perhaps the most glaring sign of the times is the Adolescent Family Life Program. Also known as the Teen Chastity Program, it gets some 15 million federal dollars to encourage teenagers to refrain from sexual intercourse, and to discourage them from using contraceptives if they do have sex, and from having abortions if they get pregnant. In the last few years, there have been countless local confrontations over gay rights, sex education, abortion rights, adult bookstores, and public school curricula. It is unlikely that the anti-sex backlash is over, or that it has even peaked. Unless something changes dramatically, it is likely that the next few years will bring more of the same.

Periods such as the 1880s in England, and the 1950s in the United States, recodify the relations of sexuality. The struggles that were fought leave a residue in the form of laws, social practices, and ideologies which then affect the way in which sexuality is experienced long after the immediate conflicts have faded. All the signs indicate that the present era is another of those watersheds in the politics of sex. The settlements that emerge from the 1980s will have an impact far into the future. It is therefore imperative to understand what is going on and what is at stake in order to make informed decisions about what policies to support and oppose.

It is difficult to make such decisions in the absence of a coherent and intelligent body of radical thought about sex. Unfortunately, progressive political analysis of sexuality is relatively underdeveloped. Much of what is available from the

feminist movement has simply added to the mystification that shrouds the subject. There is an urgent need to develop radical perspectives on sexuality.

Paradoxically, an explosion of exciting scholarship and political writing about sex has been generated in these bleak years. In the 1950s, the early gay rights movement began and prospered while the bars were being raided and anti-gay laws were being passed. In the last six years, new erotic communities, political alliances, and analyses have been developed in the midst of the repression. In this essay, I will propose elements of a descriptive and conceptual framework for thinking about sex and its politics. I hope to contribute to the pressing task of creating an accurate, humane, and genuinely liberatory body of thought about sexuality.

## II Sexual thoughts

"You see, Tim," Phillip said suddenly, "your argument isn't reasonable. Suppose I granted your first point that homosexuality is justifiable in certain instances and under certain controls. Then there is the catch: where does justification end and degeneracy begin? Society must condemn to protect. Permit even the intellectual homosexual a place of respect and the first bar is down. Then comes the next and the next until the sadist, the flagellant, the criminally insane demand their places, and society ceases to exist. So I ask again: where is the line drawn? Where does degeneracy begin if not at the beginning of individual freedom in such matters?"

*(Fragment from a discussion between two gay men trying to decide if they may love each other, from a novel published in 1950.<sup>27</sup>*

A radical theory of sex must identify, describe, explain, and denounce erotic injustice and sexual oppression. Such a theory needs refined conceptual tools which can grasp the subject and hold it in view. It must build rich descriptions of sexuality as it exists in society and history. It requires a convincing critical language that can convey the barbarity of sexual persecution.

Several persistent features of thought about sex inhibit the development of such a theory. These assumptions are so pervasive in Western culture that they are rarely questioned. Thus, they tend to reappear in different political contexts, acquiring new rhetorical expressions but reproducing fundamental axioms.

One such axiom is sexual essentialism – the idea that sex is a natural force that exists prior to social life and shapes institutions. Sexual essentialism is embedded in the folk wisdoms of Western societies, which consider sex to be eternally unchanging, asexual, and transhistorical. Dominated for over a century by medicine,

psychiatry, and psychology, the academic study of sex has reproduced essentialism. These fields classify sex as a property of individuals. It may reside in their hormones or their psyches. It may be construed as physiological or psychological. But within these ethnoscientific categories, sexuality has no history and no significant social determinants.

During the last five years, a sophisticated historical and theoretical scholarship has challenged sexual essentialism both explicitly and implicitly. Gay history, particularly the work of Jeffrey Weeks, has led this assault by showing that homosexuality as we know it is a relatively modern institutional complex.<sup>28</sup> Many historians have come to see the contemporary institutional forms of heterosexuality as an even more recent development.<sup>29</sup> An important contributor to the new scholarship is Judith Walkowitz, whose research has demonstrated the extent to which prostitution was transformed around the turn of the century. She provides meticulous descriptions of how the interplay of social forces such as ideology, fear, political agitation, legal reform, and medical practice can change the structure of sexual behavior and alter its consequences.<sup>30</sup>

Michel Foucault's *The History of Sexuality* has been the most influential and emblematic text of the new scholarship on sex. Foucault criticizes the traditional understanding of sexuality as a natural libido yearning to break free of social constraint. He argues that desires are not preexisting biological entities, but rather, that they are constituted in the course of historically specific social practices. He emphasizes the generative aspects of the social organization of sex rather than its repressive elements by pointing out that new sexualities are constantly produced. And he points to a major discontinuity between kinship-based systems of sexuality and more modern forms.<sup>31</sup>

The new scholarship on sexual behavior has given sex a history and created a constructivist alternative to sexual essentialism. Underlying this body of work is an assumption that sexuality is constituted in society and history, not biologically ordained.<sup>32</sup> This does not mean the biological capacities are not prerequisites for human sexuality. It does mean that human sexuality is not comprehensible in purely biological terms. Human organisms with human brains are necessary for human cultures, but no examination of the body or its parts can explain the nature and variety of human social systems. The belly's hunger gives no clues as to the complexities of cuisine. The body, the brain, the genitalia, and the capacity for language are all necessary for human sexuality. But they do not determine its content, its experiences, or its institutional forms. Moreover, we never encounter the body unmediated by the meanings that cultures

give to it. To paraphrase Lévi-Strauss, my position on the relationship between biology and sexuality is a "Kantianism without a transcendental libido."<sup>33</sup>

It is impossible to think with any clarity about the politics of race or gender as long as these are thought of as biological entities rather than as social constructs. Similarly, sexuality is impervious to political analysis as long as it is primarily conceived as a biological phenomenon or an aspect of individual psychology. Sexuality is as much a human product as are diets, methods of transportation, systems of etiquette, forms of labor, types of entertainment, processes of production, and modes of oppression. Once sex is understood in terms of social analysis and historical understanding, a more realistic politics of sex becomes possible. One may then think of sexual politics in terms of such phenomena as populations, neighborhoods, settlement patterns, migration, urban conflict, epidemiology, and police technology. These are more fruitful categories of thought than the more traditional ones of sin, disease, neurosis, pathology, decadence, pollution, or the decline and fall of empires.

By detailing the relationships between stigmatized erotic populations and the social forces which regulate them, work such as that of Allan Bérubé, John D'Emilio, Jeffrey Weeks, and Judith Walkowitz contains implicit categories of political analysis and criticism. Nevertheless, the constructivist perspective has displayed some political weaknesses. This has been most evident in misconstructions of Foucault's position.

Because of his emphasis on the ways that sexuality is produced, Foucault has been vulnerable to interpretations that deny or minimize the reality of sexual repression in the more political sense. Foucault makes it abundantly clear that he is not denying the existence of sexual repression so much as inscribing it within a large dynamic.<sup>34</sup> Sexuality in Western societies has been structured within an extremely punitive social framework, and has been subjected to very real formal and informal controls. It is necessary to recognize repressive phenomena without resorting to the essentialist assumptions of the language of libido. It is important to hold repressive sexual practices in focus, even while situating them within a different totality and a more refined terminology.<sup>35</sup>

Most radical thought about sex has been embedded within a model of the instincts and their restraints. Concepts of sexual oppression have been lodged within that more biological understanding of sexuality. It is often easier to fall back on the notion of a natural libido subjected to inhumane repression than to reformulate concepts of sexual injustice within a more constructivist framework. But it is essential that we do so. We

need a radical critique of sexual arrangements that has the conceptual elegance of Foucault and the evocative passion of Reich.

The new scholarship on sex has brought a welcome insistence that sexual terms be restricted to their proper historical and social contexts, and a cautionary scepticism towards sweeping generalizations. But it is important to be able to indicate groupings of erotic behavior and general trends within erotic discourse. In addition to sexual essentialism, there are at least five other ideological formations whose grip on sexual thought is so strong that to fail to discuss them is to remain enmeshed within them. These are sex negativity, the fallacy of misplaced scale, the hierarchical valuation of sex acts, the domino theory of sexual peril, and the lack of a concept of benign sexual variation.

Of these five, the most important is sex negativity. Western cultures generally consider sex to be a dangerous, destructive, negative force.<sup>36</sup> Most Christian tradition, following Paul, holds that sex is inherently sinful. It may be redeemed if performed within marriage for procreative purposes and if the pleasurable aspects are not enjoyed too much. In turn, this idea rests on the assumption that the genitalia are an intrinsically inferior part of the body, much lower and less holy than the mind, the "soul," the "heart," or even the upper part of the digestive system (the status of the excretory organs is close to that of the genitalia).<sup>37</sup> Such notions have by now acquired a life of their own and no longer depend solely on religion for their perseverance.

This culture always treats sex with suspicion. It construes and judges almost any sexual practice in terms of its worst possible expression. Sex is presumed guilty until proven innocent. Virtually all erotic behavior is considered bad unless a specific reason to exempt it has been established. The most acceptable excuses are marriage, reproduction, and love. Sometimes scientific curiosity, aesthetic experience, or a long-term intimate relationship may serve. But the exercise of erotic capacity, intelligence, curiosity, or creativity all require pretexts that are unnecessary for other pleasures, such as the enjoyment of food, fiction, or astronomy.

What I call the fallacy of misplaced scale is a corollary of sex negativity. Susan Sontag once commented that since Christianity focused "on sexual behavior as the root of virtue, everything pertaining to sex has been a 'special case' in our culture."<sup>38</sup> Sex law has incorporated the religious attitude that heretical sex is an especially heinous sin that deserves the harshest punishments. Throughout much of European and American history, a single act of consensual anal penetration was grounds for execution. In some states, sodomy still carries twenty-year prison sentences.

Outside the law, sex is also a marked category. Small differences in value or behavior are often experienced as cosmic threats. Although people can be intolerant, silly, or pushy about what constitutes proper diet, differences in menu rarely provoke the kinds of rage, anxiety, and sheer terror that routinely accompany differences in erotic taste. Sexual acts are burdened with an excess of significance.

Modern Western societies appraise sex acts according to a hierarchical system of sexual value. Marital, reproductive heterosexuals are alone at the top of the erotic pyramid. Clamoring below are unmarried monogamous heterosexuals in couples, followed by most other heterosexuals. Solitary sex floats ambiguously. The powerful nineteenth-century stigma on masturbation lingers in less potent, modified forms, such as the idea that masturbation is an inferior substitute for partnered encounters. Stable, long-term lesbian and gay male couples are verging on respectability, but bar dykes and promiscuous gay men are hovering just above the groups at the very bottom of the pyramid. The most despised sexual castes currently include transsexuals, transvestites, fetishists, sadomasochists, sex workers such as prostitutes and porn models, and the lowliest of all, those whose eroticism transgresses generational boundaries.

Individuals whose behavior stands high in this hierarchy are rewarded with certified mental health, respectability, legality, social and physical mobility, institutional support, and material benefits. As sexual behaviors or occupations fall lower on the scale, the individuals who practice them are subjected to a presumption of mental illness, disreputability, criminality, restricted social and physical mobility, loss of institutional support, and economic sanctions.

Extreme and punitive stigma maintains some sexual behaviors as low status and is an effective sanction against those who engage in them. The intensity of this stigma is rooted in Western religious traditions. But most of its contemporary content derives from medical and psychiatric opprobrium.

The old religious taboos were primarily based on kinship forms of social organization. They were meant to deter inappropriate unions and to provide proper kin. Sex laws derived from Biblical pronouncements were aimed at preventing the acquisition of the wrong kinds of affinal partners: consanguineous kin (incest), the same gender (homosexuality), or the wrong species (bestiality). When medicine and psychiatry acquired extensive powers over sexuality, they were less concerned with unsuitable mates than with unfit forms of desire. If taboos against incest best characterized kinship systems of sexual organization, then the shift to an emphasis on taboos against masturbation was more

apposite to the newer systems organized around qualities of erotic experience.<sup>39</sup>

Medicine and psychiatry multiplied the categories of sexual misconduct. The section on psychosexual disorders in the *Diagnostic and Statistical Manual of Mental Disorders (DSM)* of the American Psychiatric Association (APA) is a fairly reliable map of the current moral hierarchy of sexual activities. The APA list is much more elaborate than the traditional condemnations of whoring, sodomy, and adultery. The most recent edition, *DSM-III*, removed homosexuality from the roster of mental disorders after a long political struggle. But fetishism, sadism, masochism, transsexuality, transvestism, exhibitionism, voyeurism, and pedophilia are quite firmly entrenched as psychological malfunctions.<sup>40</sup> Books are still being written about the genesis, etiology, treatment, and cure of these assorted "pathologies."

Psychiatric condemnation of sexual behaviors invokes concepts of mental and emotional inferiority rather than categories of sexual sin. Low status sex practices are vilified as mental diseases or symptoms of defective personality integration. In addition, psychological terms conflate difficulties of psychodynamic functioning with modes of erotic conduct. They equate sexual masochism with self-destructive personality patterns, sexual sadism with emotional aggression, and homoeroticism with immaturity. These terminological muddles have become powerful stereotypes that are indiscriminately applied to individuals on the basis of their sexual orientations.

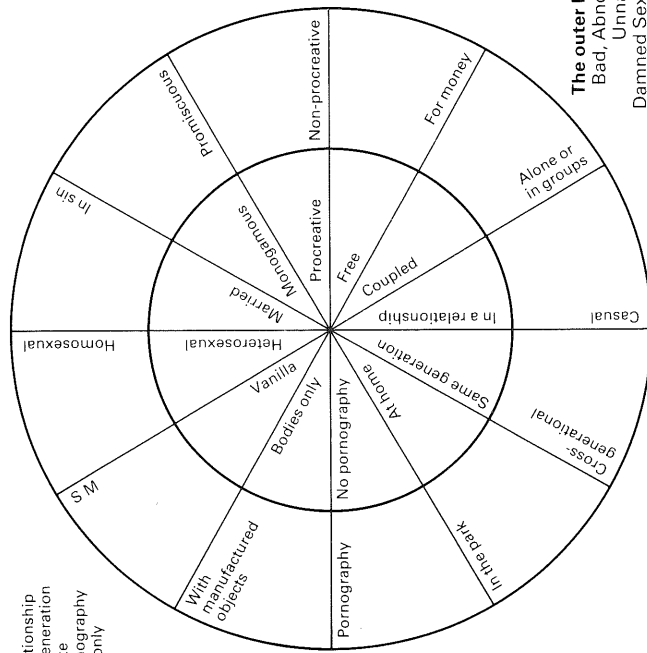
Popular culture is permeated with ideas that erotic variety is dangerous, unhealthy, depraved, and a menace to everything from small children to national security. Popular sexual ideology is a noxious stew made up of ideas of sexual sin, concepts of psychological inferiority, anti-communism, mob hysteria, accusations of witchcraft, and xenophobia. The mass media nourish these attitudes with relentless propaganda. I would call this system of erotic stigma the last socially respectable form of prejudice if the old forms did not show such obstinate vitality, and new ones did not continually become apparent.

All these hierarchies of sexual value - religious, psychiatric, and popular - function in much the same ways as do ideological systems of racism, ethnocentrism, and religious chauvinism. They rationalize the well-being of the sexually privileged and the adversity of the sexual rabble.

Figure 1 diagrams a general version of the sexual value system. According to this system, sexuality that is "good," "normal" and "natural" should ideally be heterosexual, marital, monogamous, reproductive, and non-commercial. It should be coupled, relational, within the same generation, and occur at home. It should

The charmed circle:  
Good, Normal, Natural,  
Blessed Sexuality

Heterosexual  
Married  
Monogamous  
Procreative  
Non-commercial  
In pairs  
In a relationship  
In private  
Same generation  
No pornography  
Bodies only  
Vanilla



The outer limits:  
Bad, Abnormal,  
Unnatural,  
Damned Sexuality

Homosexual  
Unmarried  
Promiscuous  
Non-procreative  
Commercial  
Alone or in groups  
Casual  
Cross-generational  
In public  
Pornography  
With manufactured objects  
Sadomasochistic

Figure 1 The sex hierarchy: the charmed circle vs the outer limits

not involve pornography, fetish objects, sex toys of any sort, or roles other than male and female. Any sex that violates these rules is "bad," "abnormal," or "unnatural." Bad sex may be homosexual, unmarried, promiscuous, non-procreative, or commercial. It may be masturbatory or take place at orgies, may be casual, may cross generational lines, and may take place in "public," or at least in the bushes or the baths. It may involve the use of pornography, fetish objects, sex toys, or unusual roles (see Figure 1).

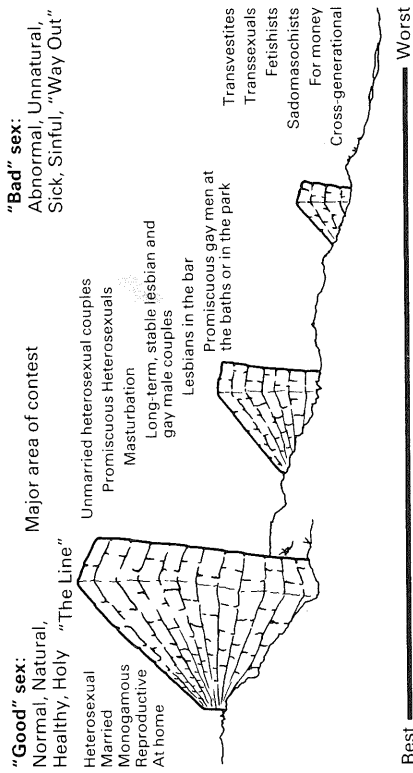


Figure 2 The sex hierarchy: the struggle over where to draw the line

Figure 2 diagrams another aspect of the sexual hierarchy: the need to draw and maintain an imaginary line between good and bad sex. Most of the discourses on sex, be they religious, psychiatric, popular, or political, delimit a very small portion of human sexual capacity as sanctifiable, safe, healthy, mature, legal, or politically correct. The "line" distinguishes these from all other erotic behaviors, which are understood to be the work of the devil, dangerous, psychopathological, infantile, or politically reprehensible. Arguments are then conducted over "where to draw the line," and to determine what other activities, if any, may be permitted to cross over into acceptability.

All these models assume a domino theory of sexual peril. The line appears to stand between sexual order and chaos. It expresses the fear that if anything is permitted to cross this erotic DMZ, the barrier against scary sex will crumble and something unspeakable will skitter across.

Most systems of sexual judgment — religious, psychological, feminist, or socialist — attempt to determine on which side of the line a particular act falls. Only sex acts on the good side of the line are accorded moral complexity. For instance, heterosexual encounters may be sublime or disgusting, free or forced, healing or destructive, romantic or mercenary. As long as it does not violate other rules, heterosexuality is acknowledged to exhibit the full range of human experience. In contrast, all sex acts on the bad side of the line are considered utterly repulsive and devoid of all emotional nuance. The further from the line a sex act is, the more it is depicted as a uniformly bad experience.

As a result of the sex conflicts of the last decade, some behavior near the border is inching across it. Unmarried couples living together, masturbation, and some forms of homosexuality

are moving in the direction of respectability (see Figure 2). Most homosexuality is still on the bad side of the line. But if it is coupled and monogamous, the society is beginning to recognize that it includes the full range of human interaction. Promiscuous homosexuality, sadomasochism, fetishism, transsexuality, and cross-generational encounters are still viewed as unmodulated horrors incapable of involving affection, love, free choice, kindness, or transcendence.

This kind of sexual morality has more in common with ideologies of racism than with true ethics. It grants virtue to the dominant groups, and relegates vice to the underprivileged. A democratic morality should judge sexual acts by the way partners treat one another, the level of mutual consideration, the presence or absence of coercion, and the quantity and quality of the pleasures they provide. Whether sex acts are gay or straight, coupled or in groups, naked or in underwear, commercial or free, with or without video, should not be ethical concerns.

It is difficult to develop a pluralistic sexual ethics without a concept of benign sexual variation. Variation is a fundamental property of all life, from the simplest biological organisms to the most complex human social formations. Yet sexuality is supposed to conform to a single standard. One of the most tenacious ideas about sex is that there is one best way to do it, and that everyone should do it that way.

Most people find it difficult to grasp that whatever they like to do sexually will be thoroughly repulsive to someone else, and that whatever repels them sexually will be the most treasured delight of someone, somewhere. One need not like or perform a particular sex act in order to recognize that someone else will, and that this difference does not indicate a lack of good taste, mental health, or intelligence in either party. Most people mistake their sexual preferences for a universal system that will or should work for everyone.

This notion of a single ideal sexuality characterizes most systems of thought about sex. For religion, the ideal is procreative marriage. For psychology, it is mature heterosexuality. Although its content varies, the format of a single sexual standard is continually reconstituted within other rhetorical frameworks, including feminism and socialism. It is just as objectionable to insist that everyone should be lesbian, non-monogamous, or kinky, as to believe that everyone should be heterosexual, married, or vanilla — though the latter set of opinions are backed by considerably more coercive power than the former.

Progressives who would be ashamed to display cultural chauvinism in other areas routinely exhibit it towards sexual

differences. We have learned to cherish different cultures as unique expressions of human inventiveness rather than as the inferior or disgusting habits of savages. We need a similarly anthropological understanding of different sexual cultures.

Empirical sex research is the one field that does incorporate a positive concept of sexual variation. Alfred Kinsey approached the study of sex with the same uninhibited curiosity he had previously applied to examining a species of wasp. His scientific detachment gave his work a refreshing neutrality that enraged moralists and caused immense controversy.<sup>41</sup> Among Kinsey's successors, John Gagnon and William Simon have pioneered the application of sociological understandings to erotic variety.<sup>42</sup> Even some of the older sexology is useful. Although his work is imbued with unappetizing eugenic beliefs, Havelock Ellis was an acute and sympathetic observer. His monumental *Studies in the Psychology of Sex* is resplendent with detail.<sup>43</sup>

Much political writing on sexuality reveals complete ignorance of both classical sexology and modern sex research. Perhaps this is because so few colleges and universities bother to teach human sexuality, and because so much stigma adheres even to scholarly investigation of sex. Neither sexology nor sex research has been immune to the prevailing sexual value system. Both contain assumptions and information which should not be accepted uncritically. But sexology and sex research provide abundant detail, a welcome posture of calm, and a well developed ability to treat sexual variety as something that exists rather than as something to be exterminated. These fields can provide an empirical grounding for a radical theory of sexuality more useful than the combination of psychoanalysis and feminist first principles to which so many texts resort.

### III Sexual transformation

As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. . . . The sodomite had been a temporary aberration; the homosexual was now a species.

Michel Foucault<sup>44</sup>

In spite of many continuities with ancestral forms, modern sexual arrangements have a distinctive character which sets them apart from preexisting systems. In Western Europe and the United States, industrialization and urbanization reshaped the traditional rural and peasant populations into a new urban industrial and

service workforce. It generated new forms of state apparatus, reorganized family relations, altered gender roles, made possible new forms of identity, produced new varieties of social inequality, and created new formats for political and ideological conflict. It also gave rise to a new sexual system characterized by distinct types of sexual persons, populations, stratification, and political conflict.

The writings of nineteenth-century sexology suggest the appearance of a kind of erotic speculation. However outlandish their explanations, the early sexologists were witnessing the emergence of new kinds of erotic individuals and their aggregation into rudimentary communities. The modern sexual system contains sets of these sexual populations, stratified by the operation of an ideological and social hierarchy. Differences in social value create friction among these groups, who engage in political contests to alter or maintain their place in the ranking. Contemporary sexual politics should be reconceptualized in terms of the emergence and on-going development of this system, its social relations, the ideologies which interpret it, and its characteristic modes of conflict.

Homosexuality is the best example of this process of erotic speculation. Homosexual behavior is always present among humans. But in different societies and epochs it may be rewarded or punished, required or forbidden, a temporary experience or a life-long vocation. In some New Guinea societies, for example, homosexual activities are obligatory for all males. Homosexual acts are considered utterly masculine, roles are based on age, and partners are determined by kinship status.<sup>45</sup> Although these men engage in extensive homosexual and pedophile behavior, they are neither homosexuals nor pederasts.

Nor was the sixteenth-century sodomite a homosexual. In 1631, Mervyn Touchet, Earl of Castlehaven, was tried and executed for sodomy. It is clear from the proceedings that the earl was not understood by himself or anyone else to be a particular kind of sexual individual. "While from the twentieth-century viewpoint Lord Castlehaven obviously suffered from psychosexual problems requiring the services of an analyst, from the seventeenth century viewpoint he had deliberately broken the Law of God and the Laws of England, and required the simpler services of an executioner."<sup>46</sup> The earl did not slip into his tightest doublet and waltz down to the nearest gay tavern to mingle with his fellow sodomists. He stayed in his manor house and bugged his servants. Gay self-awareness, gay pubs, the sense of group commonality, and even the term homosexual were not part of the earl's universe.

The New Guinea bachelor and the sodomite nobleman are only

tangentially related to a modern gay man, who may migrate from rural Colorado to San Francisco in order to live in a gay neighborhood, work in a gay business, and participate in an elaborate experience that includes a self-conscious identity, group solidarity, a literature, a press and a high level of political activity. In modern, Western, industrial societies, homosexuality has acquired much of the institutional structure of an ethnic group.<sup>47</sup>

The relocation of homoeroticism into these quasi-ethnic, nucleated, sexually constituted communities is to some extent a consequence of the transfers of population brought about by industrialization. As laborers migrated to work in cities, there were increased opportunities for voluntary communities to form. Homosexually inclined women and men, who would have been vulnerable and isolated in most pre-industrial villages, began to congregate in small corners of the big cities. Most large nineteenth-century cities in Western Europe and North America had areas where men could cruise for other men. Lesbian communities seem to have coalesced more slowly and on a smaller scale. Nevertheless, by the 1890s, there were several cafes in Paris near the Place Pigalle which catered to a lesbian clientele, and it is likely that there were similar places in the other major capitals of Western Europe.

Areas like these acquired bad reputations, which alerted other interested individuals of their existence and location. In the United States, lesbian and gay male territories were well established in New York, Chicago, San Francisco, and Los Angeles in the 1950s. Sexually motivated migration to places such as Greenwich Village had become a sizable sociological phenomenon. By the late 1970s, sexual migration was occurring on a scale so significant that it began to have a recognizable impact on urban politics in the United States, with San Francisco being the most notable and notorious example.<sup>48</sup>

Prostitution has undergone a similar metamorphosis. Prostitution began to change from a temporary job to a more permanent occupation as a result of nineteenth-century agitation, legal reform, and police persecution. Prostitutes, who had been part of the general working-class population, became increasingly isolated as members of an outcast group.<sup>49</sup> Prostitutes and other sex workers differ from homosexuals and other sexual minorities. Sex work is an occupation, while sexual deviation is an erotic preference. Nevertheless, they share some common features of social organization. Like homosexuals, prostitutes are a criminal sexual population stigmatized on the basis of sexual activity. Prostitutes and male homosexuals are the primary prey of vice police everywhere.<sup>50</sup> Like gay men, prostitutes occupy

well demarcated urban territories and battle with police to defend and maintain those territories. The legal persecution of both populations is justified by an elaborate ideology which classifies them as dangerous and inferior undesirables who are not entitled to be left in peace.

Besides organizing homosexuals and prostitutes into localized populations, the "modernization of sex" has generated a system of continual sexual ethnogenesis. Other populations of erotic dissidents - commonly known as the "perversions" or the "paraphilias" - also began to coalesce. Sexualities keep marching out of the *Diagnostic and Statistical Manual* and on to the pages of social history. At present, several other groups are trying to emulate the successes of homosexuals. Bisexuals, sadomasochists, individuals who prefer cross-generational encounters, transsexuals, and transvestites are all in various states of community formation and identity acquisition. The perversions are not proliferating as much as they are attempting to acquire social space, small businesses, political resources, and a measure of relief from the penalties for sexual heresy.

#### IV Sexual stratification

An entire sub-race was born, different - despite certain kinship ties - from the libertines of the past. From the end of the eighteenth century to our own, they circulated through the pores of society; they were always hounded, but not always by laws; were often locked up, but not always in prisons; were sick perhaps, but scandalous, dangerous victims, prey to a strange evil that also bore the name of vice and sometimes crime. They were children wise beyond their years, precocious little girls, ambiguous schoolboys, dubious servants and educators, cruel or maniacal husbands, solitary collectors, ramblers with bizarre impulses; they haunted the houses of correction, the penal colonies, the tribunals, and the asylums; they carried their infamy to the doctors and their sickness to the judges. This was the numberless family of perverts who were on friendly terms with delinquents and akin to madmen.

Michel Foucault<sup>51</sup>

The industrial transformation of Western Europe and North America brought about new forms of social stratification. The resultant inequalities of class are well known and have been explored in detail by a century of scholarship. The construction of modern systems of racism and ethnic injustice has been well documented and critically assessed. Feminist thought has analyzed the prevailing organization of gender oppression. But although specific erotic groups, such as militant homosexuals and sex workers, have agitated against their own mistreatment, there has been no equivalent attempt to locate particular varieties of sexual persecution within a more general system of sexual

stratification. Nevertheless, such a system exists, and in its contemporary form it is a consequence of Western industrialization.

Sex law is the most adamant instrument of sexual stratification and erotic persecution. The state routinely intervenes in sexual behavior at a level that would not be tolerated in other areas of social life. Most people are unaware of the extent of sex law, the quantity and qualities of illegal sexual behavior, and the punitive character of legal sanctions. Although federal agencies may be involved in obscenity and prostitution cases, most sex laws are enacted at the state and municipal level, and enforcement is largely in the hands of local police. Thus, there is a tremendous amount of variation in the laws applicable to any given locale. Moreover, enforcement of sex laws varies dramatically with the local political climate. In spite of this legal thicket, one can make some tentative and qualified generalizations. My discussion of sex law does not apply to laws against sexual coercion, sexual assault, or rape. It does pertain to the myriad prohibitions on consensual sex and the "status" offenses such as statutory rape.

Sex law is harsh. The penalties for violating sex statutes are universally out of proportion to any social or individual harm. A single act of consensual but illicit sex, such as placing one's lips upon the genitalia of an enthusiastic partner, is punished in most states with more severity than rape, battery, or murder. Each such genital kiss, each lewd caress, is a separate crime. It is therefore painfully easy to commit multiple felonies in the course of a single evening of illegal passion. Once someone is convicted of a sex violation, a second performance of the same act is grounds for prosecution as a repeat offender, in which case penalties will be even more severe. In some states, individuals have become repeat felons for having engaged in homosexual love-making on two separate occasions. Once an erotic activity has been proscribed by sex law, the full power of the state enforces conformity to the values embodied in those laws. Sex laws are notoriously easy to pass, as legislators are loath to be soft on vice. Once on the books, they are extremely difficult to dislodge.

Sex law is not a perfect reflection of the prevailing moral evaluations of sexual conduct. Sexual variation *per se* is more specifically policed by the mental-health professions, popular ideology, and extra-legal social practice. Some of the most detested erotic behaviors, such as fetishism and sadomasochism, are not as closely or completely regulated by the criminal justice system as somewhat less stigmatized practices, such as homosexuality. Areas of sexual behavior come under the purview of

the law when they become objects of social concern and political uproar. Each sex scare or morality campaign deposits new regulations as a kind of fossil record of its passage. The legal regiment is thickest — and sex law has its greatest potency — in areas involving obscenity, money, minors, and homosexuality.

Obscenity laws enforce a powerful taboo against direct representation of erotic activities. Current emphasis on the ways in which sexuality has become a focus of social attention should not be misused to undermine a critique of this prohibition. It is one thing to create sexual discourse in the form of psychoanalysis, or in the course of a morality crusade. It is quite another to graphically depict sex acts or genitalia. The first is socially permissible in a way the second is not. Sexual speech is forced into reticence, euphemism, and indirection. Freedom of speech about sex is a glaring exception to the protections of the First Amendment, which is not even considered applicable to purely sexual statements.

The anti-obscenity laws also form part of a group of statutes that make almost all sexual commerce illegal. Sex law incorporates a very strong prohibition against mixing sex and money, except via marriage. In addition to the obscenity statutes, other laws impinging on sexual commerce include anti-prostitution laws, alcoholic beverage regulations, and ordinances governing the location and operation of "adult" businesses. The sex industry and the gay economy have both managed to circumvent some of this legislation, but that process has not been easy or simple. The underlying criminality of sex-oriented business keeps it marginal, underdeveloped, and distorted. Sex businesses can only operate in legal loopholes. This tends to keep investment down and to divert commercial activity towards the goal of staying out of jail rather than the delivery of goods and services. It also renders sex workers more vulnerable to exploitation and bad working conditions. If sex commerce were legal, sex workers would be more able to organize and agitate for higher pay, better conditions, greater control, and less stigma.

Whatever one thinks of the limitations of capitalist commerce, such an extreme exclusion from the market process would hardly be socially acceptable in other areas of activity. Imagine, for example, that the exchange of money for medical care, pharmacological advice, or psychological counseling were illegal. Medical practice would take place in a much less satisfactory fashion if doctors, nurses, druggists, and therapists could be hauled off to jail at the whim of the local "health squad." But that is essentially the situation of prostitutes, sex workers, and sex entrepreneurs.

Marx himself considered the capitalist market a revolutionary,



if limited, force. He argued that capitalism was progressive in its dissolution of pre-capitalist superstition, prejudice, and the bonds of traditional modes of life. "Hence the great civilizing influence of capital, its production of a state of society compared with which all earlier stages appear to be merely local progress and idolatry of nature."<sup>52</sup> Keeping sex from realizing the positive effects of the market economy hardly makes it socialist.

The law is especially ferocious in maintaining the boundary between childhood "innocence" and "adult" sexuality. Rather than recognizing the sexuality of the young, and attempting to provide for it in a caring and responsible manner, our culture denies and punishes erotic interest and activity by anyone under the local age of consent. The amount of law devoted to protecting young people from premature exposure to sexuality is breathtaking.

The primary mechanism for insuring the separation of sexual generations is age of consent laws. These laws make no distinction between the most brutal rape and the most gentle romance. A 20-year-old convicted of sexual contact with a 17-year-old will face a severe sentence in virtually every state, regardless of the nature of the relationship.<sup>53</sup> Nor are minors permitted access to "adult" sexuality in other forms. They are forbidden to see books, movies, or television in which sexuality is "too" graphically portrayed. It is legal for young people to see hideous depictions of violence, but not to see explicit pictures of genitalia. Sexually active young people are frequently incarcerated in juvenile homes, or otherwise punished for their "pre-cocity."

Adults who deviate too much from conventional standards of sexual conduct are often denied contact with the young, even their own. Custody laws permit the state to steal the children of anyone whose erotic activities appear questionable to a judge presiding over family court matters. Countless lesbians, gay men, prostitutes, swingers, sex workers, and "promiscuous" women have been declared unfit parents under such provisions. Members of the teaching professions are closely monitored for signs of sexual misconduct. In most states, certification laws require that teachers arrested for sex offenses lose their jobs and credentials. In some cases, a teacher may be fired merely because an unconventional lifestyle becomes known to school officials. Moral turpitude is one of the few legal grounds for revoking academic tenure.<sup>54</sup> The more influence one has over the next generation, the less latitude one is permitted in behavior and opinion. The coercive power of the law ensures the transmission of conservative sexual values with these kinds of controls over parenting and teaching.

The only adult sexual behavior that is legal in every state is the placement of the penis in the vagina in wedlock. Consenting adults statutes ameliorate this situation in fewer than half the states. Most states impose severe criminal penalties on consensual sodomy, homosexual contact short of sodomy, adultery, seduction, and adult incest. Sodomy laws vary a great deal. In some states, they apply equally to homosexual and heterosexual partners and regardless of marital status. Some state courts have ruled that married couples have the right to commit sodomy in private. Only homosexual sodomy is illegal in some states. Some sodomy statutes prohibit both anal sex and oral-genital contact. In other states, sodomy applies only to anal penetration, and oral sex is covered under separate statutes.<sup>55</sup>

Laws like these criminalize sexual behavior that is freely chosen and avidly sought. The ideology embodied in them reflects the value hierarchies discussed above. That is, some sex acts are considered to be so intrinsically vile that no one should be allowed under any circumstance to perform them. The fact that individuals consent to or even prefer them is taken to be additional evidence of depravity. This system of sex law is similar to legalized racism. State prohibition of same sex contact, anal penetration, and oral sex make homosexuals a criminal group denied the privileges of full citizenship. With such laws, prosecution is persecution. Even when they are not strictly enforced, as is usually the case, the members of criminalized sexual communities remain vulnerable to the possibility of arbitrary arrest, or to periods in which they become the objects of social panic. When those occur, the laws are in place and police action is swift. Even sporadic enforcement serves to remind individuals that they are members of a subject population. The occasional arrest for sodomy, lewd behavior, solicitation, or oral sex keeps everyone else afraid, nervous, and circumspect.

The state also upholds the sexual hierarchy through bureaucratic regulation. Immigration policy still prohibits the admission of homosexuals (and other sexual "deviates") into the United States. Military regulations bar homosexuals from serving in the armed forces. The fact that gay people cannot legally marry means that they cannot enjoy the same legal rights as heterosexuals in many matters, including inheritance, taxation, protection from testimony in court, and the acquisition of citizenship for foreign partners. These are but a few of the ways that the state reflects and maintains the social relations of sexuality. The law buttresses structures of power, codes of behavior, and forms of prejudice. At their worst, sex law and sex regulation are simply sexual apartheid.

Although the legal apparatus of sex is staggering, most

everyday social control is extra-legal. Less formal, but very effective social sanctions are imposed on members of "inferior" sexual populations.

In her marvelous ethnographic study of gay life in the 1960s, Esther Newton observed that the homosexual population was divided into what she called the "overts" and the "coverts." "The overts live their *entire* working lives within the context of the [gay] community; the coverts live their entire *nonworking* lives within it."<sup>56</sup> At the time of Newton's study, the gay community provided far fewer jobs than it does now, and the non-gay work world was almost completely intolerant of homosexuality. There were some fortunate individuals who could be openly gay and earn decent salaries. But the vast majority of homosexuals had to choose between honest poverty and the strain of maintaining a false identity.

Though this situation has changed a great deal, discrimination against gay people is still rampant. For the bulk of the gay population, being out on the job is still impossible. Generally, the more important and higher paid the job, the less the society will tolerate overt erotic deviance. If it is difficult for gay people to find employment where they do not have to pretend, it is doubly and triply so for more exotically sexed individuals. Sadomasochists leave their fetish clothes at home, and know that they must be especially careful to conceal their real identities. An exposed pedophile would probably be stoned out of the office. Having to maintain such absolute secrecy is a considerable burden. Even those who are content to be secretive may be exposed by some accidental event. Individuals who are erotically unconventional risk being unemployable or unable to pursue their chosen careers.

Public officials and anyone who occupies a position of social consequence are especially vulnerable. A sex scandal is the surest method for hounding someone out of office or destroying a political career. The fact that important people are expected to conform to the strictest standards of erotic conduct discourages sex perverts of all kinds from seeking such positions. Instead, erotic dissidents are channeled into positions that have less impact on the mainstream of social activity and opinion.

The expansion of the gay economy in the last decade has provided some employment alternatives and some relief from job discrimination against homosexuals. But most of the jobs provided by the gay economy are low-status and low-paying. Bartenders, bathhouse attendants, and disc jockeys are not bank officers or corporate executives. Many of the sexual migrants who flock to places like San Francisco are downwardly mobile. They face intense competition for choice positions. The influx of

sexual migrants provides a pool of cheap and exploitable labor for many of the city's businesses, both gay and straight.

Families play a crucial role in enforcing sexual conformity. Much social pressure is brought to bear to deny erotic dissidents the comforts and resources that families provide. Popular ideology holds that families are not supposed to produce or harbor erotic non-conformity. Many families respond by trying to reform, punish, or exile sexually offending members. Many sexual migrants have been thrown out by their families, and many others are fleeing from the threat of institutionalization. Any random collection of homosexuals, sex workers, or miscellaneous perverts can provide heart-stopping stories of rejection and mistreatment by horrified families. Christmas is the great family holiday in the United States and consequently it is a time of considerable tension in the gay community. Half the inhabitants go off to their families of origin; many of those who remain in the gay ghettos cannot do so, and relive their anger and grief.

In addition to economic penalties and strain on family relations, the stigma of erotic dissidence creates friction at all other levels of everyday life. The general public helps to penalize erotic non-conformity when, according to the values they have been taught, landlords refuse housing, neighbors call in the police, and hoodlums commit sanctioned battery. The ideologies of erotic inferiority and sexual danger decrease the power of sex perverts and sex workers in social encounters of all kinds. They have less protection from unscrupulous or criminal behavior, less access to police protection, and less recourse to the courts. Dealings with institutions and bureaucracies — hospitals, police, coroners, banks, public officials — are more difficult.

Sex is a vector of oppression. The system of sexual oppression cuts across other modes of social inequality, sorting out individuals and groups according to its own intrinsic dynamics. It is not reducible to, or understandable in terms of, class, race, ethnicity, or gender. Wealth, white skin, male gender, and ethnic privileges can mitigate the effects of sexual stratification. A rich, white male pervert will generally be less affected than a poor, black, female pervert. But even the most privileged are not immune to sexual oppression. Some of the consequences of the system of sexual hierarchy are mere nuisances. Others are quite grave. In its most serious manifestations, the sexual system is a Kafkaesque nightmare in which unlucky victims become herds of human cattle whose identification, surveillance, apprehension, treatment, incarceration, and punishment produce jobs and self-satisfaction for thousands of vice police, prison officials, psychiatrists, and social workers.<sup>57</sup>

## V Sexual conflicts

The moral panic crystallizes widespread fears and anxieties, and often deals with them not by seeking the real causes of the problems and conditions which they demonstrate but by displacing them on to 'Folk Devils' in an identified social group (often the 'immoral' or 'degenerate'). Sexuality has had a peculiar centrality in such panics, and sexual 'deviants' have been omnipresent scapegoats.

Jeffrey Weeks<sup>58</sup>

The sexual system is not a monolithic, omnipotent structure. There are continuous battles over the definitions, evaluations, arrangements, privileges, and costs of sexual behavior. Political struggle over sex assumes characteristic forms.

Sexual ideology plays a crucial role in sexual experience. Consequently, definitions and evaluations of sexual conduct are objects of bitter contest. The confrontations between early gay liberation and the psychiatric establishment are the best example of this kind of fight, but there are constant skirmishes. Recurrent battles take place between the primary producers of sexual ideology – the churches, the family, the shrinks, and the media – and the groups whose experience they name, distort, and endanger.

The legal regulation of sexual conduct is another battleground. Lysander Spooner dissected the system of state sanctioned moral coercion over a century ago in a text inspired primarily by the temperance campaigns. In *Vices Are Not Crimes: A Vindication of Moral Liberty*, Spooner argued that government should protect its citizens against crime, but that it is foolish, unjust, and tyrannical to legislate against vice. He discusses rationalizations still heard today in defense of legalized moralism – that "vices" (Spooner is referring to drink, but homosexuality, prostitution, or recreational drug use may be substituted) lead to crimes, and should therefore be prevented; that those who practice "vice" are *non compos mentis* and should therefore be protected from their self-destruction by state-accomplished ruin; and that children must be protected from supposedly harmful knowledge.<sup>59</sup> The discourse on victimless crimes has not changed much. Legal struggle over sex law will continue until basic freedoms of sexual action and expression are guaranteed. This requires the repeal of all sex laws except those few that deal with actual, not statutory, coercion; and it entails the abolition of vice squads, whose job it is to enforce legislated morality.

In addition to the definitional and legal wars, there are less obvious forms of sexual political conflict which I call the territorial and border wars. The processes by which erotic minorities form communities and the forces that seek to inhibit them lead to

struggles over the nature and boundaries of sexual zones.

Dissident sexuality is rarer and more closely monitored in small towns and rural areas. Consequently, metropolitan life continually beckons to young perverts. Sexual migration creates concentrated pools of potential partners, friends, and associates. It enables individuals to create adult, kin-like networks in which to live. But there are many barriers which sexual migrants have to overcome.

According to the mainstream media and popular prejudice, the marginal sexual worlds are bleak and dangerous. They are portrayed as impoverished, ugly, and inhabited by psychopaths and criminals. New migrants must be sufficiently motivated to resist the impact of such discouraging images. Attempts to counter negative propaganda with more realistic information generally meet with censorship, and there are continuous ideological struggles over which representations of sexual communities make it into the popular media.

Information on how to find, occupy, and live in the marginal sexual worlds is also suppressed. Navigational guides are scarce and inaccurate. In the past, fragments of rumor, distorted gossip, and bad publicity were the most available clues to the location of underground erotic communities. During the late 1960s and early 1970s, better information became available. Now groups like the Moral Majority want to rebuild the ideological walls around the sexual undergrounds and make transit in and out of them as difficult as possible.

Migration is expensive. Transportation costs, moving expenses, and the necessity of finding new jobs and housing are economic difficulties that sexual migrants must overcome. These are especially imposing barriers to the young, who are often the most desperate to move. There are, however, routes into the erotic communities which mark trails through the propaganda thicket and provide some economic shelter along the way. Higher education can be a route for young people from affluent backgrounds. In spite of serious limitations, the information on sexual behavior at most colleges and universities is better than elsewhere, and most colleges and universities shelter small erotic networks of all sorts.

For poorer kids, the military is often the easiest way to get the hell out of wherever they are. Military prohibitions against homosexuality make this a perilous route. Although young queers continually attempt to use the armed forces to get out of intolerable hometown situations and closer to functional gay communities, they face the hazards of exposure, court martial, and dishonorable discharge.

Once in the cities, erotic populations tend to nucleate and to

occupy some regular, visible territory. Churches and other anti-vice forces constantly put pressure on local authorities to contain such areas, reduce their visibility, or to drive their inhabitants out of town. There are periodic crackdowns in which local vice squads are unleashed on the populations they control. Gay men, prostitutes, and sometimes transvestites are sufficiently territorial and numerous to engage in intense battles with the cops over particular streets, parks, and alleys. Such border wars are usually inconclusive, but they result in many casualties.

For most of this century, the sexual underworlds have been marginal and impoverished, their residents subjected to stress and exploitation. The spectacular success of gay entrepreneurs in creating a variegated gay economy has altered the quality of life within the gay ghetto. The level of material comfort and social elaboration achieved by the gay community in the last fifteen years is unprecedented. But it is important to recall what happened to similar miracles. The growth of the black population in New York in the early part of the twentieth century led to the Harlem Renaissance, but that period of creativity was doused by the Depression. The relative prosperity and cultural florescence of the gay ghetto may be equally fragile. Like blacks who fled the South for the metropolitan North, homosexuals may have merely traded rural problems for urban ones.

Gay pioneers occupied neighborhoods that were centrally located but run down. Consequently, they border poor neighborhoods. Gays, especially low-income gays, end up competing with other low-income groups for the limited supply of cheap and moderate housing. In San Francisco, competition for low-cost housing has exacerbated both racism and homophobia, and is one source of the epidemic of street violence against homosexuals. Instead of being isolated and invisible in rural settings, city gays are now numerous and obvious targets for urban frustrations.

In San Francisco, unbridled construction of downtown skyscrapers and high-cost condominiums is causing affordable housing to evaporate. Megabuck construction is creating pressure on all city residents. Poor gay renters are visible in low-income neighborhoods; multimillionaire contractors are not. The specter of the "homosexual invasion" is a convenient scapegoat which deflects attention from the banks, the planning commission, the political establishment, and the big developers. In San Francisco, the well-being of the gay community has become embroiled in the high-stakes politics of urban real estate.

Downtown expansion affects all the territorial erotic underworlds. In both San Francisco and New York, high investment construction and urban renewal have intruded on the main areas

of prostitution, pornography, and leather bars. Developers are salivating over Times Square, the Tenderloin, what is left of North Beach, and South of Market. Anti-sex ideology, obscenity law, prostitution regulations, and the alcoholic beverage codes are all being used to dislodge seedy adult businesses, sex workers, and leathermen. Within ten years, most of these areas will have been bulldozed and made safe for convention centers, international hotels, corporate headquarters, and housing for the rich.

The most important and consequential kind of sex conflict is what Jeffrey Weeks has termed the "moral panic." Moral panics are the "political moment" of sex, in which diffuse attitudes are channeled into political action and from there into social change.<sup>60</sup> The white slavery hysteria of the 1880s, the anti-homosexual campaigns of the 1950s, and the child pornography panic of the late 1970s were typical moral panics.

Because sexuality in Western societies is so mystified, the wars over it are often fought at oblique angles, aimed at phony targets, conducted with misplaced passions, and are highly, intensely symbolic. Sexual activities often function as signifiers for personal and social apprehensions to which they have no intrinsic connection. During a moral panic, such fears attach to some unfortunate sexual activity or population. The media become ablaze with indignation, the public behaves like a rabid mob, the police are activated, and the state enacts new laws and regulations. When the furor has passed, some innocent erotic group has been decimated, and the state has extended its power into new areas of erotic behavior.

The system of sexual stratification provides easy victims who lack the power to defend themselves, and a preexisting apparatus for controlling their movements and curtailing their freedoms. The stigma against sexual dissidents renders them morally defenseless. Every moral panic has consequences on two levels. The target population suffers most, but everyone is affected by the social and legal changes.

Moral panics rarely alleviate any real problem, because they are aimed at chimeras and signifiers. They draw on the pre-existing discursive structure which invents victims in order to justify treating "vices" as crimes. The criminalization of innocuous behaviors such as homosexuality, prostitution, obscenity, or recreational drug use, is rationalized by portraying them as menaces to health and safety, women and children, national security, the family, or civilization itself. Even when activity is acknowledged to be harmless, it may be banned because it is alleged to "lead" to something ostensibly worse (another manifestation of the domino theory).<sup>61</sup> Great and mighty edifices have been built on the basis of such phantasms. Generally, the

outbreak of a moral panic is preceded by an intensification of such scapegoating.

It is always risky to prophesy. But it does not take much prescience to detect potential moral panics in two current developments: the attacks on sadomasochists by a segment of the feminist movement, and the right's increasing use of AIDS to incite virulent homophobia.

Feminist anti-pornography ideology has always contained an implied, and sometimes overt, indictment of sadomasochism. The pictures of sucking and fucking that comprise the bulk of pornography may be unnerving to those who are not familiar with them. But it is hard to make a convincing case that such images are violent. All of the early anti-porn slide shows used a highly selective sample of S/M imagery to sell a very flimsy analysis. Taken out of context, such images are often shocking. This shock value was mercilessly exploited to scare audiences into accepting the anti-porn perspective.

A great deal of anti-porn propaganda implies that sadomasochism is the underlying and essential "truth" towards which all pornography tends. Porn is thought to lead to S/M porn which in turn is alleged to lead to rape. This is a just-so story that revitalizes the notion that sex perverts commit sex crimes, not normal people. There is no evidence that the readers of S/M erotica or practicing sadomasochists commit a disproportionate number of sex crimes. Anti-porn literature scapegoats an unpopular sexual minority and its reading material for social problems they do not create.

The use of S/M imagery in anti-porn discourse is inflammatory. It implies that the way to make the world safe for women is to get rid of sadomasochism. The use of S/M images in the movie *Not a Love Story* was on a moral par with the use of depictions of black men raping white women, or of drooling old Jews pawing young Aryan girls, to incite racist or anti-Semitic frenzy.

Feminist rhetoric has a distressing tendency to reappear in reactionary contexts. For example, in 1980 and 1981, Pope John Paul II delivered a series of pronouncements reaffirming his commitment to the most conservative and Pauline understandings of human sexuality. In condemning divorce, abortion, trial marriage, pornography, prostitution, birth control, unbridled hedonism, and lust, the pope employed a great deal of feminist rhetoric about sexual objectification. Sounding like lesbian feminist polemicist Julia Penelope, His Holiness explained that "considering anyone in a lustful way makes that person a sexual object rather than a human being worthy of dignity."<sup>62</sup>

The right wing opposes pornography and has already adopted elements of feminist anti-porn rhetoric. The anti-S/M discourse

developed in the women's movement could easily become a vehicle for a moral witch hunt. It provides a rationale for the defenseless target population. It provides a rationale for the recriminalization of sexual materials which have escaped the reach of current obscenity laws. It would be especially easy to pass laws against S/M erotica resembling the child pornography laws. The ostensible purpose of such laws would be to reduce violence by banning so-called violent porn. A focused campaign against the leather menace might also result in the passage of laws to criminalize S/M behavior that is not currently illegal. The ultimate result of such a moral panic would be the legalized violation of a community of harmless perverts. It is dubious that such a sexual witch-hunt would make any appreciable contribution towards reducing violence against women.

An AIDS panic is even more probable. When fears of incurable disease mingle with sexual terror, the resulting brew is extremely volatile. A century ago, attempts to control syphilis led to the passage of the Contagious Diseases Acts in England. The Acts were based on erroneous medical theories and did nothing to halt the spread of the disease. But they did make life miserable for the hundreds of women who were incarcerated, subjected to forcible vaginal examination, and stigmatized for life as prostitutes.<sup>63</sup>

Whatever happens, AIDS will have far-reaching consequences on sex in general, and on homosexuality in particular. The disease will have a significant impact on the choices gay people make. Fewer will migrate to the gay meccas out of fear of the disease. Those who already reside in the ghettos will avoid situations they fear will expose them. The gay economy, and the political apparatus it supports, may prove to be evanescent. Fear of AIDS has already affected sexual ideology. Just when homosexuals have had some success in throwing off the taint of mental disease, gay people find themselves metaphorically welded to an image of lethal physical deterioration. The syndrome, its peculiar qualities, and its transmissibility are being used to reinforce old fears that sexual activity, homosexuality, and promiscuity led to disease and death.

AIDS is both a personal tragedy for those who contract the syndrome and a calamity for the gay community. Homophobes have gleefully hastened to turn this tragedy against its victims. One columnist has suggested that AIDS has always existed, that the Biblical prohibitions on sodomy were designed to protect people from AIDS, and that AIDS is therefore an appropriate punishment for violating the Levitical codes. Using fear of infection as a rationale, local right-wingers attempted to ban the gay rodeo from Reno, Nevada. A recent issue of the *Moral*

*Majority Report* featured a picture of a "typical" white family of four wearing surgical masks. The headline read: "AIDS: HOMOSEXUAL DISEASES THREATEN AMERICAN FAMILIES."<sup>64</sup> Phyllis Schlafly has recently issued a pamphlet arguing that passage of the Equal Rights Amendment would make it impossible to "legally protect ourselves against AIDS and other diseases carried by homosexuals."<sup>65</sup> Current right-wing literature calls for shutting down the gay baths, for a legal ban on homosexual employment in food-handling occupations, and for state-mandated prohibitions on blood donations by gay people. Such policies would require the government to identify all homosexuals and impose easily recognizable legal and social markers on them.

It is bad enough that the gay community must deal with the medical misfortune of having been the population in which a deadly disease first became widespread and visible. It is worse to have to deal with the social consequences as well. Even before the AIDS scare, Greece passed a law that enabled police to arrest suspected homosexuals and force them to submit to an examination for venereal disease. It is likely that until AIDS and its methods of transmission are understood, there will be all sorts of proposals to control it by punishing the gay community and by attacking its institutions. When the cause of Legionnaires' Disease was unknown, there were no calls to quarantine members of the American Legion or to shut down their meeting halls. The Contagious Diseases Acts in England did little to control syphilis, but they caused a great deal of suffering for the women who came under their purview. The history of panic that has accompanied new epidemics, and of the casualties incurred by their scapegoats, should make everyone pause and consider with extreme scepticism any attempts to justify anti-gay policy initiatives on the basis of AIDS.

## VI The limits of feminism

We know that in an overwhelmingly large number of cases, sex crime is associated with pornography. We know that sex criminals read it, are clearly influenced by it. I believe that, if we can eliminate the distribution of such items among impressionable children, we shall greatly reduce our frightening sex-crime rate.

J. Edgar Hoover<sup>66</sup>

In the absence of a more articulated radical theory of sex, most progressives have turned to feminism for guidance. But the relationship between feminism and sex is complex. Because sexuality is a nexus of the relationships between genders, much of the oppression of women is borne by, mediated through, and

constituted within, sexuality. Feminism has always been vitally interested in sex. But there have been two strains of feminist thought on the subject. One tendency has criticized the restrictions on women's sexual behavior and denounced the high costs imposed on women for being sexually active. This tradition of feminist sexual thought has called for a sexual liberation that would work for women as well as for men. The second tendency has considered sexual liberalization to be inherently a mere extension of male privilege. This tradition resonates with conservative, anti-sexual discourse. With the advent of the anti-pornography movement, it achieved temporary hegemony over feminist analysis.

The anti-pornography movement and its texts have been the most extensive expression of this discourse.<sup>67</sup> In addition, proponents of this viewpoint have condemned virtually every variant of sexual expression as anti-feminist. Within this framework, monogamous lesbianism that occurs within long-term, intimate relationships and which does not involve playing with polarized roles, has replaced married, procreative heterosexuality at the top of the value hierarchy. Heterosexuality has been demoted to somewhere in the middle. Apart from this change, everything else looks more or less familiar. The lower depths are occupied by the usual groups and behaviors: prostitution, transsexuality, sadomasochism, and cross-generational activities.<sup>68</sup> Most gay male conduct, all casual sex, promiscuity, and lesbian behavior that does involve roles or kink or non-monogamy are also censured.<sup>69</sup> Even sexual fantasy during masturbation is denounced as a phallogentric holdover.<sup>70</sup>

This discourse on sexuality is less a sexology than a demonology. It presents most sexual behavior in the worst possible light. Its descriptions of erotic conduct always use the worst available example as if it were representative. It presents the most disgusting pornography, the most exploited forms of prostitution, and the least palatable or most shocking manifestations of sexual variation. This rhetorical tactic consistently misrepresents human sexuality in all its forms. The picture of human sexuality that emerges from this literature is unremittingly ugly.

In addition, this anti-porn rhetoric is a massive exercise in scapegoating. It criticizes non-routine acts of love rather than routine acts of oppression, exploitation, or violence. This demon sexology directs legitimate anger at women's lack of personal safety against innocent individuals, practices, and communities. Anti-porn propaganda often implies that sexism originates within the commercial sex industry and subsequently infects the rest of society. This is sociologically nonsensical. The sex industry is

hardly a feminist utopia. It reflects the sexism that exists in the society as a whole. We need to analyze and oppose the manifestations of gender inequality specific to the sex industry. But this is not the same as attempting to wipe out commercial sex.

Similarly, erotic minorities such as sadomasochists and transsexuals are as likely to exhibit sexist attitudes or behavior as any other politically random social grouping. But to claim that they are inherently anti-feminist is sheer fantasy. A good deal of current feminist literature attributes the oppression of women to graphic representations of sex, prostitution, sex education, sadomasochism, male homosexuality, and transsexualism. What ever happened to the family, religion, education, child-rearing practices, the media, the state, psychiatry, job discrimination, and unequal pay?

Finally, this so-called feminist discourse recreates a very conservative sexual morality. For over a century, battles have been waged over just how much shame, distress, and punishment should be incurred by sexual activity. The conservative tradition has promoted opposition to pornography, prostitution, homosexuality, all erotic variation, sex education, sex research, abortion, and contraception. The opposing, pro-sex tradition has included individuals like Havelock Ellis, Magnus Hirschfeld, Alfred Kinsey, and Victoria Woodhull, as well as the sex education movement, organizations of militant prostitutes and homosexuals, the reproductive rights movement, and organizations such as the Sexual Reform League of the 1960s. This motley collection of sex reformers, sex educators, and sexual militants has mixed records on both sexual and feminist issues. But surely they are closer to the spirit of modern feminism than are moral crusaders, the social purity movement, and anti-vice organizations. Nevertheless, the current feminist sexual demonology generally elevates the anti-vice crusaders to positions of ancestral honor, while condemning the more liberatory tradition as anti-feminist. In an essay that exemplifies some of these trends, Sheila Jeffreys blames Havelock Ellis, Edward Carpenter, Alexandra Kollantai, "believers in the joy of sex of every possible political persuasion," and the 1929 congress of the World League for Sex Reform for making "a great contribution to the defeat of militant feminism."<sup>71</sup>

The anti-pornography movement and its avatars have claimed to speak for all feminism. Fortunately, they do not. Sexual liberation has been and continues to be a feminist goal. The women's movement may have produced some of the most retrogressive sexual thinking this side of the Vatican. But it has also produced an exciting, innovative, and articulate defense of sexual pleasure and erotic justice. This "pro-sex" feminism has

been spearheaded by lesbians whose sexuality does not conform to movement standards of purity (primarily lesbian sadomasochists and butch/femme dykes), by unapologetic heterosexuals, and by women who adhere to classic radical feminism rather than to the revisionist celebrations of femininity which have become so common.<sup>72</sup> Although the anti-porn forces have attempted to weed anyone who disagrees with them out of the movement, the fact remains that feminist thought about sex is profoundly polarized.<sup>73</sup>

Whenever there is polarization, there is an unhappy tendency to think the truth lies somewhere in between. Ellen Willis has commented sarcastically that "the feminist bias is that women are equal to men and the male chauvinist bias is that women are inferior. The unbiased view is that the truth lies somewhere in between."<sup>74</sup> The most recent development in the feminist sex wars is the emergence of a "middle" that seeks to evade the dangers of anti-porn fascism, on the one hand, and a supposed "anything goes" libertarianism, on the other.<sup>75</sup> Although it is hard to criticize a position that is not yet fully formed, I want to draw attention to some incipient problems.

The emergent middle is based on a false characterization of the poles of the debate, construing both sides as equally extremist. According to B. Ruby Rich, "the desire for a language of sexuality has led feminists into locations (pornography, sadomasochism) too narrow or overdetermined for a fruitful discussion. Debate has collapsed into a rumble."<sup>76</sup> True, the fights between Women Against Pornography (WAP) and lesbian sadomasochists have resembled gang warfare. But the responsibility for this lies primarily with the anti-porn movement, and its refusal to engage in principled discussion. S/M lesbians have been forced into a struggle to maintain their membership in the movement, and to defend themselves against slander. No major spokeswoman for lesbian S/M has argued for any kind of S/M supremacy, or advocated that everyone should be a sadomasochist. In addition to self-defense, S/M lesbians have called for appreciation for erotic diversity and more open discussion of sexuality.<sup>77</sup> Trying to find a middle course between WAP and Samois is a bit like saying that the truth about homosexuality lies somewhere between the positions of the Moral Majority and those of the gay movement.

In political life, it is all too easy to marginalize radicals, and to attempt to buy acceptance for a moderate position by portraying others as extremists. Liberals have done this for years to communists. Sexual radicals have opened up the sex debates. It is shameful to deny their contribution, misrepresent their positions, and further their stigmatization.

In contrast to cultural feminists, who simply want to purge sexual dissidents, the sexual moderates are willing to defend the rights of erotic non-conformists to political participation. Yet this defense of political rights is linked to an implicit system of ideological condescension. The argument has two major parts. The first is an accusation that sexual dissidents have not paid close enough attention to the meaning, sources, or historical construction of their sexuality. This emphasis on meaning appears to function in much the same way that the question of etiology has functioned in discussions of homosexuality. That is, homosexuality, sadomasochism, prostitution, or boy-love are taken to be mysterious and problematic in some way that more respectable sexualities are not. The search for a cause is a search for something that could change so that these "problematic" eroticisms would simply not occur. Sexual militants have replied to such exercises that although the question of etiology or cause is of intellectual interest, it is not high on the political agenda and that, moreover, the privileging of such questions is itself a regressive political choice.

The second part of the "moderate" position focuses on questions of consent. Sexual radicals of all varieties have demanded the legal and social legitimation of consenting sexual behavior. Feminists have criticized them for ostensibly finessing questions about "the limits of consent" and "structural constraints" on consent.<sup>78</sup> Although there are deep problems with the political discourse of consent, and although there are certainly structural constraints on sexual choice, this criticism has been consistently misapplied in the sex debates. It does not take into account the very specific semantic content that consent has in sex law and sex practice.

As I mentioned earlier, a great deal of sex law does not distinguish between consensual and coercive behavior. Only rape law contains such a distinction. Rape law is based on the assumption, correct in my view, that heterosexual activity may be freely chosen or forcibly coerced. One has the legal right to engage in heterosexual behavior as long as it does not fall under the purview of other statutes and as long as it is agreeable to both parties.

This is not the case for most other sexual acts. Sodomy laws, as I mentioned above, are based on the assumption that the forbidden acts are an "abominable and detestable crime against nature." Criminality is intrinsic to the acts themselves, no matter what the desires of the participants. "Unlike rape, sodomy or an unnatural or perverted sexual act may be committed between two persons both of whom consent, and, regardless of which is the aggressor, both may be prosecuted."<sup>79</sup> Before the consenting

adult statute was passed in California in 1976, lesbian lovers could have been prosecuted for committing oral copulation. If both participants were capable of consent, both were equally guilty.<sup>80</sup>

Adult incest statutes operate in a similar fashion. Contrary to popular mythology, the incest statutes have little to do with protecting children from rape by close relatives. The incest statutes themselves prohibit marriage or sexual intercourse between adults who are closely related. Prosecutions are rare, but two were reported recently. In 1979, a 19-year-old Marine met his 42-year-old mother, from whom he had been separated at birth. The two fell in love and got married. They were charged and found guilty of incest, which under Virginia law carries a maximum ten-year sentence. During their trial, the Marine testified, "I love her very much. I feel that two people who love each other should be able to live together."<sup>81</sup> In another case, a brother and sister who had been raised separately met and decided to get married. They were arrested and pleaded guilty to felony incest in return for probation. A condition of probation was that they not live together as husband and wife. Had they not accepted, they would have faced twenty years in prison.<sup>82</sup>

In a famous S/M case, a man was convicted of aggravated assault for a whipping administered in an S/M scene. There was no complaining victim. The session had been filmed and he was prosecuted on the basis of the film. The man appealed his conviction by arguing that he had been involved in a consensual sexual encounter and had assaulted no one. In rejecting his appeal, the court ruled that one may not consent to an assault or battery "except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing, or wrestling."<sup>83</sup> The court went on to note that the "consent of a person without legal capacity to give consent, such as a child or insane person, is ineffective," and that "it is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury."<sup>84</sup> Therefore, anyone who would consent to a whipping would be presumed *non compos mentis* and legally incapable of consenting. S/M sex generally involves a much lower level of force than the average football game, and results in far fewer injuries than most sports. But the court ruled that football players are sane, whereas masochists are not.

Sodomy laws, adult incest laws, and legal interpretations such as the one above clearly interfere with consensual behavior and impose criminal penalties on it. Within the law, consent is a privilege enjoyed only by those who engage in the highest-status



sexual behavior. Those who enjoy low-status sexual behavior do not have the legal right to engage in it. In addition, economic sanctions, family pressures, erotic stigma, social discrimination, negative ideology, and the paucity of information about erotic behavior, all serve to make it difficult for people to make unconventional sexual choices. There certainly are structural constraints that impede free sexual choice, but they hardly operate to coerce anyone into being a pervert. On the contrary, they operate to coerce everyone toward normality.

The "brainwash theory" explains erotic diversity by assuming that some sexual acts are so disgusting that no one would willingly perform them. Therefore, the reasoning goes, anyone who does so must have been forced or fooled. Even constructivist sexual theory has been pressed into the service of explaining away why otherwise rational individuals might engage in variant sexual behavior. Another position that is not yet fully formed uses the ideas of Foucault and Weeks to imply that the "perversions" are an especially unsavory or problematic aspect of the construction of modern sexuality.<sup>85</sup> This is yet another version of the notion that sexual dissidents are victims of the subtle machinations of the social system. Weeks and Foucault would not accept such an interpretation, since they consider all sexuality to be constructed, the conventional no less than the deviant.

Psychology is the last resort of those who refuse to acknowledge that sexual dissidents are as conscious and free as any other group of sexual actors. If deviants are not responding to the manipulations of the social system, then perhaps the source of their incomprehensible choices can be found in a bad childhood, unsuccessful socialization, or inadequate identity formation. In her essay on erotic domination, Jessica Benjamin draws upon psychoanalysis and philosophy to explain why what she calls "sadomasochism" is alienated, distorted, unsatisfactory, numb, purposeless, and an attempt to "relieve an original effort at differentiation that failed."<sup>86</sup> This essay substitutes a psycho-philosophical inferiority for the more usual means of devaluing dissident eroticism. One reviewer has already construed Benjamin's argument as showing that sadomasochism is merely an "obsessive replay of the infant power struggle."<sup>87</sup>

The position which defends the political rights of perverts but which seeks to understand their "alienated" sexuality is certainly preferable to the WAP-style bloodbaths. But for the most part, the sexual moderates have not confronted their discomfort with erotic choices that differ from their own. Erotic chauvinism cannot be redeemed by tarring it up in Marxist drag, sophisticated constructivist theory, or retro-psychobabble.

Whichever feminist position on sexuality – right, left, or center

– eventually attains dominance, the existence of such a rich discussion is evidence that the feminist movement will always be a source of interesting thought about sex. Nevertheless, I want to challenge the assumption that feminism is or should be the privileged site of a theory of sexuality. Feminism is the theory of gender oppression. To automatically assume that this makes it the theory of sexual oppression is to fail to distinguish between gender, on the one hand, and erotic desire, on the other.

In the English language, the word "sex" has two very different meanings. It means gender and gender identity, as in "the female sex" or "the male sex." But sex also refers to sexual activity, lust, intercourse, and arousal, as in "to have sex." This semantic merging reflects a cultural assumption that sexuality is reducible to sexual intercourse and that it is a function of the relations between women and men. The cultural fusion of gender with sexuality has given rise to the idea that a theory of sexuality may be derived directly out of a theory of gender.

In an earlier essay, "The Traffic in Women," I used the concept of a sex/gender system, defined as a "set of arrangements by which a society transforms biological sexuality into products of human activity."<sup>88</sup> I went on to argue that "Sex as we know it – gender identity, sexual desire and fantasy, concepts of childhood – is itself a social product."<sup>89</sup> In that essay, I did not distinguish between lust and gender, treating both as modalities of the same underlying social process.

"The Traffic in Women" was inspired by the literature on kin-based systems of social organization. It appeared to me at the time that gender and desire were systemically intertwined in such social formations. This may or may not be an accurate assessment of the relationship between sex and gender in tribal organizations. But it is surely not an adequate formulation for sexuality in Western industrial societies. As Foucault has pointed out, a system of sexuality has emerged out of earlier kinship forms and has acquired significant autonomy.

Particularly from the eighteenth century onward, Western societies created and deployed a new apparatus which was superimposed on the previous one, and which, without completely supplanting the latter, helped to reduce its importance. I am speaking of the deployment of *sexuality* . . . For the first [kinship], what is pertinent is the link between partners and definite statutes; the second [sexuality] is concerned with the sensations of the body, the quality of pleasures, and the nature of impressions.<sup>90</sup>

The development of this sexual system has taken place in the context of gender relations. Part of the modern ideology of sex is that lust is the province of men, purity that of women. Women have been to some extent excluded from the modern sexual

system. It is no accident that pornography and the perversions have been considered part of the male domain. In the sex industry, women have been excluded from most production and consumption, and allowed to participate primarily as workers. In order to participate in the "perversions," women have had to overcome serious limitations on their social mobility, their economic resources, and their sexual freedoms. Gender affects the operation of the sexual system, and the sexual system has had gender-specific manifestations. But although sex and gender are related, they are not the same thing, and they form the basis of two distinct arenas of social practice.

In contrast to my perspective in "The Traffic in Women," I am now arguing that it is essential to separate gender and sexuality analytically to more accurately reflect their separate social existence. This goes against the grain of much contemporary feminist thought, which treats sexuality as a derivation of gender. For instance, lesbian feminist ideology has mostly analyzed the oppression of lesbians in terms of the oppression of women. However, lesbians are also oppressed as queers and perverts, by the operation of sexual, not gender, stratification. Although it pains many lesbians to think about it, the fact is that lesbians have shared many of the sociological features and suffered from many of the same social penalties as have gay men, sadomasochists, transvestites, and prostitutes.

Catherine MacKinnon has made the most explicit theoretical attempt to subsume sexuality under feminist thought. According to MacKinnon, "Sexuality is to feminism what work is to marxism... the molding, direction, and expression of sexuality organizes society into two sexes, women and men."<sup>91</sup> This analytic strategy in turn rests on a decision to "use sex and gender relatively interchangeably."<sup>92</sup> It is this definitional fusion that I want to challenge.

There is an instructive analogy in the history of the differentiation of contemporary feminist thought from Marxism. Marxism is probably the most supple and powerful conceptual system extant for analyzing social inequality. But attempts to make Marxism the sole explanatory system for all social inequalities have been dismal exercises. Marxism is most successful in the areas of social life for which it was originally developed - class relations under capitalism.

In the early days of the contemporary women's movement, a theoretical conflict took place over the applicability of Marxism to gender stratification. Since Marxist theory is relatively powerful, it does in fact detect important and interesting aspects of gender oppression. It works best for those issues of gender most closely related to issues of class and the organization of labor. The issues

more specific to the social structure of gender were not amenable to Marxist analysis.

The relationship between feminism and a radical theory of sexual oppression is similar. Feminist conceptual tools were developed to detect and analyze gender-based hierarchies. To the extent that these overlap with erotic stratifications, feminist theory has some explanatory power. But as issues become less those of gender and more those of sexuality, feminist analysis becomes irrelevant and often misleading. Feminist thought simply lacks angles of vision which can encompass the social organization of sexuality. The criteria of relevance in feminist thought do not allow it to see or assess critical power relations in the area of sexuality.

In the long run, feminism's critique of gender hierarchy must be incorporated into a radical theory of sex, and the critique of sexual oppression should enrich feminism. But an autonomous theory and politics specific to sexuality must be developed.

It is a mistake to substitute feminism for Marxism as the last word in social theory. Feminism is no more capable than Marxism of being the ultimate and complete account of all social inequality. Nor is feminism the residual theory which can take care of everything to which Marx did not attend. These critical tools were fashioned to handle very specific areas of social activity. Other areas of social life, their forms of power, and their characteristic modes of oppression, need their own conceptual implements. In this essay, I have argued for theoretical as well as sexual pluralism.

## VII Conclusion

... these pleasures which we lightly call physical. . .

Colette<sup>93</sup>

Like gender, sexuality is political. It is organized into systems of power, which reward and encourage some individuals and activities, while punishing and suppressing others. Like the capitalist organization of labor and its distribution of rewards and powers, the modern sexual system has been the object of political struggle since it emerged and as it has evolved. But if the disputes between labor and capital are mystified, sexual conflicts are completely camouflaged.

The legislative restructuring that took place at the end of the nineteenth century and in the early decades of the twentieth was a refracted response to the emergence of the modern erotic system. During that period, new erotic communities formed. It became possible to be a male homosexual or a lesbian in a way it

had not been previously. Mass-produced erotica became available, and the possibilities for sexual commerce expanded. The first homosexual rights organizations were formed, and the first analyses of sexual oppression were articulated.<sup>94</sup>

The repression of the 1950s was in part a backlash to the expansion of sexual communities and possibilities which took place during World War II.<sup>95</sup> During the 1950s, gay rights organizations were established, the Kinsey reports were published, and lesbian literature flourished. The 1950s were a formative as well as a repressive era.

The current right-wing sexual counter-offensive is in part a reaction to the sexual liberalization of the 1960s and early 1970s. Moreover, it has brought about a unified and self-conscious coalition of sexual radicals. In one sense, what is now occurring is the emergence of a new sexual movement, aware of new issues and seeking a new theoretical basis. The sex wars out on the streets have been partly responsible for provoking a new intellectual focus on sexuality. The sexual system is shifting once again, and we are seeing many symptoms of its change.

In Western culture, sex is taken all too seriously. A person is not considered immoral, is not sent to prison, and is not expelled from her or his family, for enjoying spicy cuisine. But an individual may go through all this and more for enjoying shoe leather. Ultimately, of what possible social significance is it if a person likes to masturbate over a shoe? It may even be non-consensual, but since we do not ask permission of our shoes to wear them, it hardly seems necessary to obtain dispensation to come on them.

If sex is taken too seriously, sexual persecution is not taken seriously enough. There is systematic mistreatment of individuals and communities on the basis of erotic taste or behavior. There are serious penalties for belonging to the various sexual occupational castes. The sexuality of the young is denied, adult sexuality is often treated like a variety of nuclear waste, and the graphic representation of sex takes place in a mire of legal and social circumlocution. Specific populations bear the brunt of the current system of erotic power, but their persecution upholds a system that affects everyone.

The 1980s have already been a time of great sexual suffering. They have also been a time of ferment and new possibility. It is up to all of us to try to prevent more barbarism and to encourage erotic creativity. Those who consider themselves progressive need to examine their preconceptions, update their sexual educations, and acquaint themselves with the existence and operation of sexual hierarchy. It is time to recognize the political dimensions of erotic life.

### Acknowledgments

It is always a treat to get to the point in a paper when I can thank those who contributed to its realization. Many of my ideas about the formation of sexual communities first occurred to me during a course given by Charles Tilly on "The Urbanization of Europe from 1500-1900." Few courses could ever provide as much excitement, stimulation, and conceptual richness as did that one. Daniel Tsang alerted me to the significance of the events of 1977 and taught me to pay attention to sex law. Pat Califia deepened my appreciation for human sexual variety and taught me to respect the much-maligned fields of sex research and sex education. Jeff Escoffier shared his powerful grasp of gay history and sociology, and I have especially benefited from his insights into the gay economy. Allan Bérubé's work in progress on gay history has enabled me to think with more clarity about the dynamics of sexual oppression. Conversations with Ellen Dubois, Amber Hollibaugh, Mary Ryan, Judy Stacey, Kay Trumburger, and Martha Vicinus have influenced the direction of my thinking.

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### A note on definitions

Throughout this essay, I use terms such as homosexual, sex worker, and pervert. I use "homosexual" to refer to both women and men. If I want to be more specific, I use terms such as

"lesbian" or "gay male." "Sex worker" is intended to be more inclusive than "prostitute," in order to encompass the many jobs of the sex industry. Sex worker includes erotic dancers, strippers, porn models, nude women who will talk to a customer via telephone hook-up and can be seen but not touched, phone partners, and the various other employees of sex businesses such as receptionists, janitors, and barkers. Obviously, it also includes prostitutes, hustlers, and "male models." I use the term "pervert" as a shorthand for all the stigmatized sexual orientations. It used to cover male and female homosexuality as well but as these become less disreputable, the term has increasingly referred to the other "deviations." Terms such as "pervert" and "deviant" have, in general use, a connotation of disapproval, disgust, and dislike. I am using these terms in a denotative fashion, and do not intend them to convey any disapproval on my part.

### Notes

- 1 Demetrius Zambaco, "Onanism and Nervous Disorders in Two Little Girls", in François Peraldi (ed.), *Polysexuality, Sermiotext(e)*, vol. IV, no. 1, 1981, pp. 31, 36.
- 2 Linda Gordon and Ellen Dubois, "Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth Century Feminist Sexual Thought", *Feminist Studies*, vol. 9, no. 1, Spring 1983; Steven Marcus, *The Other Victorians*, New York, New American Library, 1974; Mary Ryan, "The Power of Women's Networks: A Case Study of Female Moral Reform in America", *Feminist Studies*, vol. 5, no. 1, 1979; Judith R. Walkowitz, *Prostitution and Victorian Society*, Cambridge, Cambridge University Press, 1980; Judith R. Walkowitz, "Male Vice and Feminist Virtue: Feminism and the Politics of Prostitution in Nineteenth-Century Britain", *History Workshop Journal*, no. 13, Spring 1982; Jeffrey Weeks, *Sex, Politics and Society: The Regulation of Sexuality Since 1800*, New York, Longman, 1981.
- 3 G.J. Barker-Benfield, *The Horrors of the Half-Known Life*, New York, Harper Colophon, 1976; Marcus, op. cit.; Weeks, op. cit., especially pages 48-52; Zambaco, op. cit.
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  - 11 Allan Bérubé, "Behind the Spectre of San Francisco", *Body Politic*, April 1981; Allan Bérubé, "Marching to a Different Drummer", *Advocate*, October 15, 1981; John D'Emilio, *Sexual Politics, Sexual Communities: The Making of the Homosexual Minority in the United States, 1940-1970*, Chicago, University of Chicago Press, 1983; Jonathan Katz, *Gay American History*, New York, Thomas Y. Crowell, 1976.
  - 12 D'Emilio, op. cit., pp. 46-7; Allan Bérubé, personal communication.
  - 13 John Gerassi, *The Boys of Boise*, New York, Collier, 1968, p. 14. I am indebted to Allan Bérubé for calling my attention to this incident.
  - 14 Allan Bérubé, personal communication; D'Emilio, op. cit.; John D'Emilio, "Gay Politics, Gay Community: San Francisco's Experience", *Socialist Review*, no. 55, January-February 1981.
  - 15 The following examples suggest avenues for additional research. A local crackdown at the University of Michigan is documented in Daniel Tsang, "Gay Ann Arbor Purges", *Midwest Gay Academic Journal*, vol. 1, no. 1, 1977; and Daniel Tsang, "Ann Arbor Gay Purges", part 2, *Midwest Gay Academic Journal*, vol. 1, no. 2, 1977. At the University of Michigan, the number of faculty dismissed for alleged homosexuality appears to rival the number fired for alleged communist tendencies. It would be interesting to have figures comparing the number of professors who lost their positions during this period due to sexual and political offenses. On regulatory reform, many states passed laws during this period prohibiting the sale of alcoholic beverages to "known sex perverts" or providing that bars which catered to "sex perverts" be closed. Such a law was passed in California in 1955, and declared unconstitutional by the state Supreme Court in 1959 (Allan Bérubé, personal communication). It would be of great interest to know exactly which states passed such statutes, the dates of their enactment, the discussion that preceded them, and how many are still on the books. On the persecution of other erotic populations, evidence indicates that John Willie and Irving Klaw, the two premier producers and distributors of bondage erotica in the United States from the late 1940s through the early 1960s, encountered frequent police harassment and that Klaw, at least, was affected by a congressional investigation conducted by the Kefauver Committee. I am indebted to personal communication from J.B. Rund for

information on the careers of Willie and Klaw. Published sources are scarce, but see John Willie, *The Adventures of Sweet Gwendoline*, New York, Belier Press, 1974; J.B. Rund, "Preface", *Bizarre Comics*, vol. 8, New York, Belier Press, 1977; J.B. Rund, "Preface", *Bizarre Fotos*, vol. 1, New York, Belier Press, 1978; and J.B. Rund, "Preface", *Bizarre Katalogs*, vol. 1, New York, Belier Press, 1979. It would be useful to have more systematic information on legal shifts and police activity affecting non-gay erotic dissidence.

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- 49 Walkowitz, *Prostitution and Victorian Society*, op. cit.
- 50 Vice cops also harass all sex businesses, be these gay bars, gay baths, adult book stores, the producers and distributors of commercial erotica, or swing clubs.
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- 56 Esther Newton, *Mother Camp: Female Impersonators in America*, Englewood Cliffs, New Jersey, Prentice-Hall, 1972, p. 21, emphasis in the original.
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- an excellent discussion of gay oppression in the 1950s which covers many of the areas I have mentioned. The dynamics he describes, however, are operative in modified forms for other erotic populations, and in other periods. The specific model of gay oppression needs to be generalized to apply, with appropriate modifications, to other sexual groups.
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- 63 See especially Walkowitz, *Prostitution and Victorian Society*, op. cit., and Weeks, *Sex, Politics and Society*, op. cit.
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bars."); Judith Pasternak, "The Strangest Bedfellows: Lesbian Feminism and the Sexual Revolution", *WomanNews*, October 1983; Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence", in Ann Snitow, Christine Stansell, and Sharon Thompson (eds), *Powers of Desire: The Politics of Sexuality*, New York, Monthly Review Press, 1983.

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# ESSAY

## THEORIZING YES: AN ESSAY ON FEMINISM, LAW, AND DESIRE

*Katherine M. Franke\**

*In this Essay, Professor Franke observes that, unlike feminists from other disciplines, feminist legal theorists have neglected to formulate a positive theory of female sexuality. Instead, discussions of female sexuality have been framed as either a matter of dependency or danger. Professor Franke begins her challenge to this scheme by asking why legal feminism has accepted unquestionably the fact that most women reproduce in their lifetimes. Why have not social forces that incentivize motherhood—a dynamic she terms reproductivity—been exposed to as exacting a feminist critique as have heteronormative forces that normalize heterosexuality? Furthermore, she continues by noting that when feminist legal theory renders sex as dangerous, such analysis risks advancing the view that the only acceptable answer to any sexual proposition is “no.” Professor Franke cautions that the willingness of most legal feminists to maternalize uncritically the female subject or to conceptualize sex as the inevitable site of danger for women, effectively marginalizes, if not erases, the possibility of non-reproductive female sexual desire and pleasure.*

Legal feminism is by no means a discipline autonomous from a larger set of conversations self-identified as feminist in nature. Indeed, we, the legal feminists, regard ourselves as concerned with issues that are central to a broader intellectual and political feminist movement: sex-based equality in the workplace, reproductive rights, domestic violence, the needs of working mothers, sexual harassment, and rape, to name only a few such issues, figure centrally in feminist theory—legal and otherwise. Yet, there appears to be an increasing disconnect between legal feminism and other feminist disciplines when it comes to the scope and meaning of a feminist approach to sexuality, desire, and women’s “hedonic lives,” to borrow a term Robin West introduced into the legal literature some years ago.<sup>1</sup> Without a doubt, when it comes to sex, we have done a more than adequate job of theorizing the right to say *no*, but we have left to others the task of understanding what it might mean to say *yes*. However, as Carole Vance has reminded us for over twenty years, a feminist approach to sexual matters must “simultaneously . . . reduce the dangers women

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1. Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *Wis. Women’s L.J.* 81, 81 (1987).

face and . . . expand the possibilities, opportunities, and permissions for pleasure that are open to them.”<sup>2</sup>

In this Essay I will ask a set of questions intended to highlight the degree to which legal feminism has, by and large, reduced questions of sexuality to two principal concerns for women: *dependency*, and the responsibilities that motherhood entails, and *danger*, such as sexual harassment, rape, incest, and domestic violence.<sup>3</sup> This concentration on the elimination of sexual danger and dependency for women risks making “women’s actual experience with pleasure invisible, overstat[ing] danger until it monopolizes the entire frame, positions women solely as victims, and fails to empower our movement with women’s curiosity, desire, adventure and success.”<sup>4</sup> Curiously, since the end of the so-called “sex wars”<sup>5</sup> in the 1980s, it seems that legal feminists have ceded to queer theorists the job of imagining the female body as a site of pleasure, intimacy, and erotic possibility.

While we devote our considerable energies to addressing sexuality understood in terms of freedom from oppressive practices, feminists in other disciplines continue to simultaneously approach questions of sexuality in both negative (freedom from) and positive (freedom to) terms.<sup>6</sup> Why do legal feminists frame questions of sexuality more narrowly than our colleagues in other fields? Is there something intrinsic to a legal approach to sexuality that deprives us of the tools, authority, or expertise to

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2. Carole S. Vance, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference*, 38 N.Y.L. Sch. L. Rev. 289, 290 (1993).

3. In their Foreword to a symposium on the Gender, Work & Family Project’s Inaugural Feminist Legal Theory Lecture given by Martha Fineman, Project Co-Directors Adrienne Davis and Joan Williams identified the “eroticization of dominance” understood as “the sex/violence axis of gender formation,” and “conflict that people experience as they negotiate between their work lives and their family lives,” as the two principal strands of contemporary feminist legal theory. Adrienne D. Davis & Joan C. Williams, Foreword, 8 Am. U. J. Gender Soc. Pol’y & L. 1, 2–3 (2000).

4. Vance, *supra* note 2, at 290.

5. See, e.g., *Caught Looking: Feminism, Pornography and Censorship* 4–8 (Kate Ellis et al. eds., 1992); Lisa Duggan & Nan D. Hunter, *Sex Wars: Sexual Dissent and Political Culture* 1, 30–78 (1995); Alice Echols, *Daring To Be Bad: Radical Feminism in America 1967–1975*, at 289–91 (1989); Lisa Duggan, *The Sex Panic: Women, Censorship, and “Pornography”: An Historical Overview*, 38 N.Y.L. Sch. L. Rev. 25, 28 (1993); Vance, *supra* note 2, at 289.

6. To name only a few, from Cinema Studies, see, e.g., Laura Kipnis, *Bound and Gagged: Pornography and the Politics of Fantasy in America*, at x–xi (1996); Laura Kipnis, *Ecstasy Unlimited: On Sex, Capital, Gender, and Aesthetics* 8–11 (1993); Laura Kipnis, *Adultery*, 24 *Critical Inquiry* 289, 293 (1998); from Anthropology, see, e.g., Micaela di Leonardo, *Exotics at Home: Anthropologies, Others, American Modernity* 326–46 (1998); *The Gender/Sexuality Reader: Culture, History, Political Economy* 5–8 (Micaela di Leonardo ed., 1997); Deborah A. Elliston, *Erotic Anthropology: “Ritualized Homosexuality” in Melanesia and Beyond*, 22 *Am. Ethnologist* 848, 855–56 (1995); from History, see, e.g., Judith R. Walkowitz, *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London* 113–22 (1992); from American Studies, see, e.g., Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* 5 (1997). See generally Special Issue on Intimacy, 24 *Critical Inquiry* (1998).

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address desire head on? Can law protect pleasure? Should it? Or have legal feminists implicitly made the (I believe mistaken) strategic judgment that feminist legal theory cannot explore sexuality positively until danger and dependency are first eliminated?

I cannot promise answers to these difficult questions for law and for feminism. Rather, with this Essay I hope to stimulate a conversation among legal feminists about our approaches to sexuality, and by asking some uncomfortable questions, foreground what I believe are unexamined premises in legal feminist approaches to dependency and danger that could bear more critical attention.

In the discussion that follows, I first examine the two principal manners in which legal feminists tend to approach questions of sexuality: dependency and danger. I then situate these approaches within a larger feminist context in which I consider viable future directions for feminist legal theory in light of the complex interrelationships of sexuality, gender, and desire.

#### I. THE REPRONORMATIVITY OF MOTHERHOOD

Motherhood and its implications figure centrally in virtually all feminist agendas. However, for much of first and second wave legal feminism, issues of gender collapse quite quickly into the normative significance of our roles as mothers. Grounding feminist legal theory in object relations theory<sup>7</sup> and demanding that women's participation in the wage labor market be compatible with our responsibilities as mothers<sup>8</sup> are only two salient examples of how the legal feminist frame tends to collapse women's identity into motherhood. The centrality, presumption, and inevitability of our responsibility for children remain a starting point for many, if not most, legal feminists.<sup>9</sup>

Consider two propositions: The overwhelming majority of women are heterosexual. The overwhelming majority of women are mothers. The degree to which social preferences and prohibitions—otherwise known as compulsory heterosexuality—contribute to the “fact” stated by the first proposition has become relatively accepted within feminist, and certainly queer, theory circles. Feminists have become, to varying degrees, sensitive to the technologies of power that steer, suggest, coerce, and demand that women be heterosexual and that abjection lies in the refusal of such a demand.

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7. See, e.g., Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* 11 (1978); Robin West, *Jurisprudence and Gender*, 55 *U. Chi. L. Rev.* 1, 1 (1988).

8. See, e.g., Joan Williams, *Unbending Gender: Why Family and Work Conflict and What To Do About It*, at x (2000).

9. *Id.* See also Sara Ruddick, *Thinking Mothers/Conceiving Birth*, in *Representations of Motherhood* 29, 36 (Donna Bassin et al. eds., 1994) (“To respect *female* bodies means respecting, even treasuring, the birthgiving vulnerabilities and procreative powers of females.”).

Yet the same cannot be said of the second proposition laid out above: Most women are mothers. Why is it that we are willing to acknowledge that heteronormative cultural preferences play a significant role in sexual orientation and selection of sexual partners, while at the same time refusing to treat repronormative forces as warranting similar theoretical attention?<sup>10</sup> If you believe the statistics, women are more likely not to have borne a child in their lifetimes<sup>11</sup> than to be lesbian.<sup>12</sup> Is there any principled reason why legal feminists might not want to devote some attention to exposing the complex ways in which reproduction is incentivized and subsidized in ways that may bear upon the life choices women face? To ask such a question is to risk being labeled unfeminist.<sup>13</sup> To

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10. To be fair, Dorothy Roberts and Carol Sanger are two legal theorists who have raised this issue in their work. Roberts has noted the contrast between coercive natalism for white women and the forces that discourage Black women from procreating. See, e.g., Dorothy E. Roberts, *The Genetic Tie*, 62 U. Chi. L. Rev. 209, 239 & nn.118–19 (1995); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 Am. U. J. Gender Soc. Pol’y & L. 1, 10–11 (1993); Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 Ky. L.J. 1197, 1225 (1995–1996). Sanger has applied a similar analysis to other presumptively disfavored mothers. See, e.g., Carol Sanger, *M is for the Many Things*, 1 S. Cal. Rev. L. & Women’s Stud. 15, 49–51 (1992) [hereinafter *Sanger, M is for the Many Things*]; Carol Sanger, *Separating from Children*, 96 Colum. L. Rev. 375, 410 (1996); see also Julia E. Hanigsberg, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 Mich. L. Rev. 371, 417–18 (1995) (calling for “reconceptualizing the abortion decision within the context of mothering decisions”).

11. Census data reveals that 19% of women will not have borne a child by their forty-fourth birthday. Amara Bachu & Martin O’Connell, U.S. Dep’t of Commerce, *Current Population Reports: Fertility of American Women: June 1998* 2 tbl. A (2000). Of course, women who have not borne children themselves can be and are mothers, whether through adoption, parenting of their partner’s children, or what Patricia Hill Collins calls “othermothering.” Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* 119 (1990).

12. Of course, the validity of statistics regarding the prevalence of lesbians in the population is vulnerable on a number of fronts: underreporting by lesbians due to homophobia, difficulty defining the category “lesbian,” and the important distinction between lesbian acts and lesbian identity are among the most prominent. Reports of the incidence of lesbianism in the U.S. population vary from Kinsey’s figure that 13% of women had reported reaching orgasm with another woman at some point in their lives, to the National Opinion Research Center’s 1992 report entitled “The Social Organization of Sexuality” that found only 1.3% of women had engaged in “homosexual” activity in the preceding year. See Alfred C. Kinsey et al., *Sexual Behavior in the Human Female* 454 (1953); Edward O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* 294 (1994). Naomi Mezey has done a nice job of surveying and critiquing this literature. Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 Berkeley Women’s L.J. 98, 104–06 (1995).

13. There is a burgeoning academic and popular literature that raises the question of “childless by choice.” See, e.g., Jane Bartlett, *Will You Be Mother?: Women Who Choose to Say No*, at ix (1994); Joan Brady, *I Don’t Need a Baby To Be Who I Am: Thoughts and Affirmations on a Fulfilling Life*, at xi–xvi, 112–25 (1998); Elinor Burkett, *The Baby Boon: How Family-Friendly America Cheats the Childless* 7 (2000); Mardy S. Ireland, *Reconceiving Women: Separating Motherhood from Female Identity*, at vii (1993);

suggest that we reconceptualize procreation as a cultural preference rather than a biological imperative, and then explore ways in which to lessen or at least modify the demand to conform to that preference, is to initiate a conversation within feminism that has been explicitly and curtly rejected by some legal feminists. However, it is a conversation that necessarily demands feminist discussants, for only by positing the possibility of female identity divorced from mothering can we make mothering ethically and politically intelligible. Surely mothering grounds the lives of many women, but that ground, once taken for granted, risks obscuring the figure of woman, whose identity extends beyond her role as mother.

Notwithstanding the prevalence of both childlessness and lesbianism,<sup>14</sup> somehow reproduction continues to be regarded as more inevitable and natural than heterosexuality. That is to say, repronormativity remains in the closet even while heteronormativity has stepped more into the light of the theoretical and political day. Reproduction has been so taken for granted that only women who are *not* parents are regarded as having made a choice—a choice that is constructed as nontraditional, nonconventional, and for some, non-natural.<sup>15</sup> In a telling switch, the

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Carolyn M. Morell, *Unwomanly Conduct: The Challenges Of Intentional Childlessness*, at xiii (1994); Martha E. Gimenez, *Feminism, Pronatalism, and Motherhood*, in *Mothering: Essays in Feminist Theory* 287, 299–301 (Joyce Trebilcot ed., 1983); Irene Reti, *Introduction to Childless by Choice: A Feminist Anthology* 1–3 (Irene Reti ed., 1992); Lisa Belkin, *Your Kids are Their Problem*, *N.Y. Times*, July 23, 2000, (Magazine), at 30; Enid Nemy, *No Children. No Apologies.*, *N.Y. Times*, Apr. 6, 1995, at C12. By listing these publications here, I do not mean to endorse the arguments that their authors have made. In fact, some of these texts I would characterize as proto-, neo-, or anti-feminist in their approaches, just as I would characterize the work of Naomi Wolf and Katie Roiphe. Burkett, for instance, raises some interesting concerns for the lay reader regarding the degree to which parenting is subsidized for middle-class families in public and private ways, but she does so, seemingly, in complete ignorance of the real burdens and discriminations that working mothers suffer at home and at work—such as the history and current reality of losing their jobs when they get pregnant, or losing promotions for sexist reasons. See Burkett, *supra*, at 25–61 (describing how workers with children gain substantial benefits in the workplace). I mention these publications to illustrate what appears to be something of a growing sentiment among childless workers that their life choices are treated as of secondary importance when compared with those workers engaged in child-rearing.

14. By setting up the comparison this way, I do not mean to reify the notion that lesbians do not have children. Of course we do, and in greater numbers each year. Rather my goal is to expose the degree to which even thoughtful legal feminists persist in the idea that reproduction is the result of a natural drive not worthy of our critical attention except when socially discouraged, while sexual orientation is, at least in theory, understood to be subject to powerful cultural influences.

15. The construction of the woman who chooses not to have children is contrasted with the woman who desires to, but is unable to bear children. The tragedy of her predicament reinforces the marginality of the woman who is childless by choice. Interestingly enough, in a context in which nature has visited a cruel deprivation on the “barren woman,” the woman who chooses not to reproduce is positioned as having made a choice that violates some natural instinct, order, or destiny. See Callahan & Roberts, *supra* note 10, at 1225 (“Our society does not think it is just fine for people to remain single and childless deliberately or for married people to remain childless deliberately. Infertility is constructed as a nearly unbearable tragedy; deliberate childlessness is constructed as nearly

issue of choice flips for lesbians, who are constructed as choosing motherhood, given that lesbians continue to have an identity understood as non-reproductive in nature. Similarly, the official story of reproduction as a natural drive is deeply racialized, as women of color have struggled against social forces that have at times coercively appropriated, and at other times coercively discouraged their reproduction in numerous ways. So too, in recent debates over welfare reform, poor mothers have been vilified for having borne children strategically.<sup>16</sup> While a claim not borne out by any reliable studies, it has justified the punishment of women who reproduce for the wrong reasons.<sup>17</sup>

Thus, reproduction raises numerous sticky normative questions, yet underexplored within feminism, with respect to choice, coercion, and policies that incentivize and disincentivize reproductive uses of women's sexual bodies—not only for women who occupy law's margins, such as lesbians and women of color, but also for women whose reproduction we regard as unproblematic.

The first objection one hears when one questions the normativity of reproduction is: "But we must reproduce the species."<sup>18</sup> Certainly this must be right, but the conversation-stopping power of this natalist objection should not be overstated.<sup>19</sup> The fact that the future of the species depends upon ongoing reproduction<sup>20</sup> does not relieve us from devoting critical attention to the manners in which this biological demand becomes culturally organized. Feminists have undertaken deep and nuanced critiques of the social and sexual division of labor that devalues

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unimaginable selfishness."). This flipping, of structuring the natural as the cultural and the cultural as the natural, merely illustrates the degree to which nature (here, infertility) has proven easier to transform than culture (the expectations that women be mothers).

16. Recent welfare reform has portrayed poor women as choosing to reproduce in order to receive larger welfare grants. See, e.g., Mimi Abramovitz, *Under Attack, Fighting Back: Women and Welfare in the United States* 35 (1996); Laura M. Friedman, Comment, *Family Cap and the Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children*, 56 *Ohio St. L.J.* 637, 657–59 (1995) (discussing various states' "Family Cap" programs); see also Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 602 (a)(7)(A)(iii) (Supp. III 1997) (allowing waivers of federal welfare requirements for, inter alia, states that adopt family caps); *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171, 194–95 (3d Cir. 1996) (upholding New Jersey Family Cap against constitutional and statutory challenge).

17. See Linda C. McClain, "Irresponsible" Reproduction, 47 *Hastings L.J.* 339, 352–58 (1996) (analyzing the various manners in which poor women's reproduction is figured as irresponsible).

18. So responded a prominent feminist philosopher of the family when I raised concerns about compulsory reproduction at a recent conference.

19. For an interesting discussion of the biological roots of mothering, see generally Sarah Blaffer Hrdy, *Mother Nature: A History of Mothers, Infants, and Natural Selection* 146–74 (1999).

20. Issues of world *over*population and the disproportionate amount of world resources consumed by Americans make the "we have to reproduce the species" retort a more complex issue than a mere biological demand. See, e.g., Mona L. Hymel, *The Population Crisis: The Stork, the Plow, and the IRS*, 77 *N.C. L. Rev.* 13, 102–03 (1998).

reproduction, largely assigns it to women in isolated households, and then refuses to remunerate it.<sup>21</sup> Our response to this oppressive sexual history must go beyond the mere revaluation of women's reproductive labor such that the maternalization of female identity remains intact.<sup>22</sup>

The push to commodify dependency work has been an important means by which the separate spheres doctrine has been repudiated, but what has it done for women's sexuality generally? Surely our best strategy cannot lie in creative efforts to commodify the domain of sexuality that is the surplus above mere procreation, for it may be that its greatest value lies precisely in its excess. What might "acts that are not civic acts, like sex, [have to do with feminist] citizenship"?<sup>23</sup> Or, as Jennifer Brown recently put it, what are we to make of activities like prayer and orgasm for which their market value bears little relevance to the value we derive from them?<sup>24</sup> That is not to say that these activities are of no consumptive or productive value, but rather that we may prize them for the manner in which they figure outside of traditional valuations of exchange. "Revolution must involve heterogeneous expression, wasteful gift exchange (pure expenditure rather than accumulation, final consumption rather than productive consumption), and nonprocreative sex."<sup>25</sup>

Martha Fineman's work is among the most sophisticated attempts to reconceptualize the practice of motherhood *tout court*.<sup>26</sup> She has observed that "[m]otherhood [is] a colonized concept—an event physically practiced and experienced by women, but occupied and defined, given

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21. E.g., Nancy C.M. Hartsock, *Money, Sex, and Power* 234–40 (1983); Carole Pateman, *The Sexual Contract* 116–53 (1988); Mary Jo Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 *B.U. L. Rev.* 55, 59 (1979).

22. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 *Harv. L. Rev.* 829, 830–31 (1990); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 *S. Cal. L. Rev.* 1877, 1906–28 (1988). For a critical account of the literature, see Vicki Schultz, *Life's Work*, 100 *Colum. L. Rev.* 1881, 1899–1907 (2000).

23. Berlant, *supra* note 6, at 5.

24. Brown writes:

[I]f we want to talk about what human beings are like, we face the limitations of any view that divides the world into production and consumption, with no third way. I think that (probably some, not all) human beings want and even need some time . . . in which they neither produce nor consume, but merely (to put it in sort of new agey terms) "be," . . . [such as] prayer, meditation, washing dishes (even when an electric dishwasher in the house could do the job), playing, sex, orgasm. It may be that each of these activities also has productive or consumptive properties, but I think that those properties are of secondary importance much of the time.

E-mail from Jennifer Gerarda Brown, Professor, Quinnipiac College School of Law, to Katherine Franke, Professor of Law, Columbia University (June 29, 2000, 11:33:59 CST) (on file with author).

25. Miranda Joseph, *The Performance of Production and Consumption*, 54 *Soc. Text* 25, 51 (1998).

26. E.g., Martha Albertson Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies* (1995) [hereinafter *Fineman, Neutered Mother*].

content and value, by the core concepts of patriarchal ideology.”<sup>27</sup> She urges us to sever our erotic relationships from our kinship relationships, pointing out that there is no necessary connection between the erotic bonds that tie adults to one another and the kinship ties that lash parent to child. Fineman’s most recent work makes the claim that caring for children is society-preserving work that “produces and reproduces society,”<sup>28</sup> and which must be done “if a society is to survive and perpetuate itself.”<sup>29</sup> These arguments are developed to justify a claim that mothers are owed a social debt for performing this work.<sup>30</sup> Yet at times she too succumbs to an insufficiently critical reliance upon natalism. The altruistic needs of those who perform this all-important society-preserving work are, for Fineman, to be distinguished from other selfish lifestyle choices a person might make and for which they might seek public subsidies—such as purchasing an expensive sports car.<sup>31</sup> Mothering, for Fineman, is social production worthy of substantial public support, while owning a Porsche is simple consumption, and therefore merely individual rather than society-preserving in nature.<sup>32</sup>

The normative distinction that sets up the altruism of mothers against the selfishness of Porsche drivers suffers from several weaknesses, not the least of which are the confusion between the social effect of a practice and an individual’s motivation for engaging in the practice,<sup>33</sup> and an impoverished account of the meanings of and relationships between social production, social reproduction, and consumption.

Beginning with Marx, various social theorists have worked hard to displace oppositions between production and consumption, the eco-

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27. Martha A. Fineman, *Images of Mothers in Poverty Discourses*, 1991 *Duke L.J.* 274, 289–90.

28. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 *Am. U. J. Gender Soc. Pol’y & L.* 13, 19 (2000).

29. *Id.* at 18.

30. *Id.* at 16–19.

31. See *id.* at 21 n.15. Fineman notes:

In particular, I have been struck by two quasi-economic responses to the point that caretakers should be compensated. I refer to one as the “Porsche Preference.” This argument states that if someone prefers a child, this preference should not be treated differently than any other choice (like the choice to own a Porsche). Society should not subsidize either preference. I hope the society-preserving nature of children helps to distinguish that preference from the whim of the auto fan.

*Id.*

32. The framing of the costs of mothering as a privileged form of cultural work, and as labor that must figure at the center of any feminist project, risks a built-in erasure of, if not disfavor for, other types of “society-preserving work” that are not repronormative in nature. Lauren Berlant shares a similar concern with respect to the connection between production and reproduction for women: “At this time in America, however, the reproducing woman is no longer cast as a potentially productive citizen, except insofar as she procreates: her capacity for other kinds of creative agency has become an obstacle to national reproduction.” Berlant, *supra* note 6, at 100.

33. I must thank Renée Römken for bringing this distinction to my attention.



conomic and the social, the individual and the collective.<sup>34</sup> While Fineman, and many others,<sup>35</sup> are correct that society reproduces itself through the process of biological reproduction, this is by no means the only manner in which social reproduction takes place, nor is it necessarily the most important. The reproduction of society takes place constantly through countless reiterative practices, many of which are structured as simultaneously productive and consumptive in nature.<sup>36</sup> After all, this was the principal strategy of Henry Ford: “What was special about Ford . . . was his vision, his explicit recognition that mass production meant mass consumption . . . .”<sup>37</sup> Thus, “production produces not only workers but Americans, loyal and proud General Motors employees [for instance], women, and gays and lesbians,”<sup>38</sup> all of whom, as an essential part of their identity as Americans, are expected to, and do, consume at least in equal measure to that which they produce. Consumptive acts and behavior are thus at once deeply constitutive and productive in nature. One gains social status from using a gold card, carrying shopping bags from exclusive stores, and wearing brand names on the *outside* of your clothing. In late-modern American society, a minority social group can claim that it has achieved a level of social visibility, acceptance, and presence when it is recognized as a niche market. The gay community, for instance, celebrated the fact that alcohol manufacturers, such as SKYY Vodka, began to target the community in their marketing strategies.<sup>39</sup> Martina Navratilova has been used by MasterCard in its advertisements to sell credit cards to lesbians and gays under the notion that we are building commu-

34. Miranda Joseph does a nice job of elaborating the intellectual histories that have undermined these binaries. See Joseph, *supra* note 25, at 25.

35. This view is not, of course, unique to Fineman. John Rawls has similarly framed both the family and the social utility of reproduction:

The family is part of the basic structure, since one of its main roles is to be the basis of the orderly production and reproduction of society and its culture from one generation to the next. . . . [R]eproductive labor is socially necessary labor. Accepting this, a central role of the family is to arrange in a reasonable and effective way the raising of and caring for children, ensuring their moral development and education into the wider culture. . . . The family must ensure the nurturing and development of such citizens in appropriate numbers to maintain an enduring society.

These requirements limit all arrangements of the basic structure, including efforts to achieve equality of opportunity. The family imposes constraints on ways in which this goal can be achieved, and the principles of justice are stated to try to take these constraints into account.

John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 788 (1997) (citation omitted).

36. “Not only is the individual’s identity formed/expressed in production but the collectivity, social relations, are also determined through the mode of production.” Joseph, *supra* note 25, at 29 (discussing Karl Marx’s essay, *The German Ideology*).

37. David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* 125–26 (1990).

38. Joseph, *supra* note 25, at 26.

39. Alexandra Chasin, *Selling Out: The Gay and Lesbian Movement Goes to Market* 134–41 (2000).

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nity by making purchases with a rainbow credit card: “The Rainbow card . . . promotes the idea that personal consumption is an effective mode of political participation . . . .”<sup>40</sup> Similarly, African Americans are urged to build the Black community by buying Black.<sup>41</sup> Such examples illustrate how consumption “become[s] the site and structure through which the community enacts [and produces] its very existence.”<sup>42</sup>

Returning to Fineman’s Porsche owner, if there is anything we have learned as members of modern political economies, it is that consumption is society-preserving work. On the other hand, while surely there is social value to the reproduction of the species, I question whether “society-preserving work” accurately or adequately describes how women actually experience the labor they are performing by having and raising children. “Women have children because they love them or the idea of them, to keep a marriage together, to meet social, spousal or parental expectations, to experience pregnancy, or to pass on the family name, genes, or silver.” Professor Sanger continues, “[s]ometimes children are conceived for the benefit of existing children: to keep someone from being an only child,”<sup>43</sup> or to provide bone marrow to a dying sibling.<sup>44</sup> Indeed, I suspect that if polled, mothers would rank a species-regarding reason well behind more private and personal motivations for their decisions to reproduce.<sup>45</sup> A recent letter to the editor of the *New Yorker* noted that “many adoptive families I know were driven not by an altruistic urge but by a selfish desire to create a family.”<sup>46</sup> To portray mothering as purely altruistic, other-regarding, and socially valuable, and sports car

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40. *Id.* at 198–99.

41. See Timothy Bates, *Banking on Black Enterprise: The Potential of Emerging Firms for Revitalizing Urban Economies* 31–72 (1993); Jeremiah Cotton, *Towards a Theory and Strategy for Black Economic Development*, in *Race, Politics, and Economic Development* 11, 29–30 (James Jennings ed., 1992); Lateef Mtima, *African-American Economic Empowerment Strategies for the New Millennium—Revisiting the Washington-Du Bois Dialectic*, 43 *How. L.J.* 391, 429 (1999) (“African-Americans must restructure intra-community attitudes to black enterprise. African-Americans must not merely ‘buy black,’ but must also step up the effort to establish and support more black entrepreneurial and professional endeavors.”); Michael L. Moss, *Harlem’s Economic Paradox*, *N.Y. Times*, Dec. 13, 1995, at A23 (discussing “buy black” sentiments at the root of fatal fire and commercial landlord dispute on Harlem’s 125th Street shopping strip); cf. Chasin, *supra* note 39, at 50–53 (analogizing “Buy Black” to “Buy Queer”).

42. Joseph, *supra* note 25, at 44.

43. Sanger, *M is for the Many Things*, *supra* note 10, at 48.

44. See *id.* at 48–49 (citing Denise Hamilton, *Woman Is Having Baby to Save Her Ailing Daughter*, *L.A. Times*, Feb. 16, 1990, at A1); Denise Grady, *Son Conceived to Provide Blood Cells for Daughter*, *N.Y. Times*, Oct. 4, 2000, at A24; Abigail Trafford, *Brave New Reasons for Mothering: Having a Baby to Produce a Potential Organ Donor*, *Wash. Post*, Feb. 27, 1990, at Z6.

45. “[P]oor people have children for the same reasons that other people have children. All the data shows that people have children because they want companionship or because children are valued in society.” Martha Davis, *Contemporary Challenges to Gender Equality*, 43 *N.Y.L. Sch. L. Rev.* 159, 171 (1999).

46. Barbara C. Boches, *Letter*, *New Yorker*, Aug. 14, 2000, at 5.

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ownership as purely selfish and socially inconsequential, is to ignore the complex interrelations between production, reproduction, and consumption,<sup>47</sup> as well as the social forces that govern the “choices” and priorities we set in our own lives.<sup>48</sup>

What is more, even though there is an enormous public interest in the labor performed by mothers—to the point that some feminist theorists describe children as a public good<sup>49</sup>—children remain the private property of their parents, which is an arrangement most feminists do not find troubling.<sup>50</sup> The politics of public value, public subsidy, but private accountability with respect to raising children is revealed to be quite paradoxical under close examination. A recent cover story in the *New York Times Magazine* profiled a family in the leadership of the home-schooling movement. A large number of home schoolers are fundamentalist christian families who, according to the *New York Times Magazine*, “are no longer fighting against the mainstream—they’re ‘dropping out’ and creating their own private America.”<sup>51</sup> Many families, like the Scheibners profiled in this article, are heeding the call of Paul Weyrich, a founder of the Christian Right, to “drop out of this culture, and find places . . . where we can live godly, righteous, and sober lives.”<sup>52</sup> Not coincidentally, these families, and many others like them, are also making the loudest demands for public subsidies or vouchers that will finance home-schooling as well as private, parochial school tuition for families that seek to remove their children from the public school system. It must be worth at least thinking about the carte blanche we give the privatized family to refuse to teach “our” future citizens public norms of tolerance, equality,

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47. See Joseph, *supra* note 25, at 29–38.

48. Francine Blau, Lawrence Kahn, and Jane Waldfogel have studied the economic and social structures that incentivize or discourage young women’s decisions regarding when and whether to marry, concluding that labor market opportunities and education have significant effects upon these choices. See Francine D. Blau et al., *Understanding Young Women’s Marriage Decisions: The Role of Labor and Marriage Market Conditions*, 53 *Indus. & Lab. Rel. Rev.* 624, 645 (2000).

49. See, e.g., Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 *U. Chi. Legal F.* 21, 73 (“Children are a public good benefiting the entire community: we all benefit from having younger generations of workers, particularly as we age.”); Nancy Folbre, *Children As Public Goods*, *Am. Econ. Rev.*, May 1994, at 86, 86 (“[A]s children become increasingly public goods, parenting becomes an increasingly public service.”).

50. By contrast, some American Indian tribes treat children as belonging to more than just their parents. See Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power Over Children*, 83 *Minn. L. Rev.* 927, 963 n.152 (1999); see also Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 *Geo. L.J.* 459, 474 (1990) (describing collective approaches to parenting).

51. Margaret Talbot, *A Mighty Fortress*, *N.Y. Times*, Feb. 27, 2000, (*Magazine*), at 34, 36.

52. *A Moral Minority? An Open Letter to Conservatives from Paul Weyrich* (Feb. 16, 1999), at <http://freecongress.org/fcf/specials/weyrichopenltr.htm> (on file with the *Columbia Law Review*).

and humanity—or worse.<sup>53</sup> The freedom to indulge such non-public, if not anti-public, preferences in the raising of children can be quite alarming—especially when the public is called upon to finance the raising of these future christian soldiers.<sup>54</sup> We have delegated to private parties the task of producing and raising the next generation, and we have done so in the absence of any public accountability for what kinds of people this public service produces.

What also strikes me as worthy of examination is the degree to which parenting is described as productive social activity while, in many regards, parenting has become as much or more about consumption than production. Sylvia Ann Hewlett, the founder of the National Parenting Association, mused in a recent op-ed piece in the *New York Times* about how the public fails to recognize the financial sacrifices that mothers make to raise children.<sup>55</sup> What with “therapy, summer camp, computer equipment and so on,”<sup>56</sup> kids are just darn expensive, she argued. The “and so on” explicitly includes a “three-bedroom home” in her calculus, but surely implicitly entails Pokémon accessories, My Little Pony dolls, Barbies, fancy sneakers, and other expensive articles of consumption that are aggressively marketed to children these days. While I don’t think that children of any economic class should be deprived of the toys and other items that bring joy into their lives, I am concerned about the bourgeois framing of an issue that gives the larger public the tab for the marketing-induced “needs” of children. And all in the name of “society-preserving work.” That children want things, or their parents wish to provide them to their children, is an insufficient justification for shifting the costs of those needs to the public. In other words, the framing of needs in the language of rights is always problematic, but particularly so where needs, such as those Hewlett asserts, are invoked so uncritically.

Finally, I have one last concern about the “we must reproduce the species” response to my invitation to legal feminists to critically examine repronormativity in society. Policies favoring reproduction are often justified by the need to create another generation of workers who will sup-

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53. See *id.* (“What I mean by separation is, for example, what the home-schoolers have done. Faced with public school systems that no longer educate but instead ‘condition’ students with attitudes demanded by Political Correctness, they have seceded.”).

54. The IRS has recently determined that a christian home-schooling organization qualifies as a nontaxable charity. See IRS Exemption Rulings, 153 Daily Tax Rep. (BNA), Aug. 8, 2000, at K-2 (Section 509 (a) (2)—Classification as Nonprivate Foundation Due to Nature of Support). In May 1999, Senate Finance Committee Chairman William Roth unveiled an education package that included education IRA withdrawals for qualified education expenses associated with primary and secondary private schooling and certain home-schooling. See Bud Newman, Tax Legislation: Roth Unveils Education Tax Break Package; Cost of \$7.6 Billion over 10 Years is Offset, 95 Daily Tax Rep. (BNA), May 18, 1999, at G-4.

55. See Sylvia Ann Hewlett, Editorial, Have a Child, and Experience the Wage Gap, *N.Y. Times*, May 16, 2000, at A23.

56. *Id.*

port us in our old age.<sup>57</sup> But these policies cannot be disaggregated from immigration policy. The need to maintain a certain corps of tax-paying workers could be met through manipulation of our immigration laws—as we have done in the past to meet demand in particular sectors of the economy.<sup>58</sup> With the impending bulge in demand on the social security system precipitated by the retirement of baby boomers, more than a few policymakers have suggested that an increase in legal immigration for higher-skilled workers will replenish the system during a period of excessive demand.

Thus we see a convergence of interests among Silicon Valley executives in need of high-tech labor, immigrant rights groups advocating on behalf of undocumented workers, and those concerned with the financial future of Medicare and Social Security materializing in aggressive lobbying to increase the available workforce. To encourage workers to come to the United States, a recently enacted law increased the number of H1-B visas annually made available to skilled workers.<sup>59</sup> To further bolster the social security system, a proposed amnesty program legalizes the status of numerous illegal immigrants, a measure that both facilitates more employers paying into the current social security system on behalf of their presently employed workers and creates the sizable workforce necessary to support the financial demands that the impending retirement of the baby-boomers will generate.<sup>60</sup>

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57. See, e.g., Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 *Minn. L. Rev.* 1463, 1518 (1998) (describing children as “society’s workers, tax-payers, and leaders” and as “qualified workers who can contribute tax dollars toward tomorrow’s needs”).

58. Beginning in 1907, the federal government vested decisions with respect to the admission of aliens in the Secretary of Labor. See Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898; see also Michael J. Churgin, *Immigration Internal Decisionmaking: A View from History*, 78 *Tex. L. Rev.* 1633, 1635 (2000) (reporting proposed legislation to increase number of visas for skilled foreign workers); Richard Delgado & Jean Stefancic, *California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 *UCLA L. Rev.* 1521, 1550 (2000) (discussing the manner in which Mexicans were admitted into the U.S. for migrant labor in California during a period of acute labor shortage occasioned by the beginning of World War II); Marjorie Valbrun, *Renewed Bids for Visas for High-Tech Workers Reflect the Political Influence of Silicon Valley*, *Wall St. J.*, Sept. 15, 1999, at A34 (noting expanded influence of Silicon Valley in 2000 elections); Marjorie Valbrun & Glenn Burkins, *Tight Labor Market Shifts Immigration Debate*, *Wall St. J.*, Feb. 10, 2000, at A2 (discussing shortage of skilled workers in high-tech industries and proposed legislation to raise immigration cap).

59. See, e.g., Lizette Alvarez, *Congress Approves a Big Increase in Visas for Specialized Workers*, *N.Y. Times*, Oct. 4, 2000, at A1 (describing how “the bill’s immediate goal is to help high-tech companies recruit employees”).

60. See *The Economic Need for Immigration*, *Fin. Times*, July 31, 2000, at 19; Julian Simon, *Cato Institute and the National Immigration Forum, Immigration: The Demographic and Economic Facts* (July 7, 1998), available at [http://www.cato.org/pubs/policy\\_report/pr-imitro.html](http://www.cato.org/pubs/policy_report/pr-imitro.html) (on file with the *Columbia Law Review*). However, the economic justification for opening up U.S. borders often takes a rather familiar turn when advocates push for the “right” kind of immigrants—those who speak English, are of a certain education and economic class, and can document that they will not become a public charge. See Jodi Wilgoren, *California and the West, Immigrants Are a Boon to*

The preference for natalist over immigration-based solutions to this intergenerational support problem have often taken the form of loosely-veiled racism, xenophobia, or decolonization.<sup>61</sup> In Israel, for instance, the government has long-favored maternal policies that generously subsidize Jewish women's maternity and childcare needs while actively discouraging Palestinian women's reproduction.<sup>62</sup> Similarly, a government report addressing France's slow population growth suggested that the government allow greater immigration. This solution was dismissed out of hand, as the French regarded their country already too full of foreigners. (Multiculturalism has not been embraced by the majority of the French people as a republican value.<sup>63</sup>) Unlike the myth of the melting pot in the United States, "immigrants have practically no place in the French national memory."<sup>64</sup> Instead, the government opted for very generous state subsidies to French women upon the birth of their second and third child, accompanied by a tightening up of immigration laws, particularly for Franco-Algerians and others from former French colonies.<sup>65</sup> In case there was any mistaking the motivation for France's aggressive natalism, socialist President Francois Mitterrand explained that nationalism, not socialism, justified his raising family benefits by twenty-five percent as one of his first acts in office.<sup>66</sup>

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Economy, Study Says, L.A. Times, July 7, 1998, at A3 (citing a 1990–1991 study that showed that two-thirds of the women giving birth in public hospitals and one in four federal prisoners were undocumented).

61. See Etienne Balibar, Is There a 'Neo-Racism?', in Etienne Balibar & Immanuel Wallerstein, *Race, Nation, Class: Ambiguous Identities* 17, 21 (Chris Turner trans., Verso ed. 1991) (1988) (conceptualizing "new racism" in France as "the reversal of population movements between the old colonies and the old metropolises"); see also Gérard Noiriel, *Difficulties in French Historical Research on Immigration*, in *Immigrants In Two Democracies: French and American Experience* 66, 75 (Donald L. Horowitz & Gérard Noiriel eds., 1992) (arguing that immigration policy, from as far back as 1789, was motivated by "the preservation of the traditional national character . . . admit[ing] the elements capable of assimilation and exclud[ing] the others . . . [T]he leitmotif of French political thought on immigration was that in order to preserve the identity of the French people, a policy of ethnic selection must be applied." (citations omitted)).

62. See, e.g., Mimi Ajzenstadt & John Gal, *Appearances Can Be Deceptive: Gender in the Israeli Welfare State* 15–18 (June 5, 2000) (unpublished manuscript, on file with the *Columbia Law Review*) (describing the "clear-cut desire on the part of Jewish decision-makers to adopt a pro-natal policy to encourage Jewish, but not Arab, demographic growth in the newly formed state").

63. See, e.g., Alec G. Hargreaves, *Immigration, 'Race' and Ethnicity in Contemporary France* 176 (1995) (describing the reform of French nationality laws); *The Missing Children*, *Economist*, Aug. 3, 1991, at 44 (explaining how the French have come to view cultural differences as a negative rather than a positive feature of society).

64. Noiriel, *supra* note 61, at 66, 68.

65. See Hargreaves, *supra* note 63, at 169–76; Nancy L. Green, *Le Melting-Pot: Made in America*, *Produced in France*, 86 *J. Am. Hist.* 1188, 1197 (1999).

66. William Echikson, *A Baby Boom, S'il Vous Plait!*, *Christian Sci. Monitor*, Aug. 24, 1983, at 6. See generally Judy Scales-Trent, *African Women in France: Immigration, Family, and Work*, 24 *Brook. J. Int'l L.* 705, 708–11 (1999) (describing the increase in African, particularly African female, immigration into France).

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Unfortunately, U.S. immigration policy cannot boast of an absence of racist underpinnings. Nineteenth-century immigration laws allowed Chinese men to enter the United States only as laborers, denied entry to Chinese women and children, and prohibited the laborers from intermarrying with non-Chinese women.<sup>67</sup> Such a policy isolated Chinese workers so that they could devote their entire lives to their jobs and prevented an undesirable group from reproducing.<sup>68</sup> Despite our national mythology of the United States as an ethnic melting pot, throughout the nation's history arguments rooted in eugenics and other notions of racial inferiority have been invoked in order to limit immigration and maintain a particular conception of U.S. national identity.<sup>69</sup>

I raise these questions regarding the erasure of the normativity of reproduction with a keen eye to the degree to which the paradigmatic case in each of my examples is a white, middle-class woman. Women of color and low-income women have struggled against overwhelming disincentives to reproduction,<sup>70</sup> including the forced sterilization of African American, Puerto Rican, and American Indian women,<sup>71</sup> and the removal of children of color from their birth parents in order to place them in white families.<sup>72</sup> Our national preference for a natalist solution to preserve society assumes that the production of reproduction take place in white, monied wombs. Similarly, my critique of the privatized family has purchase largely, again, for white, middle-class families. People of color and low-income people have always been vulnerable to intrusive intervention by the state into their family lives.<sup>73</sup> The questions I raise must be asked with these contexts in mind.

This is not to say that the concerns I suggest here have no relevance to women of color and other women whose reproduction has been struc-

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67. Chinese Exclusion Act, ch. 126, 22 Stat. 58, 59 (1882) (repealed 1943).

68. See, e.g., Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy, 1850–1990*, at 45–46 (1993) (amply documenting the manner in which U.S. immigration laws were explicitly designed to shape, limit, and manipulate Chinese American, Korean American, and Japanese American identity).

69. See Desmond King, *Making Americans: Immigration, Race, and the Origins of the Diverse Democracy 166–95* (2000).

70. See, e.g., Dorothy Roberts, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* 23 (1997) (“[Slavery] marked Black women from the beginning as objects whose decisions about reproduction should be subject to social regulation rather than to their own will.”).

71. See generally Nancy Ehrenreich, *The Colonization of the Womb*, 43 *Duke L.J.* 492, 515 (1993) (detailing the involuntary sterilization of women of color through the 1970s who were sterilized because they were believed to be “sexually promiscuous and either too irresponsible or too ignorant to use birth control”); Iris Lopez, *Agency and Constraint: Sterilization and Reproductive Freedom Among Puerto Rican Women in New York City*, 22 *Urb. Anthropology & Stud. Cultural Sys. & World Econ. Dev.* 299, 301–03 (1993) (reviewing incidence of sterilization abuse among Puerto Rican women in New York City).

72. See, e.g., Linda Gordon, *The Great Arizona Orphan Abduction* 309 (1999).

73. See, e.g., Naomi R. Cahn, *Models of Family Privacy*, 67 *Geo. Wash. L. Rev.* 1225, 1243 (1999).

turally discouraged, if not prohibited. I hope these remarks will at least problematize arguments made on behalf of reproductively disfavored women in which equality and fairness are figured as the restoration of the repronormative privileges enjoyed by women who are not subject to race and class bias—their “unproblematic” behavior is the baseline against which we measure the extent of the bias suffered by women of color and lesbians, for instance. We should be cautious about developing strategies in which assimilation to a white, middle-class hetero/repro norm stands for the absence of coercion, and the restoration of a non-biased natural set of choices.

Surely public and private forces that discourage or stigmatize women of color’s reproductive behavior are worthy of strong opprobrium. The data documenting fertility patterns of women in the United States, however, raises interesting questions regarding the presumed baselines that distinguish coerced from freely-chosen reproduction. Notwithstanding structural disincentives to reproduce, women of color are more likely than white women to have children during their lifetime. For instance, 85.5% of Hispanic/Latina women bear at least one child by the age of 44, as compared with 83% of African American and Asian American women, and 80.5% of white, non-Hispanic women.<sup>74</sup> So too, fertility operates in inverse proportion to income and education.<sup>75</sup> This data demonstrates durable “preferences” to reproduce among women of color, women earning lower incomes, and less-educated women, but it tells us nothing about the nature of those preferences. These numbers might suggest intracommunity critical, normative discussions regarding the primacy placed upon reproduction. The unstated premise of much of the literature critiquing policies and practices that discourage women of color’s fertility is the belief that more women would be reproducing in the absence of these structural disincentives, presumably restoring fertility for Hispanic/Latina women to rates in excess of 90%. Might there be any grounds upon which virtually universal motherhood by Latinas would garner critical attention from critical race feminists? According to what theory of well-being, equality, community, and flourishing would a cultural justification or explanation for women of color’s overwhelming reproduction be legitimate? Revealing the genealogy of a community norm that privileges large families is surely an important project, but that genealogy does not, standing alone, resolve the question of whether the community norm is one worthy of preserving prospectively. To call it cultural should begin, not end, our critical attention to this issue.

Another way to cast this concern is to ask: What social practices are in need of explanation? Typically, only the deviant, perverse, disfavored, or odd. You do not see biologists plumbing the human genome in search of the “straight gene,” nor do we worry that heterosexual kindergarten

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74. Bachu & O’Connell, *supra* note 11, at 2 tbl.A.

75. *Id.* at 4 tbl.C.



teachers will make little kids straight.<sup>76</sup> The normativity of white, straight middle-class women's repronormative behavior serves to set-off the lesbian/Black/HIV-positive/infertile/disabled woman's predicament as a marked deviation from the natural order.

It is a common feminist practice to rake a gender-based dragnet over a problem and see what it turns up (glass ceilings, sexual harassment, sex segregation at work, disproportionate amount of caretaking/domestic work done by women at home). But it is also important, from time to time, to take an interest in what it does not pick up (most women are mothers, for instance), and ask why. When we peel away the artifice of the naturalness of the unmarked category, sometimes we find a pay-off to some or a price paid by others. These payments and prices may demand a gender-based analysis—at least in part. My point here is to suggest that legal feminism may benefit from exposing all women's reproduction to this sort of scrutiny.

For these reasons, I hope legal feminists might consider the ways in which repronormative forces affect women's child-bearing and raising "choices," just as (hetero)sexuality has come to be understood as both compulsory and ineluctably the product of heteronormative forces. In understanding this project, feminists should not abandon a concern for the role of reproduction and mothering in women's lives. Instead we could stand to pay closer attention to the taken-for-grantedness of motherhood in feminist legal theory. What is our stake in treating motherhood as a social position and a set of both expectations and entitlements not worthy of the level of interrogation we have visited on other fundamental aspects of women's lives? Too few of us have taken this insight as seriously as I believe Fineman intended it and challenged the baseline that accepts motherhood as an inevitability in women's lives. What are we missing by failing to do so?

## II. GETTING STUCK IN "NO"

Implicitly installing Lysistrada as the patron saint of feminism, for many feminist legal theorists, saying no to sex has been understood as one of the principal ways of saying yes to power.<sup>77</sup> No to incest, no to

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76. For a recent refreshing counterexample, see Gay Teacher's Disclosure Spurs a Debate, N.Y. Times, June 11, 2000, at 36 (In response to parental uproar at a first-grade teacher revealing to his students that his male partner would be "someone you love the way your mom and dad love each other," the school superintendent responded: "Had the teacher at that point said, 'I'm married and have two kids,' no one would have blinked an eye. . . . There should not be a double standard for heterosexual and homosexual teachers.").

77. The parallel of this strategy to that of Foucault is worth noting: "We must not think that by saying yes to sex, one says no to power." 1 Michel Foucault, *The History Of Sexuality* 157 (Robert Hurley trans., 1978). Part of Foucault's project in the first volume of *History of Sexuality* was to critique a conception of sex as a natural drive that stands prior to and outside of relations of power that regulate sexual behavior through organized mechanisms of sexuality. My project in this Essay is to challenge feminist legal theory that

rape, no to sexual harassment—the link between sex and women’s oppression has been one of the fundamental insights of second-wave feminism.<sup>78</sup> Thanks in no small part to the work of Catharine MacKinnon,<sup>79</sup> legal feminism can pride itself in having developed a comprehensive analysis of the ways in which male domination of women is achieved by sexual means.<sup>80</sup> MacKinnon’s dominance in legal feminism can be attributed, in large measure, to the degree to which her description of women’s oppression intuitively resonates with the experiences of many women.

Because there is much about which MacKinnon is right, she cannot be dismissed out of hand. However, the rightness of her project and the degree to which she overstates her prescription leaves legal feminism in an uncomfortable bind: “To the extent that MacKinnon over determines male sexuality as violence, she under determines female sexuality as the null set,”<sup>81</sup> or worse, a terrain fully colonized by male power: “Sex feeling good may mean that one is enjoying one’s subordination; it would not be the first time.”<sup>82</sup> For MacKinnon, all gender is always already about sexuality, and all sexuality is always already about gender. And both gender and sexuality are entirely about women’s subordination to men.<sup>83</sup> Thus, “no” is the only viable feminist answer to any sexual question.

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1) neglects any positive theory of sexuality, 2) overdetermines all sexuality as always already polluted by sexist, male power and therefore toxic to women, or 3) posits a positive conception of sexuality that is the opposite of power.

78. See, e.g., Kathleen Barry, *Female Sexual Slavery* 194 (1979) (“Sex-is-power is the foundation of patriarchy . . . Institutionalized sexism and misogyny—from discrimination in employment, to exploitation through the welfare system, to dehumanization in pornography—stem from the primary sexual domination of women in one-to-one situations.”).

79. E.g., Catharine A. MacKinnon, *Feminism Unmodified* (1987) [hereinafter MacKinnon, *Feminism Unmodified*]; Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (1989) [hereinafter MacKinnon, *Toward a Feminist Theory of the State*].

80. MacKinnon writes:

Gender socialization is the process through which women come to identify themselves as sexual beings, as beings that exist for men . . . According to this revision, one “becomes a woman”—acquires and identifies with the status of female—not so much through physical maturation or inculcation into appropriate role behavior as through the experience of sexuality . . . Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality.

Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *Signs* 515, 531–33 (1982).

81. Katherine M. Franke, *What’s Wrong With Sexual Harassment?*, 49 *Stan. L. Rev.* 691, 741 (1997).

82. MacKinnon, *Feminism Unmodified*, supra note 79, at 218.

83. According to MacKinnon:

[A] theory of sexuality becomes feminist to the extent it treats sexuality as a construct of male power—defined by men, forced on women, and constitutive in the meaning of gender. Such an approach centers feminism on the perspective

Of course, not all legal feminists have signed up for MacKinnon's project; indeed she has as many critics as she has fans. Nevertheless, even among MacKinnon's greatest critics, the objects of scrutiny in the legal feminist landscape by and large remain those brought into view by MacKinnon's frame. In this domain of legal feminism, sexuality is accounted for not as reproduction and dependency, but as danger. Sexuality is something that threatens from without. It is an exogenous colonizing technology of our (women's) oppression, and is always to be examined with a "feminist eye" to the special injury that sexual violence inflicts on women. Thus, within much of legal feminism, when an objectionable practice takes on a sexual character, it has achieved its most injurious form. Assault is bad; rape is much worse. Workplace harassment is bad; workplace sexual harassment is much worse.<sup>84</sup> Emotional betrayal by a spouse is bad; adultery is much worse. Exploitative working conditions are bad; exploitative sex work is much worse.<sup>85</sup>

Just as the specter of a domain of sexuality that is the excess over bare procreation is erased by many legal feminists who theorize sex as dependency, here we see any excess beyond sexual danger equally erased by legal feminists who construct sex as something that is *done to, not by*, women. On that ground, we witness the most aggressive calls from feminists for the legal regulation of rogue sexuality, such as pornography, prostitution, infidelity, sexual violence, and sexual predation. Might there be reason for caution in the feminist impulse to exercise juridical control over this excess?

While I might agree that some of this conduct is unquestionably worthy of legal regulation and public condemnation, the feminist call for greater legal sanctions for sexual violence risks playing into the hands of those who regard human sexuality as something to be indulged in only for the purposes of reproduction.<sup>86</sup> The failure of legal feminists to articulate and press a viable positive domain of non-reproductive sexuality has left such a domain overdetermined as either lesbian territory or the site of surplus male sexuality that is in need of taming, if not excising alto-

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of the subordination of women to men as it identifies sex, that is, the sexuality of dominance and submission, as crucial, as fundamental, as on some level definitive, in that process.

Catharine A. MacKinnon, *Pleasure under Patriarchy*, in *Theories of Human Sexuality* 67–68 (James H. Geer & William T. O'Donohue eds., 1987).

84. Vicki Schultz has described this impulse in sexual harassment jurisprudence. See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *Yale L.J.* 1683, 1685–86 (1998) (describing how the law has come to privilege only sex-based harassment that is sexual in nature).

85. See generally Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 *N.Y.U. L. Rev.* 1220, 1303 (1999) (calling for legal reform to "undermine the degeneracy/respectability dichotomy that prostitution embodies").

86. The unfortunate congruence of feminist and radical right campaigns for the regulation of pornography is the best example of this potentiality.

gether, through juridical means.<sup>87</sup> The overwhelming attention we have devoted to prohibitions against bad or dangerous sex has obscured, if not eliminated, a category of desires and pleasures in which women might actually want to indulge.

Another aspect of this dynamic is revealed in the priority given to arguments marshaled against certain forms of sexual violence against women. Rarely is the diminishment or marginalization of women's sexual pleasure invoked as a reason, albeit one among others, to oppose particularly odious social practices. Limitations on access to sexual education in schools, as well as an absence of affordable contraception and abortion, are targets of feminist criticism for a number of reasons. Yet, by and large, the basis of the legal feminist demand for greater reproductive resources has been grounded in the avoidance of dependency,<sup>88</sup> or the importance of women's autonomy or liberty. Indeed, some legal feminists have framed the abortion issue as one that fundamentally involves enabling *men's* sexual pleasure on the one hand, and women's exploitation on the other.<sup>89</sup> Women's right to enjoy their own body is entirely absent

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87. An ironic implication of this tendency lies where legislatures have enacted laws to address various types of male sexual transgression, but have done so in gender neutral terms, thus exposing women to regulation by these same laws in equal degree. The legal regulation of pornography, adultery, and domestic violence, for instance, has resulted in the seizure of feminist and lesbian writings, see, e.g., Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 Va. L. Rev. 1099, 1145-47 (1993) (describing seizure of lesbian magazines and books under Canadian anti-pornography law); enforcement of adultery laws against women, see, e.g., *Bonura v. Bonura*, 505 So. 2d 143, 145 (La. Ct. App. 1987) (granting divorce in favor of husband on grounds of wife's adultery); *Zeringue v. Zeringue*, 479 So. 2d 443, 446 (La. Ct. App. 1985) (upholding mutual fault divorce based on adultery by both parties); *Armistead v. Armistead*, No. 0614-97-3, 1998 WL 37320, at \*2-\*3 (Va. Ct. App. Feb. 3, 1998) (confirming that adultery by wife is grounds for divorce in husband's favor); *Peyton v. Countryside Orthopaedics, P.C.*, No. 18157, 1999 WL 1417214, at \*4 (Va. Cir. Ct. Oct. 8, 1999) (wife's adultery considered important if contributing to divorce); and a steep rise in arrests of women pursuant to mandatory arrest policies in domestic violence situations, see Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 Harv. L. Rev. 550, 588 n.190 (1999).

88. See, e.g., Robin West, *Caring for Justice* 141-42 (1997) [hereinafter West, *Caring for Justice*]; Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 Fordham L. Rev. 1313, 1325 (1997) ("What *Griswold* and *Eisenstadt* protected for both married and unmarried individuals was the freedom to engage in heterosexual intercourse without fear of familial and reproductive consequences.").

89. This has been, in essence, Catharine MacKinnon's approach to the issue. See, e.g., Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1300 (1991) ("Women can have abortions so men can have sex."). Discussions with Kendall Thomas brought this angle to my attention. Opposition to female genital cutting is another excellent example of the sublimation of women's pleasure in the struggle to eliminate sexist practices. Those who advocate for the elimination of these cuttings do so on the grounds that these practices expose women to infection, are extremely painful, and are likely to produce infertility or incontinence. The reduction, if not elimination, of clitoral sexual pleasure is mentioned belatedly, if at all, by many of the activists who oppose these practices. The effect that genital cuttings might have on a girl's capacity for sexual pleasure was not once invoked as among the justifications for federal legislation

in these feminist legal arguments. It has been the gay and queer legal theorists who see these issues as about a “right to sex.”<sup>90</sup>

I wonder if an intergenerational moment might have arrived when we would want to de-sacrilize the sex-danger alchemy within feminist legal theory—not to ignore the significance of sexual violence for women, but instead to de-essentialize sex’s a priori status as a site of danger for women and one best cleansed of such danger. An example may best illustrate the point. Some of us who teach sexual harassment law have begun using a heuristic that excavates an interesting generational shift. I now ask my students which practice they would find most humiliating, objecti-

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condemning so-called “female genital mutilation.” See, e.g., H.R. Rep. 103-501, at 10 (1994). The findings state that complications from FGM are common and include immediate shock, bleeding, infection, and death as well as delayed medical problems such as scarring, menstrual pain and blockage, pelvic and urinary tract infections, severe injury and pain during intercourse, infertility, and difficulty with labor and delivery. There also may be psychological complications since these painful rituals can be a source of extreme emotional trauma.

Id. See also Introduction of Legislation to Prevent Female Genital Mutilation and the Dangers of the National Security Revitalization Act, 141 Cong. Rec. H1695 (daily ed. Feb. 14, 1995) (statement of Rep. Schroeder) (“FGM causes serious health problems—bleeding, chronic urinary tract and pelvic infections, build-up of scar tissue, and infertility. Women who have been genitally mutilated suffer severe trauma, painful intercourse, higher risk of AIDS, and childbirth complications.”). Ali Miller and Carole Vance have convinced me that Representative Schroeder and other Western or United Nations feminists have downplayed or eliminated the pleasure argument from their advocacy against female genital surgeries as a strategic matter. While this judgment may make sense on *real politik* grounds, it does have the effect of perpetuating the erasure of women’s sexual pleasure as a significant human rights injury. Indeed, women do not have a human right to the sexual enjoyment of their bodies, but only a right to freedom from infection and pain. See Report of the World Conference of the U.N. Decade for Women: Equality, Development and Peace, Copenhagen, July 14–30, 1980, at 34, U.N. Doc. A/CONF.94/35 (1980). Radhika Coomaraswamy, the United Nations Special Rapporteur on Violence Against Women, has framed women’s sexual rights as fundamentally reproductive in nature: “the issue of [women’s] sexual rights . . . refers generally to a woman’s control over her sexuality and her access to primary and secondary health care and reproductive technologies.” Radhika Coomaraswamy, *Reinventing International Law: Women’s Rights as Human Rights in the International Community*, Edward A. Smith Lecture at Harvard Law School (Mar. 12, 1996), available at <http://www.law.harvard.edu/programs/HRP/Publications/radhika.html> (on file with the *Columbia Law Review*). Any excess over mere reproduction is framed as an issue of concern to “the gay movement.” Id. While Coomaraswamy eloquently makes the case that female genital cutting is a violation of women’s human rights, she fails to regard the human rights issue raised by these practices as relating to a limitation on women’s sexual pleasure.

90. See David B. Cruz, “The Sexual Freedom Cases”? Contraception, Abortion, Abstinence, and the Constitution, 35 Harv. C.R.-C.L. L. Rev. 299, 300–03 (2000); Richard D. Mohr, Mr. Justice Douglas at Sodom: Gays and Privacy, 18 Colum. Hum. Rts. L. Rev. 43, 83 (1986) (“[T]hough the Court has failed to acknowledge the logical conclusion to its privacy decisions, [the Court] protect[s] the right to have sex.”). Sylvia Law would be an exception to this more general rule in recognizing and arguing for a right to sex on feminist grounds. See, e.g., Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 225 (“People have a strong affirmative interest in sexual expression and relationships.”).

fyng, or objectionable: having a male boss ask you, out of nowhere, to (i) kiss him, (ii) babysit for his kids, or (iii) be responsible for serving coffee at staff meetings. Few of my female students select the kiss as the most objectionable encounter. When we discuss their reasons for their selections,<sup>91</sup> I cannot easily write off their failure to get the “right feminist answer” to an impoverished feminist education or false consciousness. Rather, sex seems to have become a less “dense transfer point for relations of [gender-based] power”<sup>92</sup> for some women a generation younger than my feminist peers and I. This is not to say that sex no longer plays a role in gender-based hierarchies, but rather, that we might want to reassess the synergistic danger it presents today as compared with the period in which we first formulated these analyses twenty years ago. Such a generational shift highlights the fact that a feminist approach to sex and sexuality must still simultaneously address the reduction of dangers we face, the burdens of dependency, and the possibilities for women’s experiences of pleasure.

Surely legal feminists must remain committed to the idea that “sexuality [is] not an unchanging biological reality or a universal, natural force, but [is], rather, a product of political, social, economic, and cultural processes.”<sup>93</sup> In other words, sexuality has a history. My concern is that current feminist legal theory at times gives way to an impulse to dehistoricize sexuality when we suture women’s bodies to motherhood and the inevitability of violence.

### III. WHAT HAVE WE DONE?

In 1984, Gayle Rubin mused that feminism was best equipped to analyze and address gender-based subordination, and that a different discourse was needed to adequately analyze sexuality.<sup>94</sup> From this observation, many believe,<sup>95</sup> lesbian and gay, and then queer, theory was born.<sup>96</sup> For example, the introduction to *The Lesbian and Gay Studies Reader*, pub-

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91. Most students rate babysitting as by far the most objectionable, responding to the greater offensiveness of maternal stereotyping over sex.

92. Foucault, *supra* note 77, at 103.

93. Kathy Peiss & Christina Simmons, *Passion and Power: An Introduction*, in *Passion and Power* 3, 3 (Kathy Peiss & Christina Simmons eds., 1989).

94. See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *Pleasure and Danger* 267, 307 (Carole S. Vance ed., 1984) (“Feminism is the theory of gender oppression. To automatically assume that this makes it the theory of sexual oppression is to fail to distinguish between gender, on the one hand, and erotic desire, on the other.”).

95. Ironically, Rubin is not among those who hold this belief. See Interview, Gayle Rubin with Judith Butler, *Sexual Traffic*, in *Feminism Meets Queer Theory* 68, 73 (Elizabeth Weed & Naomi Schor eds., 1997).

96. Rubin’s “Thinking Sex” is the first essay in *The Lesbian and Gay Studies Reader* (Henry Abelove et al. eds., 1993). Eve Sedgwick’s *Epistemology of the Closet* is widely regarded as one of queer theory’s early canonical texts. Here Sedgwick argued that the question of gender and the question of sexuality are “not the same question, that in twentieth-century Western culture gender and sexuality represent two analytic axes that

lished some ten years later, claimed that “[l]esbian/gay studies does for *sex* and *sexuality* approximately what women’s studies does for gender.”<sup>97</sup> Some theorists, both feminist and queer alike, have understood the parallel evolution of feminist and queer theory over the last decade to be grounded in the artifice that “the kind of sex that one *is* and the kind of sex that one *does* belong to two separate kinds of analysis.”<sup>98</sup>

But surely it is a mistake to draw such a rigid distinction between acts and identities, between who we want to be and whom we want to be with, and between sex as adjective (that thing we are) and sex as verb (that thing we do). To set up the analyses of gender and sexuality as separate critical enterprises is to misread Rubin. Her point was not that issues of sex and sexuality should be fully disaggregated from feminism, but rather that she “wanted to be able to think about oppression based on sexual conduct or illicit desire that was distinct from gender oppression (although . . . not necessarily unrelated or in opposition to it).”<sup>99</sup> The wisdom imparted by Rubin in “Thinking Sex,” that neither Marxism nor feminism provided all the analytic tools we needed to adequately account for sexuality-based oppression, does not mean that forever more these two critical discourses should have nothing to say about the issue of sexuality. Rather, “feminism’s critique of gender hierarchy must be incorporated into a radical theory of sex, and the critique of sexual oppression should enrich feminism.”<sup>100</sup>

Despite such a challenge, most legal feminists seem to have lost a taste for exploring the intersecting stakes that queer and feminist theory have in fully theorizing questions of sexuality. The dependency or danger stance taken by most legal feminists when it comes to questions of sexuality is a testament to the persuasive power of the structural materialism of theorists such as Catharine MacKinnon and Martha Fineman. MacKinnon has rendered feminism the privileged site for analyzing sexuality understood as danger by subordinating sexual politics to sex-based subordination.<sup>101</sup> MacKinnon’s “nearly metaphysically perfect” portrayal of sexuality as always, already, and absolutely about gender-based subordi-

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may productively be imagined as being distinct from one another as, say, gender and class, or class and race.” Eve Sedgwick, *Epistemology of the Closet* 30 (1990).

97. Henry Abelove et al., Introduction to *The Lesbian and Gay Studies Reader*, supra note 96, at xv, xv.

98. Judith Butler, *Against Proper Objects*, in *Feminism Meets Queer Theory*, supra note 95, at 1, 7. Butler, I must note, is not among the theorists who hold this view.

99. Rubin with Butler, supra note 95, at 96. Rubin says, “I was afraid that if there were no independent analysis of sexual stratification and erotic persecution, well-intentioned feminists and other progressives would support abusive, oppressive, and undeserved witch hunts.” *Id.* at 96–97.

100. Rubin, *Thinking Sex*, supra note 94, at 309.

101. See, e.g., MacKinnon, *Feminism Unmodified*, supra note 79, at 218 (arguing that “sexism is basic” and underlies sex); Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 178 (1979) (“Sexual harassment . . . is socially incarnated in sex roles.”); MacKinnon, *Toward a Feminist Theory of the State*, supra note 79, at 127 (“Male dominance is sexual.”).

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nation and domination renders Rubin's demand for an analysis of sexuality outside of gender not only irrelevant, but incomprehensible. On the other hand, Martha Fineman has done an outstanding job of decoupling relationships grounded in dependency from those grounded in sexual desire, and in so doing has provoked a radical rethinking of motherhood.<sup>102</sup> In a sense, by framing the feminist project in gender-based terms, MacKinnon has explicitly *ruled in* all sexuality as gender-based subordination, while Fineman has implicitly *ruled it all out*, preferring to set her sights on gender and dependency constructed in asexual terms. But too few of us, as legal feminists, have stepped in to re-theorize the significance for women of non-reproductive intimacy, desire, and eroticism that end up as the detritus of Fineman's work.

Is there sexuality beyond kinship that we could call feminist? If Fineman pries open the possibility of non-reproductive sex or other intimate relationships with someone or someones other than the person or persons with whom one parents, what would be a feminist approach to these erotic/intimate possibilities? What if we went all the way with Fineman's suggestion, and declared women's sexuality to lie *only* in this non-reproductive excess?<sup>103</sup> After all, this is the domain of the female orgasm. We might want to explore, if only provisionally, what we might gain if we disaggregated reproduction from sex, and treated them as two distinct aspects of women's lives, potentially interrelated, but not necessarily so. Perhaps it is time that we dust off our Shulamith Firestone.<sup>104</sup>

What might be the consequences of de-sexualizing kinship relationships, not for kinship, which is Fineman's project, but for sexuality? Do we run any risk of constructing women as de-sexualized dependency workers who spend most of their intimate energies on runny noses and very little on other more, er, adult body functions? Might we not want to explore the necessary connections between the regulation of kinship/family and the regulation of sexuality? Subsidies for reproduction surely incentivize certain repronormative uses of the body, not to mention marriage, monogamy, and the heterosexual family—all of which are methods

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102. See, e.g., Fineman, *Neutered Mother*, supra note 26, at 8 ("I offer a utopian re-  
visioning of the family—a reconceptualization of family intimacy that redefines the legal  
core unit away from our current focus on sexual or horizontal intimacy.").

103. Sedgwick seems to lay claim to this excess as the rightful domain of queer theory:  
"There is a powerful argument to be made that a primary (or *the* primary) issue in gender  
differentiation and gender struggle is the question of who is to have control of women's  
(biologically) distinctive reproductive capability." Sedgwick, supra note 96, at 28; see also  
Biddy Martin, *Sexualities Without Genders and Other Queer Utopias*, 24 *Diacritics* 104,  
107 (1994) ("Gender, and the theory of gender offered by feminism, then, are associated  
[by Sedgwick] with reproduction and with women."). I want to resist a doctrinal boundary  
dispute in which queer theory picks up where feminism leaves off, and the reproductive or  
non-reproductive nature of the sexual activity is what separates a queer from a feminist  
issue.

104. Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution*  
233–34 (1970) (arguing that the only means to achieve women's liberation is through the  
technological separation of reproduction from the female body).

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by which our hedonic lives are tied to “proper” kinship formation favored by the state.

In the absence of a robust cultural norm in which women’s erotic pleasure can be valorized and celebrated for its own sake, many women feel they are faced with two rather undesirable choices when they consider their own erotic desires separate from reproduction or as something offered in exchange for domestic labor. They risk either being labeled sluts or nymphomaniacs<sup>105</sup> if they seek out sexual pleasure for its own sake, or they face the dilemma described by Elizabeth Abbott in her new book on the history of celibacy.<sup>106</sup> She explains her own decision to be celibate:

[C]elibacy has major tangible benefits, namely respite from the time-consuming burdens of housewifery . . . . No longer do I need to plan, shop for, cook, serve, and clean up after a week’s meals, or iron the shirts I once foolishly boasted I could do better than the dry cleaner, or answer that infernal question “Honey, where are my socks?”<sup>107</sup>

Being a de-eroticized mother cannot be the only viable alternative to being a slut or celibate.

Men have almost entirely colonized the domain of sexuality that is the excess over reproduction as for them and about them. Movies, advertising, and fashion are largely projections of male fantasy—what would it mean for women to appropriate some of this cultural excess? Just as we have accepted that sexual orientation is not merely a natural phenomenon, might we also want to explore the degree to which our passions, fantasies, secret and not so secret desires are products of the world we live in? Judith Walkowitz has observed that “[w]omen . . . do not simply experience sexual passion and ‘naturally’ find the words to express those feelings.”<sup>108</sup> Rather, those things we experience as our own desires are largely the product of a complex combination of external systems of social forces and internal personalized conventions residing in the unconscious.<sup>109</sup>

Surely legal feminists would want to theorize the *sexual* nature of human sexuality that is the “excess over or potential difference from the bare choreographies of procreation.”<sup>110</sup> Is there a reason why we have neglected to take notice of the fact that women are substantially more likely to be unhappy about their sex lives than are men? Is there something that we, as legal feminists, should be doing to address the fact that

105. See Carol Groneman, *Nymphomania: A History* 121 (2000).

106. See Elizabeth Abbott, *A History of Celibacy* 429–30 (2000).

107. *Id.* at 429.

108. Walkowitz, *supra* note 6, at 9.

109. Teresa de Lauretis has written a lovely essay in which she elaborates a theory of sexuality that draws in equal measure from Foucault’s theory of social construction and Freud’s notion of the unconscious. See Teresa de Lauretis, *The Stubborn Drive*, 24 *Critical Inquiry* 851, 851–63 (1998).

110. Sedgwick, *supra* note 96, at 29.

forty-three percent of women in the United States are suffering from diagnosable sexual dysfunction, symptomized by a lack of interest in sex, inability to achieve orgasm or arousal, and pain or discomfort during sex?<sup>111</sup>

We have done a more than adequate job of theorizing circumstances in which “no” is the right answer to a sexual encounter, but where are we on the conditions under which we would be inclined to say “yes”? What particular contribution can we as legal theorists make to these questions? Why have we done such a meager job of thinking of the “sex issue” in positive rather than negative terms, particularly compared with our sisters in other disciplines?

Many feminist legal strategies presuppose men’s sexuality as ever-dangerous, and situate female sexuality as its opposite—a trap set, in part, by the overwhelming heteronormativity of much of this feminist legal theorizing. Within this normative frame, one’s desire runs in the opposite direction of one’s identity, and male and female identity are set up in antinomial terms. Men desire women, their opposite, and that desire takes a form that is good for them, and bad for us, empowers them, subordinates us, subjectifies them, objectifies us. Many feminist theorists have taken up the project of using law to tame sexual danger, hoping to leave in their wake a domain of safe sex, of love and intimacy in which danger figures as sex’s opposite.<sup>112</sup>

Such a theory of the relationship between gender, sexuality, and subordination provides no satisfactory purchase on the question of women’s sexuality, except as to say that it amounts to the projection of violent male desire. This conclusion is manifestly unappealing, for it leaves as its remainder only three ways to affirmatively conceive women’s desire once liberated from the objectifying constraints of patriarchy: One, a mere absence or void, best understood as the trauma or injury that male sexuality leaves in its wake. Two, a warm, fuzzy, soft-focused cuddling<sup>113</sup> not the hot, steamy, edgy stuff that got us into trouble in the first place. Or three, a desire that risks bumping up against danger. Feminist legal theory often dismisses this last option as either false consciousness, or worse, women imitating male sexuality. But to evacuate women’s sexuality of any risk of a confrontation with shame, loss of control, or objectification

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111. Edward O. Laumann et al., *Sexual Dysfunction in the United States: Prevalence and Predictors*, 281 *JAMA* 537, 540 (1999) [hereinafter Laumann et al., *Sexual Dysfunction*] (finding that sexual dysfunction is more prevalent among women than men, and is associated with age, race, and education).

112. See West, *Caring for Justice*, supra note 88, at 114–16 (arguing that women’s sexual pleasure is necessarily sacrificed in sexual relationships with men because of a fear of violence); Mary Becker, *Women, Morality, and Sexual Orientation*, 8 *UCLA Women’s L.J.* 165, 191–203 (1998).

113. Michael Warner warns of sexual moralism that “too often paint[s] a sanitized, pastoral picture of sex, as though it were simply joy, light, healing, and oneness with the universe.” Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* 3 (1999).

strikes me as selling women a sanitized, meager simulacrum of sex not worth getting riled up about in any case.

Desire is not subject to cleaning up, to being purged of its nasty, messy, perilous dimensions, full of contradictions and the complexities of simultaneous longing and denial. It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure so resistant to rational explanation. It is also what makes pleasure, not a contradiction of or haven from danger, but rather a close relation. These aspects of desire have been marginalized, if not vanquished, from feminist legal theorizing about women's sexuality.

It bears noting that a soft-focused portrayal of female sexuality that is set off against the hard-edged conception of male sexuality, as well as the inclination to reduce questions of sexuality to matters of kinship or mothering, mirrors the dominant account of female and male sexuality provided by traditional sexologists that has undergone rigorous critique by feminist and queer sex researchers.<sup>114</sup> According to Rebecca Young, the view that predominated until less than twenty years ago characterized female sexuality as "romantic, non-genital, passive/responsive, monogamous, and not open to autonomous expression. In this stereotype, the normal woman is so chaste that her arousal can scarcely be termed sexual, but is instead a purely emotional response: 'romantic longing.'<sup>115</sup> The material Young examines reveals "[f]emale sexual desire and expression [is] not so much an end in itself as . . . a means for fulfilling other needs and desires: love and motherhood."<sup>116</sup>

It cannot be right that feminists should leave to queer theorists the job of providing an affirmative theory of sex that accepts and accounts for the complex ways in which denial, shame, control, prohibition, objectification, and power enable or capacitate desire and pleasure. Surely a thick conception of gender, one that we would call feminist, should be brought to bear on this project.

On the other hand, perhaps the place we find ourselves in legal feminism reveals something more about our situation within law. Is it possible that the task of theorizing yes is not one easily susceptible to the analytical tools legal theory provides? Or have we, despite our frequent protestation to the contrary,<sup>117</sup> fallen victim to the myopia of which our discipline

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114. For a recent sustained critique, see Rebecca Marie Young, *Sexing the Brain: Measurement and Meaning in Biological Research on Human Sexuality* 251–99 (2000) (unpublished Ph.D. dissertation, Columbia University) (on file with the *Columbia Law Review*).

115. *Id.* at 260.

116. *Id.* at 253.

117. See, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 *Mich. L. Rev.* 2271, 2279 (1990); Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 *U. Chi. L. Rev.* 453, 456 (1992); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *Harv. C.R.-C.L. L. Rev.* 401, 405 (1987).

in general suffers: thinking of rights and liberties primarily in negative rather than positive terms?<sup>118</sup> If this is the cause, at least in part, of legal feminism's failure to take on the simultaneous projects of negative and positive sexual liberty, what would that positive project look like?

Perhaps we face an opportunity to drag the feminist net over particular areas of law and see how a gendered construction of sexuality plays out. Take tort damages, for instance. Men are more than twice as likely to plead sexual dysfunction as a basis for money damages in personal injury claims than are women.<sup>119</sup> In some cases, courts are more willing to reward the physical disfigurement of women than their loss of sexual pleasure.<sup>120</sup> The recent study of sexual dysfunction among women found that there are a substantial number of women who have suffered loss of sexual desire and satisfaction as a result of various trauma.<sup>121</sup> That injury has been rendered invisible in tort law. Particularly given that we are now living in the Viagra years, it would behoove us as legal theorists to pursue strategies that would elevate women's sexual pleasure to the same level as that enjoyed by men. While women's rights advocates fought hard in Congress and in the courts<sup>122</sup> to have reproduction count as a major life activity in the Americans with Disabilities Act, what are the implications of this statutory preference, and the arguments we have made in its support, for women's non-reproductive sexuality? Women's sexual pleasure is not currently recognized in law as a major life activity.

As cultural practices, our legal practices produce legal and social subjects. We, the feminist legal theorists, must remain attentive to the dangers of pursuing modes of analysis and argument that suffer from a kind of theoretical phototropism that has amply nourished a theory of sexuality as dependency and danger at the expense of a withering positive theory of sexual possibility. Given the well-known dangers that lie in the substantive legal regulation of sexual pleasure,<sup>123</sup> it may be that the best we can aspire to, as feminist *legal* theorists, is a set of legal analyses, frames, and supports that erect the enabling conditions for sexual pleasure. If that modest work is the best we can expect from law, that still leaves us much work to be done.

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118. See, e.g., Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. Rev. 589, 590-93 (1986).

119. This observation is based upon my less-than-scientific survey of personal injury actions over the last ten years.

120. See, e.g., *Hammer v. Township of Livingston*, 723 A.2d 988, 992 (N.J. Super. Ct. App. Div. 1999) (concluding that plaintiff's allegation of loss of regular sexual relations is not a "substantial" loss of a bodily function).

121. See Laumann et al., *Sexual Dysfunction*, supra note 111, at 537.

122. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (finding that reproduction qualifies as a major life activity under the ADA).

123. Foucault cautions against involving the law in regulating the domain of the sexual and the erotic. See Michel Foucault, *Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984*, at 200 (Lawrence D. Kritzman ed. & Alan Sheridan et al. trans., 1988), discussed in Katherine M. Franke, *Putting Sex to Work*, 75 Denv. U. L. Rev. 1139, 1142 (1998).

**In the Matter of the ESTATE OF  
Marshall G. GARDINER,  
Deceased.**

**No. 85,030.**

Supreme Court of Kansas.

March 15, 2002.

After father died intestate, son petitioned for letters of administration, naming himself as sole heir, and claiming that marriage between father and post-operative male-to-female transsexual was void. The Leavenworth District Court, Gunnar A. Sundby, J., granted summary judgment to son and denied partial summary judgment to transsexual. Transsexual appealed. The Court of Appeals, 29 Kan.App.2d 92, 22 P.3d 1086, reversed and remanded. On son's petition for review, the Supreme Court, Allegrucci, J., held that: (1) a post-operative male-to-female transsexual is not a woman within the meaning of the statutes recognizing marriage, and (2) a marriage between a post-operative male-to-female transsexual and a man is void as against public policy.

Affirmed in part, and reversed in part.

The opinion of the court was delivered by ALLEGRUCCI, J.

J'Noel Gardiner appealed from the district court's entry of summary judgment in favor of Joseph M. Gardiner, III, (Joe) in the probate proceeding of Marshall G. Gardiner. The district court had concluded that the marriage between Joe's father, Marshall, and

J'Noel, a post-operative male-to-female transsexual, was void under Kansas law.

The Court of Appeals reversed and remanded for the district court's determination whether J'Noel was male or female at the time the marriage license was issued. See *In re Estate of Gardiner*, 29 Kan.App.2d 92, 22 P.3d 1086 (2001). The Court of Appeals directed the district court to consider a number of factors in addition to chromosomes. Joe's petition for review of the decision of the Court of Appeals was granted by this court.

The following facts regarding J'Noel's personal background are taken from the opinion of the Court of Appeals:

"J'Noel was born in Green Bay, Wisconsin. J'Noel's original birth certificate indicates J'Noel was born a male. The record shows that after sex reassignment surgery, J'Noel's birth certificate was amended in Wisconsin, pursuant to Wisconsin statutes, to state that she was female. J'Noel argued that the order drafted by a Wisconsin court directing the Department of Health and Social Services in Wisconsin to prepare a new birth record must be given full faith and credit in Kansas.

"Marshall was a businessman in northeast Kansas who had accumulated some wealth. He had one son, Joe, from whom he was estranged. Marshall's wife had died some time before he met J'Noel. There is no evidence that Marshall was not competent. Indeed, both Marshall and J'Noel possessed intelligence and real world experience. J'Noel had a Ph.D in finance and was a teacher at Park College.

"J'Noel met Marshall while on the faculty at Park College in May 1998. Marshall was a donor to the school. After the third or fourth date, J'Noel testified that Marshall brought up marriage. J'Noel wanted to get to know Marshall better, so they went to Utah for a trip. When asked about when they became sexually intimate, J'Noel testified that on this trip, Marshall had an orgasm. J'Noel stated that sometime in July 1998, Marshall was told about J'Noel's prior history as a male. The two were married in Kansas on September 25, 1998.

"There is no evidence in the record to support Joe's suggestion that Marshall did not know about J'Noel's sex reassignment. It had been completed years before Marshall and J'Noel met. Nor is there any evidence that Marshall and J'Noel were not compatible.

"Both parties agree that J'Noel has gender dysphoria or is a transsexual. J'Noel agrees that she was born with male genitalia. In a deposition, J'Noel testified that she was born with a 'birth defect'—a penis and testicles. J'Noel stated that she thought something was 'wrong' even pre-puberty and that she viewed herself as a girl but had a penis and testicles.

"J'Noel's journey from perceiving herself as one sex to the sex her brain suggests she was, deserves to be detailed. In 1991 and 1992, J'Noel began electrolysis and then thermolysis to remove body hair on the face, neck, and chest. J'Noel was married at the time and was married for 5 years. Also, beginning in 1992, J'Noel began taking hormones, and, in 1993, she had a tracheal shave. A tracheal shave is surgery to the throat to change the voice. All the while, J'Noel was receiving therapy and counseling.

"In February 1994, J'Noel had a bilateral orchiectomy to remove the testicles. J'Noel also had a forehead/eyebrow lift at this time and rhinoplasty. Rhinoplasty refers to plastic surgery to alter one's nose. In July 1994, J'Noel consulted with a psychiatrist, who opined that there were no signs of thought disorder or major affective disorder, that J'Noel fully understood the nature of the process of transsexual change, and that her life history was consistent with a diagnosis of transsexualism. The psychiatrist recommended to J'Noel that total sex reassignment was the next appropriate step in her treatment.

"In August 1994, J'Noel underwent further sex reassignment surgery. In this surgery, Eugene Schrang, M.D., J'Noel's doctor, essentially cut and inverted the penis, using part of the skin to form a female vagina, labia, and clitoris. Dr. Schrang, in a letter dated October 1994, stated that J'Noel has a 'fully functional

vagina' and should be considered 'a functioning, anatomical female.' In 1995, J'Noel also had cheek implants. J'Noel continues to take hormone replacements.

....

"After the surgery in 1994, J'Noel petitioned the Circuit Court of Outagamie County, Wisconsin, for a new birth certificate which would reflect her new name as J'Noel Ball and sex as female. The court issued a report ordering the state registrar to make these changes and issue a new birth certificate. A new birth certificate was issued on September 26, 1994. The birth certificate indicated the child's name as J'Noel Ball and sex as female. J'Noel also has had her driver's license, passport, and health documents changed to reflect her new status. Her records at two universities have also been changed to reflect her new sex designation." 29 Kan.App.2d at 96-98, 22 P.3d 1086.

Before meeting Marshall, J'Noel was married to S.P., a female. J'Noel and S.P. met and began living together in 1980, while J'Noel was in college. They married in 1988. J'Noel testified she and S.P. engaged in heterosexual relations during their relationship. J'Noel believed she was capable of fathering children, and the couple used birth control so S.P. would not become pregnant. J'Noel and S.P. divorced in May 1994.

J'Noel Ball and Marshall Gardiner were married in Kansas in September 1998. Marshall died intestate in August 1999. This legal journey started with Joe filing a petition for letters of administration, alleging that J'Noel had waived any rights to Marshall's estate. J'Noel filed an objection and asked that letters of administration be issued to her. The court then appointed a special administrator. Joe amended his petition, alleging that he was the sole heir in that the marriage between J'Noel and Marshall was void since J'Noel was born a man. J'Noel argues that she is a biological female and was at the time of her marriage to Marshall. There is no dispute that J'Noel is a transsexual.

According to Stedman's Medical Dictionary 1841 (26th ed.1995), a transsexual is a "person with the external genitalia and sec-

ondary sexual characteristics of one sex, but whose personal identification and psychosocial configuration is that of the opposite sex; a study of morphologic, genetic, and gonadal structure may be genitally congruent or incongruent." A post-operative transsexual, such as J'Noel, is a person who has undergone medical and surgical procedures to alter "external sexual characteristics so that they resemble those of the opposite sex." Stedman's Med. Dict. 1841 (26th ed.1995). The external sexual characteristics may include genitalia, body and facial hair, breasts, voice, and facial features.

Joe opposed J'Noel's receiving a spousal share of Marshall's estate on several grounds-waiver, fraud, and void marriage in that J'Noel remained a male for the purpose of the "opposite sex" requirement of K.S.A. 2001 Supp. 23-101.

On cross-motions for summary judgment, the district court denied J'Noel's motion by declining to give full faith and credit to J'Noel's Wisconsin birth certificate, which had been amended as to sex and name. Joe's waiver argument was based on a writing that purports to waive J'Noel's interests in Marshall's property. The district court declined to conclude as a matter of law that the writing constituted a waiver. The factual issue of fraud was not decided on summary judgment. The district court granted Joe's motion with regard to the validity of the marriage on the ground that J'Noel is a male.

J'Noel appealed from the district court's entry of summary judgment against her and in Joe's favor. Joe did not cross-appeal. The Court of Appeals affirmed the district court's ruling denying J'Noel's motion for summary judgment. J'Noel did not file a cross-petition for review of that ruling, and it is not before this court. Since Joe did not file a cross-appeal of the district court's decision on waiver and fraud, those issues are likewise not before the court. The sole issue for review is whether the district court erroneously entered summary judgment in favor of Joe on the ground that J'Noel's marriage to Marshall was void.



On the question of validity of the marriage of a post-operative transsexual, there are two distinct “lines” of cases. One judges validity of the marriage according to the sexual classification assigned to the transsexual at birth. The other views medical and surgical procedures as a means of unifying a divided sexual identity and determines the transsexual’s sexual classification for the purpose of marriage at the time of marriage. The essential difference between the two approaches is the latter’s crediting a mental component, as well as an anatomical component, to each person’s sexual identity.

Among the cases brought to the court’s attention not recognizing a mental component or the efficacy of medical and surgical procedures are *Corbett v. Corbett*, 2 All E.R. 33 (1970); *In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (1987); and *Littleton v. Prange*, 9 S.W.3d 223 (Tex.Civ.App.1999), *cert. denied* 531 U.S. 872, 121 S.Ct. 174, 148 L.Ed.2d 119 (2000). Recognizing them are *M.T. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204, *cert. denied* 71 N.J. 345, 364 A.2d 1076 (1976); and *In re Kevin*, FamCA 1074 (File No. SY8136 OF 1999, Family Court of Australia, at Sydney, 2001).

The district court, in the present case, relied on *Littleton*. The Court of Appeals relied on *M.T. In re Kevin* was decided after the Court of Appeals issued its opinion, and it cites *In re Estate of Gardiner* with approval; review of that case by the full Family Court of Australia has been heard, but an opinion has not yet been issued.

*Littleton* was the source for the district court’s language and reasoning. The Texas court’s statement of the issue was: “[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?” 9 S.W.3d at 224. For what purported to be its findings of fact, the district court restated the Texas court’s conclusions nearly verbatim (See 9 S.W.3d at 230–31):

“Medical science recognizes that there are individuals whose sexual self-identity is in conflict with their biological and anatomical sex. Such people are termed transsexuals. . . .

“[T]ranssexuals believe and feel they are members of the opposite sex. . . . J’Noel is a transsexual.

“[T]hrough surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts. Transsexual medical treatment, however, does not create the internal sexual organs of a woman, except for the vaginal canal. There is no womb, cervix or ovaries in the post-operative transsexual female.

“[T]he male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically, a post-operative female transsexual is still a male. . . .

“The evidence fully supports that J’Noel, born male, wants and believes herself to be a woman. She has made every conceivable effort to make herself a female.

“[S]ome physicians would consider J’Noel a female; other physicians would consider her still a male. Her female anatomy, however, is still all man-made. The body J’Noel inhabits is a male body in all aspects other than what the physicians have supplied.

“From that the Court has to conclude, and from the evidence that’s been submitted under the affidavits, as a matter of law, she-J’Noel is a male.”

The Court of Appeals found no error in the district court’s not giving the Wisconsin birth certificate full faith and credit. 29 Kan. App.2d at 125, 22 P.3d 1086. With regard to the validity of the marriage, the Court of Appeals reversed and remanded for the district court’s determination whether J’Noel was male or female, for the purpose of K.S.A. 2001 Supp. 23–101, at the time the marriage license was issued. 29 Kan.App.2d at 127–28, 22 P.3d 1086.

The Court of Appeals rejected the reasoning of *Littleton* “as a rigid and simplistic approach to issues that are far more complex than addressed in that opinion.” 29 Kan. App.2d at 127, 22 P.3d 1086. The Court of Appeals “look[ed] with favor on the reasoning and the language” of *M.T.* 29 Kan.App.2d at 128, 22 P.3d 1086. The Court of Appeals

engaged in the following discussion of the decision in *M.T.*:

“In *M.T.*, a husband and wife were divorcing, and the issue was support and maintenance. The husband argued that he should not have to pay support to his wife because she was a male, making the marriage void. The issue before the court, similar to that before this court, was whether the marriage of a post-operative male-to-female transsexual and a male was a lawful marriage between a man and a woman. The court found that it was a valid marriage. 140 N.J.Super. at 90 [355 A.2d 204].

“In affirming the lower court’s decision, the court noted the English court’s previous decision in *Corbett*. 140 N.J.Super. at 85–86 [355 A.2d 204]. The court rejected the reasoning of *Corbett*, though, finding that ‘for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person’s gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.’ 140 N.J.Super. at 87 [355 A.2d 204]. Since the court found that the wife’s gender and genitalia were no longer ‘discordant’ and had been harmonized by medical treatment, the court held that the wife was a female at the time of her marriage and that her husband, then, was obligated to support her. 140 N.J.Super. at 89–90 [355 A.2d 204].

“The importance of the holding in *M.T.* is that it replaces the biological sex test with dual tests of anatomy and gender, where ‘for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person’s gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.’ 140 N.J.Super. at 87 [355 A.2d 204].

“The *M.T.* court further stated:

‘In this case the transsexual’s gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with

her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did so here. In so ruling we do no more than give legal effect to a *fait accompli*, based upon medical judgment and action which are irreversible. Such recognition will promote the individual’s quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.’ 140 N.J.Super. at 89–90 [355 A.2d 204].

“In *M.T.*, the husband was arguing that he did not owe any support because his wife was a man. However, in the record, it was stated that the wife had a sex reassignment operation after meeting the husband. Her husband paid for the operation. The husband later deserted the wife and then tried to get out of paying support to someone he had been living with since 1964 and had been married to for over 2 years.” 29 Kan.App.2d at 113–14, 22 P.3d 1086.

In his petition for review, Joe complained that the Court of Appeals failed to “ask the fundamental question of whether a person can actually change sex within the context of K.S.A. 23–101.” On the issue of the validity of the marriage, Joe’s principal arguments were that the Court of Appeals failed to give K.S.A.2001 Supp. 23–101 its plain and unambiguous meaning and that the Court of Appeals’ opinion improperly usurps the legislature’s policy-making role.

K.S.A.2001 Supp. 23–101 provides:

“The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. The consent of the parties is essential. The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law.”

Joe's principal argument is that the statutory phrase is plain and unambiguous. His statements of the issue and his position, however, go beyond the statutory phrase to pin down the time when the two parties are of opposite sex. The plain and unambiguous meaning of K.S.A.2001 Supp. 23-101, according to Joe, is that a valid marriage must be between two persons who are of opposite sex at the time of birth.

Applying the statute as Joe advocates, a male-to-female transsexual whose sexual preference is for women may marry a woman within the advocated reading of K.S.A.2001 Supp. 23-101 because, at the time of birth, one marriage partner was male and one was female. Thus, in spite of the outward appearance of femaleness in both marriage partners at the time of the marriage, it would not be a void marriage under the advocated reading of K.S.A.2001 Supp. 23-101. As the Court of Appeals stated in regard to J'Noel's argument that K.S.A.2001 Supp. 23-101, as applied by the district court, denied her right to marry: "When J'Noel was found by the district court to be a male for purposes of Kansas law, she was denied the right to marry a male. It logically follows, therefore, that the court did not forbid J'Noel from marrying a female." 29 Kan.App.2d at 126, 22 P.3d 1086.

Joe's fallback argument is that the legislature's intent was to uphold "traditional marriage," interpreting K.S.A.2001 Supp. 23-101 so that it invalidates a marriage between persons who are not of the opposite sex; *i.e.*, a biological male and a biological female.

Joe also contends that the legislature did not intend for the phrase "opposite sex" in K.S.A.2001 Supp. 23-101 to allow for a change from the sexual classification assigned at birth.

The district court stated that it had considered conflicting medical opinions on whether J'Noel was male or female. This is not the sort of factual dispute that would preclude summary judgment because what the district court actually took into account was the medical experts' opinions on the ultimate question. The district court did not take into account the factors on which the scientific experts based their opinions on the ultimate question. The district court relied entirely on the Texas court's opinion in *Littleton* for the "facts" on which it based its conclusion of law. There were no expert witnesses or medical testimony as to whether J'Noel was a male or female. The only medical evidence was the medical report as to the reassignment surgery attached to J'Noel's memorandum in support of her motion for partial summary judgment. There was included a "To Whom It May Concern" notarized letter signed by Dr. Schrang in which the doctor wrote: "She should now be considered a functioning, anatomical female."

Here, the district court's conclusion of law, based on its findings of fact, was that "J'Noel is a male." In other words, the district court concluded as a matter of law that J'Noel is a male and granted summary judgment on that basis.

The district court concluded as a matter of law that J'Noel was a male because she had been identified on the basis of her external genitalia at birth as a male. The Court of Appeals held that other criteria should be applied in determining whether J'Noel is a man or a woman for the purpose of the law of marriage and remanded in order for the district court to apply the criteria to the facts of this case. In this case of first impression, the Court of Appeals adopted the criteria set forth by Professor Greenberg in addition to chromosomes: "gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity," as well as other criteria that may emerge with scientific advances. 29 Kan.App.2d at 127, 22 P.3d 1086.

On appeal, J'Noel argues that the marriage is valid under Kansas law. However, in the district court, J'Noel's sole argument was that the marriage was valid under Wisconsin law and Kansas must give full faith and credit to Wisconsin law. In fact, J'Noel argued that the validity of the marriage under Kansas law was not an issue in this case and intimated the marriage would be prohibited under K.S.A.2001 Supp. 23-101. She argued, in part:

"The way that counsel for Joe Gardiner portrayed this issue, I think, is perhaps very clever and it's probably something that I would have done if I were in his shoes. He said, can someone change their sex? Does a medical doctor or a judge have the right to change somebody's sex?"

"And the answer to that may, in fact, be no, but I think the more interesting question, and the question that's really before the Court is one which I think was addressed by Counsel, and that is—perhaps that is an issue for the State legislature to deal with. In Wisconsin the State legislature has clearly held this issue. The statute in Wisconsin is clear, and this statute has been cited in the brief.

....

"However, we would urge the Court to rule on our motion favorably with respect to the sexual identity of Miss Gardiner and we would urge the Court to rule that as a matter of summary judgment she is, in fact, a female entitled, under the listed very narrow interpretation of Wisconsin law.

....

"... Does this, in fact, make J'Noel Gardiner a man-from a man to a woman?"

"I think the answer is, well, no, not technically speaking, but we're not talking about technically. We're talking about that as a matter of law, not technically, not talking scientifically...."

"In this case, the Wisconsin legislature clearly contemplated a person who had sexual reassignment surgery is allowed to change her sexual identity in conformance with the surgery that transpired.

....

"Going onto the sexual identity question, I think that counsel for Joe Gardiner have very cleverly tried to posture the questions differently than it actually exists. This is really a very simple, straightforward matter. The question is, does Kansas need to give full faith and credit to the Wisconsin statute and court order and the birth certificate that order created under Wisconsin law?"

"I think the answer to that is clearly yes. This Court is not being asked to determine whether or not J'Noel Gardiner is, in fact, a male or female. That is simply not a matter that is before this Court on this motion for summary judgment, and we would submit even at the time of trial. Surgeons may testify as to certain scientific facts and they may disagree as to whether or not that Miss Gardiner is, in fact, a male or a female.

....

"There is no need for this Court to make a decision of whether or not Miss Gardiner is in fact, a man or a woman. That's simply not a matter before this Court. The issue is whether or not Wisconsin is allowed to create their own laws and whether those laws and those decisions made by a Wisconsin tribunal and the administrative acts that follow that court order are in fact something that this Court is bound to follow.

....

"[W]e're not asking the Court to approve or disapprove of issues that relate to transsexuals marrying. We really encourage the Court to look at the very, very narrow issue here.

“Clearly, there’s issues for the Kansas legislature to look at, and I don’t think this Court or any other Court in Kansas should impose its own opinions on the legislature, but I think this Court does have a responsibility to enforce the law as it applies in other states to Kansas and give those other states full faith and credit.”

[1,2] The district court granted summary judgment, finding the marriage void under K.S.A.2001 Supp. 23-101.

structure and function that distinguish a male from a female organism; the character of being male or female.” Webster’s New Twentieth Century Dictionary (2nd ed.1970) states the initial definition of sex as “either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively.” “Male” is defined as “designating or of the sex that fertilizes the ovum and begets offspring: opposed to *female*.” “Female” is defined as “designating or of the sex that produces ova and bears offspring: opposed to *male*.” [Emphasis added.] According to Black’s Law Dictionary, 972 (6th ed.1999) a marriage “is the legal status, condition, or relation of one man and one woman united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.”

[9] The words “sex,” “male,” and “female” in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of “persons of the opposite sex” contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to “produce ova and bear offspring” does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. As the *Littleton* court noted, the transsexual still “inhabits . . . a male body in all aspects other than what the physicians have supplied.” 9 S.W.3d at 231. J’Noel does not fit the common meaning of female.

That interpretation of K.S.A.2001 Supp. 23-101 is supported by the legislative history of the statute. That legislative history is set out in the Court of Appeals decision:

“The amendment to 23-101 limiting marriage to two parties of the opposite sex began its legislative history in 1975. The minutes of the Senate Committee on Judiciary for January 21, 1976, state that the amendment would ‘affirm the traditional view of marriage.’ The proposed amendment was finally enacted in 1980.

[8] The words “sex,” “male,” and “female” are words in common usage and understood by the general population. Black’s Law Dictionary, 1375 (6th ed.1999) defines “sex” as “[t]he sum of the peculiarities of

“K.S.A. 23-101 was again amended in 1996, when language was added, stating: ‘All other marriages are declared to be contrary to the public policy of this state and are void.’ This sentence was inserted immediately after the sentence limiting marriage to two parties of the opposite sex.

“In 1996, K.S.A. 23-115 was amended, with language added stating: ‘It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.’ ” 29 Kan.App.2d at 99, 22 P.3d 1086.

The Court of Appeals then noted:

“The legislative history contains discussions about gays and lesbians, but nowhere is there any testimony that specifically states that marriage should be prohibited by two parties if one is a post-operative male-to-female or female-to-male transsexual. Thus, the question remains: Was J’Noel a female at the time the license was issued for the purpose of the statute?” 29 Kan.App.2d at 100, 22 P.3d 1086.

We do not agree that the question remains. We view the legislative silence to indicate that transsexuals are not included. If the legislature intended to include transsexuals, it could have been a simple matter to have done so. We apply the rules of statutory construction to ascertain the legislative intent as expressed in the statute. We do not read into a statute something that does not come within the wording of the statute. *Joe Self Chevrolet, Inc. v. Board of Sedgwick County Comm’rs*, 247 Kan. 625, 633, 802 P.2d 1231 (1990).

In *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir.1984), the federal district court, like the Court of Appeals here, held sex identity was not just a matter of chromosomes at birth, but was in part a psychological, self-perception, and social question. In reversing the district court, the Seventh Circuit stated:

“In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope

of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. See *Gunnison v. Commissioner*, 461 F.2d 496, 499 (7th Cir. 1972) (it is for the legislature, not the courts, to expand the class of people protected by a statute). This we must not and will not do.

“Congress has a right to deliberate on whether it wants such a broad sweeping of the untraditional and unusual within the term ‘sex’ as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view. We do not believe that the interpretation of the word ‘sex’ as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court. Congress may, at some future time, have some interest in testimony of that type, but it does not control our interpretation of Title VII based on the legislative history or lack thereof. If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.” 742 F.2d at 1086.

[10, 11] We agree with the Seventh Circuit’s analysis in *Ulane*. It is well reasoned and logical. Although *Ulane* involves sex discrimination against *Ulane* as a transsexual and as a female under Title VII, the similarity of the basic issue and facts to the present case make it both instructive and persuasive. As we have previously noted, the legislature clearly viewed “opposite sex” in the narrow traditional sense. The legislature has declared that the public policy of this state is to recognize only the traditional marriage between “two parties who are of the opposite sex,” and all other marriages are against public policy and void. We cannot ignore what the legislature has declared to be the public policy of this state. Our responsibility is to interpret K.S.A.2001 Supp. 23-101 and not to rewrite it. That is for the legislature to do if it so desires. If the legislature



wishes to change public policy, it is free to do so; we are not. To conclude that J'Noel is of the opposite sex of Marshall would require that we rewrite K.S.A.2001 Supp. 23-101.

Finally, we recognize that J'Noel has traveled a long and difficult road. J'Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery. Unfortunately, after all that, J'Noel remains a transsexual, and a male for purposes of marriage under K.S.A.2001 Supp. 23-101. We are not blind to the stress and pain experienced by one who is born a male but perceives oneself as a female. We recognize that there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal. However, the validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court.

The Court of Appeals is affirmed in part and reversed in part; the district court is affirmed.

DAVIS, J., not participating.

BRAZIL, S.J., assigned.

Defendant appealed. The Court of Appeals reversed all convictions, except manufacture of methamphetamine conviction, which it affirmed. Defendant filed petition for review. The Supreme Court, Abbott, J., held that: (1) statute defining offense of manufacture of methamphetamine did not also criminalize conduct of attempting to manufacture methamphetamine, and thus separate jury instruction on attempt was required; (2) title to statute was not dispositive on issue of whether it criminalized attempted manufacture of methamphetamine; (3) statute that prohibited manufacture of controlled substance or controlled substance analog was not violated by attempt to manufacture controlled substance; and (4) subsections of statute that prohibited manufacture of methamphetamine that referred to attempting to manufacture simply effectuated same penalty for attempting to unlawfully manufacture as for actual manufacture of controlled substance and did not criminalize any specific conduct.





INTERNATIONAL  
OLYMPIC  
COMMITTEE

## **IOC Regulations on Female Hyperandrogenism**

### **Games of the XXX Olympiad in London, 2012**

The IOC Executive Board, in accordance with Rule 19.3.10 of the Olympic Charter, and pursuant to Rule 44 of the Olympic Charter, hereby issues the following regulations regarding female hyperandrogenism and participation in the 2012 London Olympic Games (hereafter the “**Regulations**”).

Competitions at the 2012 London Olympic Games (hereafter the “**2012 OG Competitions**”), are conducted separately for men and women (with the exception of certain events). Human biology, however, allows for forms of intermediate levels between the conventional categories of male and female, sometimes referred to as intersex. Usually, intersex athletes can be placed in the male or female group on the basis of their legal sex. However, as explained below, intersex female athletes with elevated androgen production give rise to a particular concern in the context of competitive sports, which is referred to as “female hyperandrogenism.”

In general, the performances of male and female athletes may differ mainly due to the fact that men produce significantly more androgenic hormones than women and, therefore, are under stronger influence of such hormones. Androgenic hormones have performance-enhancing effects, particularly on strength, power and speed, which may provide a competitive advantage in sports. This is one of the reasons why the exogenous administration of such hormones and/or the promotion of the endogenous production of these hormones are banned under the World Anti-Doping Code, to which the IOC is a signatory.

Nothing in these Regulations is intended to make any determination of sex. Instead, these Regulations are designed to identify circumstances in which a particular athlete will not be eligible (by reason of hormonal characteristics) to participate in 2012 OG Competitions in the female category. In the event that the athlete has been declared ineligible to compete in the female category, the athlete may be eligible to compete as a male athlete, if the athlete qualifies for the male event of the sport.

#### **1. OBJECTIVE**

These Regulations are intended to help regulate standard procedures in the investigation and follow-up of a possible case of female hyperandrogenism.

#### **2. SCOPE OF APPLICATION**

These Regulations apply to all 2012 OG Competitions.



### **3. SEX AND ELIGIBILITY**

- A. For men's 2012 OG Competitions, only men are eligible to compete. For women's 2012 OG Competitions, only women are eligible to compete. For mixed gender 2012 OG Competitions, such as mixed doubles in tennis, only teams composed of one male and one female are eligible to compete. For open 2012 OG Competitions, such as equestrian, both men and women are eligible to compete.
- B. Each NOC shall ensure that its athletes are eligible for selection in accordance with IOC rules and regulations. As a consequence, each NOC shall, as appropriate, prior to the registration of its national athletes, actively investigate any perceived deviation in sex characteristics and keep complete documentation of the findings, to the extent permitted by the applicable law of legal residence of the concerned athlete.

### **4. THE IOC EXECUTIVE BOARD**

The IOC Executive Board may sanction any breach of these Regulations, pursuant to the provisions of the Olympic Charter, including Rules 40 and 59 thereof.

### **5. THE CHAIRMAN OF THE IOC MEDICAL COMMISSION AND AN EXPERT PANEL**

The Chairman of the IOC Medical Commission (hereafter the "**Chairman**") may delegate one or more of the members of the IOC Medical Commission or the OCOG Medical Officer to supervise doping controls and to manage and coordinate all the health and medical issues at the venues, including medical services for teams. The Chairman may also delegate part of his/her tasks to the IOC Medical and Scientific Director.

An Expert Panel shall be appointed to evaluate a suspected case of female hyperandrogenism. The experts are appointed by the IOC Executive Board for the duration of the 2012 OG Competitions on the recommendation of the Chairman.

An Expert Panel for the purpose of these Regulations consists of one gynaecologist, one genetic expert and one endocrinologist. Additional specialists may be appointed to an Expert Panel.

The responsibilities of the Chairman and the Expert Panel are addressed in further detail in Section 8 below.

The experts convene and/or communicate *ad hoc* in the event that a female hyperandrogenism investigation is initiated.

### **6. PERSONS WHO CAN REQUEST A FEMALE HYPERANDROGENISM INVESTIGATION**

- A. In order to request a female hyperandrogenism investigation, a person must be:
  - i. an athlete who is concerned about personal symptoms of hyperandrogenism;
  - ii. a Chief NOC Medical Officer;
  - iii. an IOC Medical Commission<sup>1</sup> member or OCOG Medical Officer; or

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<sup>1</sup> For the purpose of these Regulations, the IOC Medical Commission shall mean the IOC Medical Commission as appointed by the President of the IOC, plus the Games Group Members and OCOG IOC Medical Commission Representative.



iv. the Chairman.

- B. A request for a female hyperandrogenism investigation shall be made to the Chairman in the form of a written statement regarding the eligibility of an athlete, and must include:
- i. the reasons and basis for the request, including any evidence which might suggest that an athlete may have female hyperandrogenism;
  - ii. the relevant eligibility rules of the concerned International Federation; and
  - iii. the name, title, address, contact information and signature of the requesting person.

**7. INADMISSIBILITY AND REJECTION OF A REQUEST FOR A FEMALE HYPERANDROGENISM INVESTIGATION**

Requests for a female hyperandrogenism investigation that do not satisfy the formal requirements set forth in Section 6 above, or which lack substance, shall be rejected and declared inadmissible by the Chairman. Such decisions are final and binding and not subject to any appeal. Subsequent requests which comply with the formal requirements of Section 6 above shall be considered.

The Chairman may also refer a request considered to have been made in bad faith to the IOC Executive Board, which may impose sanctions on the requesting person. The requesting person shall have an opportunity to be heard prior to any sanctions being imposed.

**8. PROCEDURE FOR INVESTIGATING FEMALE HYPERANDROGENISM DURING THE 2012 OG COMPETITIONS**

If the request for a female hyperandrogenism investigation is considered to have potential merit by the Chairman, he/she shall initiate an investigation.

- A. After the Chairman has decided to initiate a female hyperandrogenism investigation, he/she shall instruct the IOC Medical and Scientific Director to proceed with the investigation.
- B. At the request of the IOC Medical and Scientific Director, all relevant documents (if available) of the athlete investigated (e.g., medical history, sex hormone levels, diagnosis, treatment, current findings, etc.) shall be provided by the athlete investigated and/or her team physician. The IOC Medical and Scientific Director will then provide this information to the Chairman.
- C. If the Chairman considers that no further investigation is needed based on the information provided, he/she will declare the case to be closed.
- D. If the Chairman considers that the information provided (or the lack of information provided) warrants further investigation, he/she shall recommend appointing an Expert Panel (see Section 5 above) to investigate the matter further.
- E. The Expert Panel may request that the investigated athlete and/or her team physician provide further information and/or that the investigated athlete undergo further examinations to determine whether female hyperandrogenism is present and can be considered to confer a competitive advantage.



- F. The Expert Panel shall examine all available information and establish (i) whether the investigated athlete's androgen level, measured by reference to testosterone levels in serum, is within the male range, and if so, (ii) whether such hyperandrogenism is functional or not.<sup>2</sup>
- G. The investigated athlete and team physician shall have an opportunity to be heard before the Expert Panel prior to any determination on female hyperandrogenism.
- H. Should the athlete (to be investigated), the respective team physician or any relevant person of the athlete's entourage refuse to provide the requested information, or should the athlete refuse to undergo any examinations, the athlete may be provisionally suspended from the 2012 OG Competitions by the IOC Executive Board, based upon a recommendation from the Chairman.
- I. The IOC Executive Board may impose further sanctions on the respective team physician and/or any relevant person in the athlete's entourage.
- J. The Expert Panel shall take into consideration all of the available information, including any testimony from the investigated athlete, and shall have the following procedural options:
  - i. If, in the opinion of the Expert Panel, the investigated athlete does not have female hyperandrogenism, the Chairman shall close the case, and the concerned athlete shall be eligible to compete in the female 2012 OG Competitions. Such decision in respect of the 2012 OG Competitions is final and binding and not subject to appeal. If, in the opinion of the Expert Panel, the investigated athlete has female hyperandrogenism that does not confer a competitive advantage because it is non-functional or the androgen level is below the male range, the Chairman shall close the case, and the concerned athlete shall be eligible to compete in the 2012 OG Competitions. Such decision in respect of the 2012 OG Competitions is final and binding and not subject to appeal.
  - ii. If, in the opinion of the Expert Panel, the investigated athlete has female hyperandrogenism that confers a competitive advantage (because it is functional and the androgen level is in the male range), the investigated athlete may be declared ineligible to compete in the 2012 OG Competitions by the IOC Executive Board, based upon the opinion of the Expert Panel and the recommendation of the Chairman. The IOC Executive Board may impose further sanctions on the respective team physician and/or any relevant persons in the investigated athlete's entourage.
- K. In order to help protect the dignity and privacy of the athlete concerned, requests for investigations, information gathered during investigations, results of investigations and decisions regarding a case (or potential case) of female hyperandrogenism, shall be kept confidential and not released or made public by the IOC.

Notwithstanding the above, should an athlete be declared ineligible for the 2012 OG Competitions pursuant to these Regulations, the IOC may hand the case over to the Chief Medical Officer of the relevant International Federation, subject to the informed consent of the athlete, for any follow-up, as appropriate.

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<sup>2</sup> There are some cases of hyperandrogenism that do not confer a competitive advantage because of non-functional androgen receptors.



- L. Only decisions to declare an athlete ineligible due to female hyperandrogenism pursuant to Section 8(J)(ii), decisions for provisional suspension and decisions to sanction the respective team physician and/or any relevant person in the athlete's entourage pursuant to Section 8(I) may be appealed exclusively to the Court of Arbitration for Sport ("**CAS**") in accordance with the provisions applicable before such court. Such decisions shall remain in effect while under appeal.

Only the following parties shall have the right to appeal to CAS: (a) the investigated athlete or other person who is the subject of the decision being appealed; and (b) the relevant International Federation, subject to the informed consent of the concerned athlete. The time to file an appeal to CAS shall be within twenty-one (21) days from the date of communication by the IOC to the appealing party of the decision.

Lausanne, 22 June 2012

Medical and Scientific Department





OLYMPICS | GENDER GAMES

# You Say You're a Woman? That Should Be Enough

By REBECCA JORDAN-YOUNG and KATRINA KARKAZIS JUNE 17, 2012

The International Olympic Committee's new policy governing sex verification is expected to ban women with naturally high testosterone levels, a condition known as hyperandrogenism, from women's competitions, claiming they have an unfair advantage. I.O.C. officials portray this as a reasonable compromise in a difficult situation, arguing that the rules may be imperfect, but that sports are rule-based — and that the rules should be clear.

We agree that sports need clear rules, but we also believe that the rules should be fair and as rational as possible. The new policy, if it is based on testosterone levels, is neither.

So what is a better solution?

First, at the very least, female athletes should be allowed to compete throughout any investigation. Suspending them from competition once questions are raised violates their confidentiality and imposes sanctions before relevant information has been gathered.

Second, when it comes to sex, sports authorities should acknowledge that while science can offer evidence, it cannot dictate what evidence we should use. Scientifically, there is no clear or objective way to draw a bright line between male and female.

Testosterone is one of the most slippery markers that sports authorities have come up with yet. Yes, average testosterone levels are markedly different for men and women. But levels vary widely depending on time of day, time of life, social status and — crucially — one's history of athletic training. Moreover, cellular responses range so widely that testosterone level alone is meaningless.

Testosterone is not the master molecule of athleticism. One glaring clue is that women whose tissues do not respond to testosterone at all are actually overrepresented among elite athletes.

As counterintuitive as it might seem, there is no evidence that successful athletes have higher testosterone levels than less successful ones.

Yes, doping with testosterone will most likely improve your performance by increasing muscle size, strength and endurance. But you cannot predict how well athletes will do in a competition by knowing their relative testosterone levels. There is just too much variation in how bodies make and respond to testosterone — and testosterone is but one element of an athlete's physiology.

Third, if we want a clear answer to who is eligible for women's competitions, it is time to stop pawning this fundamentally social question off onto scientists.

Bruce Kidd, a former Olympian who is a professor of kinesiology and physical education at the University of Toronto, favors prioritizing athletes' rights to bodily integrity, privacy and self-identification, and promoting broad inclusiveness. "If the proclaimed human right of self-expression is to mean anything, surely it should protect the right to name one's own gender," he says.

We agree. At present, though, because most nations do not offer their citizens the right of self-defining gender, the best bet might be to let all legally recognized women compete. Period.

Fourth, any policies must be developed through a transparent process with broad input. A major problem with the I.O.C.'s effort to create a new policy is its opaqueness. Which types of expertise and evidence were drawn on? What issues were considered?

Finally, the I.O.C. and other sports governing bodies should denounce gender bashing among athletes, coaches, the news media and fans. Policing women's testosterone would exacerbate one of the ugliest tendencies in women's sports today: the name-calling and the insinuations that an athlete is "too masculine," or worse, that she is a man. (Dominika Cibulkova of Slovakia recently said that she lost at the French Open because her opponent "played like a man." Such comments do not do female athletes any favors.)

Sex testing of female athletes will always be discriminatory. Under the new policy, men will most likely continue to enjoy freedom from scrutiny, even though they, too, have greatly varying testosterone levels, along with other variations in natural attributes that affect athletic performance.

Sex tests are based on the notion that fair competition requires "protecting" female athletes. Protection has been the cloak that covers all manner of sex discrimination, and it is seldom, if ever, the best way to advance equality.

What are these tests protecting women from? Men infiltrating women's competitions? A century of monitoring competitions for sex fraud says no. Will superwomen crowd out other athletes? No again. Women who have been ensnared by sex-testing dragnets have often been impressive, but not out of line with other elite female athletes.

What about letting go of the idea that the ultimate goal of a fair policy is to protect the "purity" of women's competitions? If the goal is instead to group athletes so that everyone has a chance to play, to excel and — yes — to win, then sex-segregated competition is just one of many possible options, and in many cases it might not be the best one.

Rigidly protecting the principle of sex segregation sometimes undermines female athletes, as with the recent rule that women's marathon records cannot be set in races that include men; the rule could have eliminated Paula Radcliffe's best time, in 2003, which beat the record by three minutes.

Sex segregation may obscure other gender inequities in sports. Men, for example, have 40 more events in the Olympics and have longer distances and

durations — with no clear rationale.

Sex segregation is probably a good idea in some sports, at some levels and at some moments. But it is time to refocus policy discussions at every level so that sex segregation is one means to achieve fairness, not the ultimate goal. Ensuring gender equity through access to opportunity is just as important.

Unlike in doping cases, women with hyperandrogenism have not cheated. There is no reason to disqualify women whose bodies produce any of the complex ingredients that add up to athleticism, be they superb vision, big lungs, flexibility, long legs or testosterone.

The obsessive focus on sex has done enough harm. María José Martínez-Patiño, whose hurdling career was derailed by sex testing, said a new policy based on testosterone levels would further the “decades-long persecution of women in sports.” As she told us, “It’s enough.”

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Darlene JESPERSEN, Plaintiff–  
Appellant,

v.

HARRAH'S OPERATING COMPANY,  
INC., Defendant–Appellee.

No. 03–15045.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Dec. 3, 2003.

Filed Dec. 28, 2004.

**Background:** Female bartender at casino terminated for refusing to wear makeup sued employer for sex discrimination under Title VII, alleging both disparate treatment and disparate impact, and asserted claims under state law. On employer's motion for summary judgment, the United States District Court for the District of Nevada, Edward C. Reed, Jr., J., 280 F.Supp.2d 1189, granted motion in part. Employee appealed.

**Holding:** The Court of Appeals, Tashima, Circuit Judge, held that bartender failed to establish that grooming policy imposed greater burden on female bartenders than on male bartenders.

Affirmed.

Thomas, Circuit Judge, dissented and filed opinion.

## 2. Civil Rights ⇄1177

Female bartender at casino who was terminated for refusing to wear makeup,

Before: TASHIMA, THOMAS, and SILVERMAN, Circuit Judges.

TASHIMA, Circuit Judge:

Plaintiff Darlene Jespersen, a bartender at Harrah's Casino in Reno, Nevada, brought this Title VII action alleging that her employer's policy requiring that certain female employees wear makeup discriminates against her on the basis of sex. The district court granted summary judgment for Harrah's, holding that its policy did not constitute sex discrimination because it imposed equal burdens on both sexes. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

### I.

The following facts are undisputed. Darlene Jespersen was a bartender at the sports bar in Harrah's Casino in Reno, Nevada, for nearly 20 years. She was an outstanding employee. Over the years, Jespersen's supervisors commented that she was "highly effective," that her attitude was "very positive," and that she made a "positive impression" on Harrah's guests. Harrah's customers repeatedly praised Jespersen on employee feedback forms, writing that Jespersen's excellent service and good attitude enhanced their experience at the sports bar and encouraged them to come back.

Throughout the 1980s and '90s Harrah's encouraged its female beverage servers to wear makeup, but wearing makeup was not a formal requirement. Although Jespersen never cared for makeup, she tried wearing it for a short period of time in the 1980s. But she found that wearing makeup made her feel sick, degraded, exposed, and violated. Jespersen felt that wearing makeup "forced her to be feminine" and to become "dolled up" like a sexual object,

and that wearing makeup actually interfered with her ability to be an effective bartender (which sometimes required her to deal with unruly, intoxicated guests) because it "took away [her] credibility as an individual and as a person." After a few weeks, Jespersen stopped wearing makeup because it was so harmful to her dignity and her effectiveness behind the bar that she could no longer do her job. Harrah's did not object to Jespersen's choice not to wear makeup and Jespersen continued to work at the sports bar and receive positive performance reviews for over a decade.

In February 2000, Harrah's implemented its "Beverage Department Image Transformation" program at 20 Harrah's locations, including its casino in Reno. The goal of the program was to create a "brand standard of excellence" throughout Harrah's operations, with an emphasis on guest service positions. The program imposed specific "appearance standards" on each of its employees in guest services, including heightened requirements for beverage servers. All beverage servers were required to be "well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform." In addition to these general appearance standards applicable to both sexes, there were gender-specific standards for male and female beverage servers. Female beverage servers were required to wear stockings and colored nail polish, and they were required to wear their hair "teased, curled, or styled." Male beverage servers were prohibited from wearing makeup or colored nail polish, and they were required to maintain short haircuts and neatly trimmed fingernails.<sup>1</sup>

1. The text of the appearance standards provides, in relevant part, as follows:

All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must pos-

sess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with

Harrah's called its new appearance standards the "Personal Best" program. In order to enforce the "Personal Best" standards, Harrah's required each beverage service employee to attend "Personal Best Image Training" prior to his or her final uniform fitting. At the training, "Personal Best Image Facilitators" instructed Harrah's employees on how to adhere to the standards of the program and tested their proficiency. At the conclusion of the training, two photographs (one portrait and one full body) were taken of the employee looking his or her "Personal Best." Each employee's "Personal Best" photographs were placed in his or her file and distributed to his or her supervisor. The supervisors used the "Personal Best" photographs as an "appearance measurement" tool, holding each employee accountable to look his or her "Personal Best" on a daily basis. Jespersen acknowledged receipt of the policy and committed to adhere to the appearance standards for her position as a beverage bartender in March 2000.

maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.

\* \* \*

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

Overall Guidelines (applied equally to male/female):

- Appearance: Must maintain Personal Best Image portrayed at time
- Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.
- No faddish hairstyles or unnatural colors are permitted.

Males:

- Hair must not extend below top of shirt collar. Ponytails are prohibited.
- Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.

Shortly thereafter, however, the "Personal Best" standards were amended such that in addition to the existing appearance standards, all female beverage servers (including beverage bartenders) were required to wear makeup.<sup>2</sup> As before, male beverage servers were prohibited from wearing makeup. Because of her objection to wearing makeup, Jespersen refused to comply with the new policy. In July 2000, Harrah's told Jespersen that the makeup requirement was mandatory for female beverage service employees and gave her 30 days to apply for a position that did not require makeup to be worn. At the expiration of the 30-day period, Jespersen had not applied for another job, and she was terminated.

After exhausting her administrative remedies with the Equal Employment Opportunity Commission, Jespersen brought this action alleging that Harrah's makeup requirement for female beverage servers constituted disparate treatment sex discrimination in violation of 42 U.S.C. § 2000e-2(a) ("Title VII"). The district

- Eye and facial makeup is not permitted.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.

Females:

- Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
- Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
- Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.

2. The amended policy required that "[m]akeup (foundation/concealer and/or face powder, as well as blush and mascara) must be worn and applied neatly in complimentary colors," and that "[l]ip color must be worn at all times."

court granted Harrah's motion for summary judgment, holding that the "Personal Best" policy did not run afoul of Title VII because (1) it did not discriminate against Jespersen on the basis of "immutable characteristics" associated with her sex, and (2) it imposed equal burdens on both sexes. Jespersen timely appealed from the judgment.

### III.

[1] Title VII prohibits employers from discriminating against "any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). In order to prevail on a Title VII disparate treatment sex discrimination claim, an employee need only establish that, but for his or her sex, he or she would have been treated differently. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) (citing *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)). Although the employee must prove that the employer acted intentionally, the intent need not have been malevolent. *Id.* at 199, 111 S.Ct. 1196 ("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.").<sup>3</sup>

[2] Pursuant to the "Personal Best" program, women are required to wear makeup, while men are prohibited from doing so. Women are required to wear their hair "teased, curled, or styled" each day, whereas men are only required to maintain short haircuts. We must decide whether these standards are discriminatory; whether they are "based on a policy

3. Even if intentional discrimination is shown, an employer can escape liability if sex "is a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal

operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). There is no BFOQ issue on this appeal.



which on its face applies less favorably to one gender . . .” *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 608 (9th Cir. 1982). If so, then Harrah’s would have discriminated against Jespersen “because of . . . sex.” 42 U.S.C. § 2000e-2(a)(1); *see id.*

We have previously held that grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex. In *Baker v. Cal. Land Title Co.*, 507 F.2d 895 (9th Cir.1974), employees challenged their employer’s rule banning men, but not women, from having long hair. *Id.* at 896. We concluded that grooming and dress standards were entirely outside the purview of Title VII because Congress intended that Title VII only prohibit discrimination based on “immutable characteristics” associated with a worker’s sex. *Id.* at 897 (“Since race, national origin and color represent immutable characteristics, logic dictates that sex is used in the same sense rather than to indicate personal modes of dress or cosmetic effects.”); *see also Fountain v. Safeway Stores Inc.*, 555 F.2d 753, 755 (9th Cir.1977) (“It is clear that regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII.”). Because grooming and dress standards regulated “mutable” characteristics such as hair length, we reasoned, employers that made compliance with such standards a condition of employment discriminated on the basis of their employees’ appearance, not their sex.

Our later cases recognized, however, that an employer’s imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination even where the appearance standards regulate only “mutable” characteristics such as weight. *Gerdom*, 692 F.2d at 605–

06. In *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir.2000) (en banc), a class of female flight attendants challenged their employer’s weight restrictions as a violation of Title VII because women were held to more strict weight limitations than were men. The employer insisted that all employees maintain a weight that corresponded to the “desirable” weight for their height as determined by an insurance company table, but women were required to maintain the weight corresponding to women of “medium” build, whereas men were permitted to maintain the weight corresponding to men of “large” build. *Id.* at 848. Citing *Fountain*, the employer argued that because the weight restrictions were mere “appearance” standards, they were not subject to Title VII. *Id.* at 854. We rejected the employer’s argument, holding that “[a] sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a BFOQ.” *Id.* at 855; *see also Carroll v. Talman Fed. Sav. & Loan Ass’n*, 604 F.2d 1028, 1032 (7th Cir.1979) (holding that employer’s policy requiring female employees to wear uniforms but permitting male employees to wear “appropriate business attire” of their choosing was sex discrimination in violation of Title VII). Although employers are free to adopt *different* appearance standards for each sex, they may not adopt standards that impose a greater burden on one sex than the other. *Frank*, 216 F.3d at 855.

Although in *Frank* we characterized the weight standards at issue as “appearance standards,” *id.*, we have, as yet, had no occasion to apply the “unequal burdens” test to gender-differentiated dress and grooming requirements. In *Frank* and *Gerdom*, we were called upon only to compare the relative burdens of different weight limitations imposed on male and female employees. In those cases our task

was simple because it was apparent from the face of the policies at issue that female flight attendants were subject to a more onerous standard than were males. See *Frank*, 216 F.3d at 854; *Gerdorn*, 692 F.2d at 608.

In order to evaluate the relative burdens the “Personal Best” policy imposes, we must assess the actual impact that it has on both male and female employees. In doing so we must weigh the cost and time necessary for employees of each sex to comply with the policy. Harrah’s contends that the burden of the makeup requirement must be evaluated with reference to all of the requirements of the policy, including those that burden men only, such as the requirement that men maintain short haircuts and neatly trimmed nails. Jespersen contends that the only meaningful appearance standard against which the makeup requirement can be measured is the corresponding “no makeup” requirement for men. We agree with Harrah’s approach. Because employers are permitted to apply different appearance standards to each sex so long as those standards are equal, our task in applying the “unequal burdens” test to grooming and dress requirements must sometimes involve weighing the relative burdens that particular requirements impose on workers of one sex against the distinct requirements imposed on workers of the other sex.<sup>4</sup>

Jespersen contends that the makeup requirement imposes “innumerable” tangible burdens on women that men do not share because cosmetics can cost hundreds of dollars per year and putting on makeup requires a significant investment in time.

4. Because the question is not presented on this record, we do not need to define the exact parameters of the “unequal burdens” test, as applied to personal appearance and grooming. We do note, however, that this is not an exact science yielding results with

There is, however, no evidence in the record in support of this contention. Jespersen cites to academic literature discussing the cost and time burdens of cosmetics generally, but she presents no evidence as to the cost or time burdens that must be borne by female bartenders in order to comply with the makeup requirement. Even if we were to take judicial notice of the fact that the application of makeup requires *some* expenditure of time and money, Jespersen would still have the burden of producing some evidence that the burdens associated with the makeup requirement are greater than the burdens the “Personal Best” policy imposes on male bartenders, and exceed whatever “burden” is associated with ordinary good-grooming standards. Because there is no evidence in the record from which we can assess the burdens that the “Personal Best” policy imposes on male bartenders either, Jespersen’s claim fails for that reason alone.

Jespersen cites *United States v. Seschillie*, 310 F.3d 1208, 1212 (9th Cir.2002), for the proposition that “a jury can make determinations requiring simple common sense without specific supporting evidence.” But *Seschillie* involved the entirely different question of whether jurors in a criminal case could draw common-sense inferences from the evidence without the aid of expert testimony. *Id.* It cannot be construed as relieving Jespersen of her burden of production at the summary judgment stage in a civil case. As the non-moving party that bore the ultimate burden of proof at trial, Jespersen had the burden of producing admissible evidence that the “Personal Best” appearance stan-

mathematical certainty. We further note that any “burden” to be measured under the “unequal burdens” test is only that burden which is imposed beyond the requirements of generally accepted good grooming standards.

dard imposes a greater burden on female beverage servers than it does on male beverage servers. See *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. She has not met that burden.

Jespersen also contends that even if Harrah's makeup requirement survives the "unequal burdens" test, that test should be invalidated in light of the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In *Price Waterhouse*, the Supreme Court held that an employer may not force its employees to conform to the sex stereotype associated with their gender as a condition of employment. *Id.* at 250-51, 109 S.Ct. 1775. When evaluating a female associate's candidacy for partnership in an accounting firm, decision makers referred to her as "macho" and suggested that she "overcompensated for being a woman" by behaving aggressively in the workplace. *Id.* at 235, 109 S.Ct. 1775. The associate was advised that her partnership chances would be improved if she learned to behave more femininely, wear makeup, have her hair styled, and wear jewelry. *Id.* Noting that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group," the Court held that the employer's discrimination against the associate because of her failure to conform to a traditional, feminine gender stereotype was sex discrimination in violation of Title VII. *Id.* at 251, 109 S.Ct. 1775.

Following *Price Waterhouse*, we have held that sexual harassment of an employee because of that employee's failure to conform to commonly-accepted gender stereotypes is sex discrimination in violation of Title VII. In *Nichols v. Azteca Restaurant Enter., Inc.*, 256 F.3d 864 (9th Cir.2001), a male waiter at a restaurant sued his employer under Title VII for sexual harassment. The waiter contended

that he was harassed because he failed to conform his behavior to a traditionally male stereotype. *Id.* at 874. Noting that *Price Waterhouse* "sets a rule that bars discrimination on the basis of sex stereotypes," we concluded that the harassment and abuse was actionable under Title VII because the waiter was systematically abused for failing to act "as a man should act" and for walking and carrying his tray "like a woman." *Id.* at 874-75. Similarly, in *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir.2002) (en banc), we held that a man stated a claim for sexual harassment under Title VII where he alleged that he was the victim of assaults "of a sexual nature" by his co-workers because of stereotypical assumptions. *Id.* at 1068.

Although *Price Waterhouse* held that Title VII bans discrimination against an employee on the basis of that employee's failure to dress and behave according to the stereotype corresponding with her gender, it did not address the specific question of whether an employer can impose sex-differentiated appearance and grooming standards on its male and female employees. Nor have our subsequent cases invalidated the "unequal burdens" test as a means of assessing whether sex-differentiated appearance standards discriminate on the basis of sex. Although the precise issue was not before us, we declined to apply *Price Waterhouse* to grooming and appearance standards cases when we rendered our decision in *Nichols*, 256 F.3d at 875 n. 7 ("Our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards."). And while a plurality of judges in *Rene* endorsed an independent claim for gender-stereotyping sexual harassment, such a claim is distinct from the claim Jespersen advances here. She has presented no evidence that she or

any other employee has been sexually harassed as a result of the “Personal Best” policy. In short, although we have applied the reasoning of *Price Waterhouse* to sexual harassment cases, we have not done so in the context of appearance and grooming standards cases, and we decline to do so here. We thus disagree with the dissent’s assertion that “Jespersen has articulated a classic case of *Price Waterhouse* discrimination . . . .” Dissent at 1084.

Finally, we note that we are, in any event, bound to follow our en banc decision in *Frank*, in which we adopted the unequal burdens test. *Price Waterhouse* predates *Frank* by more than a decade and, presumably, the *Frank* en banc court was aware of it when it adopted the unequal burdens test. Thus, *Price Waterhouse* does not qualify as an “intervening decision” which could serve as a basis for overruling *Frank*. See *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 744 n. 1 (9th Cir.2003) (en banc) (explaining that “[a] three-judge panel can overrule a prior decision of this court [only] when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point”) (internal quotation marks and citations omitted).

#### IV.

We hold that under the “unequal burdens” test, which is this Circuit’s test for evaluating whether an employer’s sex-differentiated appearance standards constitute sex discrimination in violation of Title VII, Jespersen failed to introduce evidence raising a triable issue of fact as to whether Harrah’s “Personal Best” policy imposes unequal burdens on male and female employees.

The judgment of the district court is **AFFIRMED**.

# *The Atlantic*

## **The Sexism of School Dress Codes**

These policies can perpetuate discrimination against female students, as well as LGBT students.



Alfaguarilla / Shutterstock

**LI ZHOU**

**OCT 20, 2015**

**EDUCATION**

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Maggie Sunseri was a middle-school student in Versailles, Kentucky, when she first noticed a major difference in the way her school's dress code treated males and females. Girls were disciplined disproportionately, she says, a trend she's seen continue over the years. At first Sunseri simply found this disparity unfair, but upon

realizing administrators' troubling rationale behind the dress code—that certain articles of girls' attire should be prohibited because they “distract” boys—she decided to take action.

“I've never seen a boy called out for his attire even though they also break the rules,” says Sunseri, who last summer produced *Shame: A Documentary on School Dress Code*, a film featuring interviews with dozens of her classmates and her school principal, that explores the negative impact biased rules can have on girls' confidence and sense of self. The documentary now has tens of thousands of YouTube views, while a post about the dress-code policy at her high school—Woodford County High—has been circulated more than 45,000 times on the Internet.

Although dress codes have long been a subject of contention, the growth of platforms like Facebook and Instagram, along with a [resurgence of student activism](#), has prompted a major uptick in protests against attire rules, including popular campaigns similar to the one championed by Sunseri. Conflict over these policies has also [spawned hundreds of Change.org petitions](#) and numerous school walkouts. [Many of these protests have criticized the dress codes as sexist](#) in that they unfairly target girls by [body-shaming and blaming them](#) for promoting sexual harassment. [Documented cases](#) show female students being chastised by school officials, sent home, or barred from attending events like prom.

Meanwhile, gender non-conforming and transgender students have also clashed with such policies on the grounds that they rigidly dictate how kids express their identities. Transgender students have been sent home for wearing clothing different than what's expected of their legal sex, while others have been excluded from yearbooks. Male students, using traditionally female accessories that fell within the bounds of standard dress code rules, and vice versa, have been nonetheless disciplined for their fashion choices. These cases are prompting their own backlash.

Dress codes—given the power they entrust school authorities to regulate student identity—can, according to students, ultimately establish discriminatory standards as the norm. The prevalence and convergence of today's protests suggest that

schools not only need to update their policies—they also have to recognize and address the latent biases that go into creating them.

\* \* \*

At Woodford County High, the [dress code](#) bans skirts and shorts that fall higher than the knee and shirts that extend below the collarbone. Recently, [a photo of a female student at the school](#) who was sent home after wearing a seemingly appropriate outfit that nonetheless showed collarbone—went viral on Reddit and Twitter.

Posted by [Stacie Dunn](#) on [Thursday, August 13, 2015](#)

The restrictions and severity of dress codes vary widely across states, 22 of which have some form of law granting local districts the power to establish these rules, according to the Education Commission of the States. In the U.S., [over half of public schools](#) have a dress code, which frequently outline gender-specific policies. Some administrators see these distinctions as necessary because of the different ways in which girls and boys dress. In many cases, however, female-specific policies account for a disproportionate number of the attire rules included in school handbooks. Certain parts of Arkansas’s statewide dress code, for example, exclusively applies to females.\* Passed in 2011, [the law](#) “requires districts to prohibit the wearing of clothing that exposes underwear, buttocks, or the breast of a female student.” (The provision prohibiting exposure of the "underwear and buttocks" applies to all students.)

Depending on administrators and school boards, some places are more relaxed, while others take a hard line. Policies also tend to fluctuate, according to the University of Maryland American-studies professor and fashion historian Jo Paoletti, who described dress-code adaptations as very “reactionary” to whatever happens to be popular at the time—whether it’s white go-go boots or yoga pants. Jere Hochman, the superintendent of New York’s Bedford Central School District echoes Paoletti in explaining that officials revisit his district’s policy, which has been in

place “for years and years and years,” “on an informal basis.” “It’s likely an annual conversation, he notes, “based on the times and what’s changed and fads.”

While [research on dress codes remains inconclusive](#) regarding the correlation between their implementation with students’ academic outcomes, many educators agree that they can serve an important purpose: helping insure a safe and comfortable learning environment, banning T-shirts with offensive racial epithets, for example. When students break the rules by wearing something deemed inappropriate, administrators must, of course, enforce school policies.

The process of defining what’s considered “offensive” and “inappropriate,” however, can get quite murky. Schools may promote prejudiced policies, even if those biases are unintentional. For students who attend schools with particularly harsh rules like that at Woodford, one of the key concerns is the implication that women should be hypercognizant about their physical identity and how the world responds to it. “The dress code makes girls feel self-conscious, ashamed, and uncomfortable in their own bodies,” says Sunseri.

Yet Sunseri emphasizes that this isn’t where she and other students take the most issue. “It’s not really the formal dress code by itself that is so discriminatory, it’s the message behind the dress code,” she says, “My principal constantly says that the main reason for [it] is to create a ‘distraction-free learning zone’ for our male counterparts.” Woodford County is one of many districts across the country to justify female-specific rules with that logic, and effectively, to place the onus on girls to prevent inappropriate reactions from their male classmates. (Woodford County High has not responded to multiple requests for comment.)

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**“These are not girls who are battling for the right to come to school in their bikinis—it’s a principle.”**

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“To me, that’s not a girl’s problem, that’s a guy’s problem,” says Anna Huffman, who recently graduated from Western Alamance High School in Elon, North Carolina, and helped organize a protest involving hundreds of participants. Further north, a group of high-school girls from South Orange, New Jersey, similarly launched a



campaign last fall, [#IAmMoreThanADistracted](#), which exploded into a trending topic on Twitter and gleaned thousands of responses from girls sharing their own experiences.

Educators and sociologists, too, have argued that dress codes grounded in such logic amplify a broader societal expectation: that women are the ones who need to protect themselves from unwanted attention and that those wearing what could be considered sexy clothing are “asking for” a response. “Often they report hearing phrases like, ‘boys will be boys,’ from teachers,” says Laura Bates, a co-founder of [The Everyday Sexism Project](#). “There’s a real culture being built up through some of these dress codes where girls are receiving very clear messages that male behavior, male entitlement to your body in public space is socially acceptable, but you will be punished.”

“These are not girls who are battling for the right to come to school in their bikinis—it’s a principle,” she says.

There’s also the disruption and humiliation that enforcing the attire rules can pose during school. Frequently, students are openly called out in the middle of class, told to leave and change, and sometimes, to go home and find a more appropriate outfit. In some instances, girls must wear brightly colored shirts that can exacerbate the embarrassment, [emblazoned with words like, “Dress Code Violator.”](#) Some students contend this is a bigger detractor from learning than the allegedly disruptive outfit was in the first place. “That’s crazy that they’re caring more about two more inches of a girl’s thigh being shown than them being in class,” says Huffman. These interruptions can also be detrimental to peers given the time taken out from learning in order for teachers to address the issue, as Barbara Cruz, author of [School Dress Codes: A Pro/Con Issue](#), points out.

Dress-code battles can also take place at events outside of the classroom, such as prom. At Cierra Gregersen’s homecoming dance at Bingham High School in South Jordan, Utah, administrators asked female students to sit against the wall, touch their toes, and lift their arms to determine whether their outfits were appropriate. “Girls were outside the dance crying hysterically,” says Gregersen, commenting on the public nature of the inspections and the lack of clarity around the policy. “We

should not have to be treated like sexual objects because that was what it felt like.” The incident prompted Gregersen to create a popular Change.org petition and stage a walkout with more than 100 classmates, but she says she never heard back from administration. (Bingham High School has not responded to multiple requests for comment.)

\* \* \*

Every year, Strawberry Crest High School in Dover, Florida, holds a Spirit Week right around Halloween, during which students wear outfits in accordance with each day’s theme. One of the themes last year was Throwback Thursday, enabling students to dress up in ways reminiscent of a previous decade. Peter Finucane-Terlop, a junior at the time who identifies as gay, decided to come to school in drag as a 1950s housewife.

Wearing a knee-length, baby-blue strapless dress, a button-up on top, a wig, and some make-up, Finucane-Terlop’s outfit, he says, wasn’t only accepted by his peers—it also complied with all the school’s dress-code rules: His shoulders and chest were covered, and his dress was an appropriate length.

But sometimes the ways that schools regulate attire have little to do with explicit policies. According to Finucane-Terlop, a school official commented on his outfit in the middle of the courtyard during lunch that day. Finucane-Terlop recalls him saying, “Why are you dressed like that?” and “You shouldn’t do that. You’re a boy—dress like it. What if little kids saw you?”

Finucane-Terlop says he mentioned the incident to his school counselor right after it took place but didn’t end up getting a response from administrators. April Langston, Finucane-Terlop’s counselor, and David Brown, his principal at Strawberry Crest, however, do not recall talking about or hearing of such an incident.

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**“This isn’t occasional; this isn’t just some students. This is something that happens quite regularly.”**

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Beyond this specific case, Emily Greytak, the research director at GLSEN (the Gay, Lesbian, and Straight Education Network), says the organization has noticed that incidents like the one Finucane-Terlop described are becoming more frequent, when LGBT students are discriminated against either verbally, or via disciplinary action, for clothing choices that don't fall in line with either a dress code or dress expectations that starkly demarcate different rules based on gender. According to a [recent GLSEN study](#), 19 percent of LGBT students were prevented from wearing clothes that were thought to be from another gender and that number was even higher for transgender students, nearly 32 percent of whom have been prevented from wearing clothes that differed from those designated for their legal sex.

“This isn't occasional; this isn't just some students. This is something that happens quite regularly,” Greytak says. The discipline is sometimes informed by teachers' personal biases while in other cases, school policies discriminate against transgender or gender non-conforming students expressions of their gender identity.

As Emery Vela, a sophomore, demonstrates, eventually some students manage to navigate and help reform the policies. Vela, a transgender student who attends a charter school in Denver, Colorado, dealt with this issue when looking for footwear to match his uniform in middle school, which had different requirements for boys and girls and suspended students if they broke the rule. Despite some initial pushback, the school adjusted the policy after he spoke with administrators.

“While they're trying to achieve this goal of having a learning environment that supports learning, it's really disadvantaging transgender and gender non-conforming students when they have to wear something that doesn't match their identity,” Vela says.

\* \* \*

Dress codes trace back to the 1920s and '30s, and conflicts over the rules have been around ever since, says Paoletti, the fashion historian: “Dress has been an issue in public schools as long as teenagers have been interested in fashion.” Several cases, including *Tinker vs. Des Moines Independent Community School District* in 1969, in which students alleged that wearing black armbands at school to protest the

Vietnam War constituted free speech, have even gone all the way up to the Supreme Court.

The subjectivity inherent to many of these judgment calls—like the dress-code cases contending that boys with long hair would be society’s downfall—is often what ignites conflict. As with the kinds of protests staged by Sunseri and Huffman, many of the larger movements to resist school attire regulations today echo a broader momentum for women’s rights, pushing back against existing attitudes and practices. “We’ve seen a real resurgence in the popularity of feminism and feminist activism, particularly among young people and particularly in an international sense, facilitated by social media,” says Bates, who sees dress code protests as one key everyday impact of such trends. “I think that one of the striking elements of this new wave of activism is a sense of our entitlement and our courage to tackle the forms of sexism that are very subtle, that previously it was very difficult to stand up to, because you would be accused of overreacting, of making a fuss out of nothing.”

Similarly, Greytak says these conflicts are also an indicator that LGBT students are feeling safer in their school environments and able to criticize them: “It’s very possible that we are hearing more and seeing more about these cases because before less students would even feel comfortable being and expressing themselves.”

As this issue has gained exposure and traction, students have also derived inspiration from the actions of their peers, including Sunseri, who’s now in the process of negotiating changes to the dress code with her school administration, “If high-schoolers across the country were standing up for what they believed was right, why shouldn’t I?”

\* \* \*

According to students, the best solutions for remedying these issues entail more inclusive policymaking and raising awareness about the subject. And students and administrators tend to agree that schools should involve students early on in the rule-creation process to prevent conflicts from popping up. By developing a system like this, they have a stake in the decision and are significantly more likely to both adhere and respect the final verdict.

This also helps reduce some of the subjectivity that shapes the rules and acknowledges how touchy the topic can be for all stakeholders. “It’s sensitive for the students, it’s sensitive for the parents, it’s sensitive for the teachers,” says Matt Montgomery, the superintendent of Revere Local Schools in Richfield, Ohio. “You’re in a tough position when you’re a principal evaluating the fashion sense of a 15- or 16-year-old female. Principals are doing things like engaging female counselors and other staff members to make sure that everything is okay.”

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## **Schools should involve students early on to prevent conflicts from popping up.**

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Similarly, when conflicts do arise, maintaining an open dialogue is critical. “I always tell administrators to not be on the defensive, to hear students out, to hear families out, and then to have a well-reasoned explanation and if at all possible, to look at some of the research and be able to cite some of that,” says Cruz, the author. “Most of the time, school administrators are basing their decisions more on anecdotal evidence rather than empirical research. They need to be able to explain their rationale.”

Huffman, too, highlighted the importance of student involvement. “Adults aren’t going to be shopping at American Eagle or Forever 21,” she says, “They don’t know that it’s not even possible to buy a dress that goes to your knees.” Like Huffman, Kate Brown, a senior at Montclair High School, in Montclair, New Jersey, met with school administrators after organizing a protest, helping secure many of the policy changes her campaign had sought: removing words like “distracting.”

After all, teachers and administration don’t always realize that their policies are offensive—and this is where more education comes in. “Even for a lot of teachers in 2015, they have never had a trans student or a gender-nonconforming student where they’ve had to deal with this,” Finucane-Terlop says. “It’s new to them, so I understand that they might not know how to react.”

Ultimately, such rules could be the wrong way to handle some of the issues that they purport to cover. Since so many have previously been used to address the potential

of sexual harassment in schools regarding male students paying inappropriate attention to female students, it's clear other practices, like courses on respect and harassment, may be needed to fill this gap. These initiatives would shift the focus of school policies. "Is it possible that we can educate our boys to not be 'distracted' by their peers and not engage in misogyny and objectification of women's bodies?" asks Riddhi Sandil, a psychologist and co-founder of the Sexuality, Women and Gender Project at Teachers College at Columbia University.

"I think we live in a culture that's so used to looking at issues of harassment and assault through the wrong end of the telescope," Bates says, "that it would be really refreshing to see somebody turn it around and focus on the kind of behavior that is directed at girls rather than to police girls' own clothing."

There's a growing interest in making dress codes as gender-neutral as possible as a means of reducing sexism and LGBT discrimination. But even beyond policy changes, students say there needs to be a fundamental shift in admitting that teachers and administrators come in with their own set of biases, which they may bring to creating and enforcing school rules. "I feel like there's this misconception ... that you can separate your prejudice from your profession, because so often prejudice is unconscious," says Vela. "The biggest piece of advice I can offer is to recognize that."

In order to combat latent prejudices, schools must first acknowledge that they exist.

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*\*This article previously stated that Arkansas's entire statewide dress code exclusively applies to females. We regret the error.*

#### ABOUT THE AUTHOR

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**LI ZHOU** is a former editorial fellow at *The Atlantic*.

 [Twitter](#)

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May 22, 2017

Mr. Alex Dan  
Interim School Director  
Mystic Valley Charter School  
4 Laurel Street  
Malden, MA 02148

Massachusetts Board of Elementary and Secondary Education  
75 Pleasant Street  
Malden, MA 02148-4906

**RE: Discriminatory Policies at Mystic Valley Regional Charter School**

Dear Mr. Dan and Members of the Massachusetts Board of Education:

Below please find our letter prepared for the Mystic Valley Regional Charter School Board in advance of yesterday's emergency meeting. While we understand that the Board has suspended its hair policy for the remainder of the school year, the concerns we have remain, as do the remedies we seek for the Cook children and all Black students attending the school.

Sincerely,

American Civil Liberties Union of Massachusetts  
Anti-Defamation League  
Lawyers' Committee for Civil Rights and Economic Justice  
Mystic Valley Branch of the NAACP  
NAACP Legal Defense and Educational Fund, Inc.  
National Women's Law Center  
(The letter's authoring organizations)

Contact: Matt Cregor, Education Project Director  
Lawyers' Committee for Civil Rights and Economic Justice  
617-988-0609, mcregor@lawyerscom.org



Updated May 22, 2017

Mr. Alex Dan  
Interim School Director  
Mystic Valley Charter School  
4 Laurel Street  
Malden, MA 02148

Massachusetts Board of Elementary and Secondary Education  
75 Pleasant Street  
Malden, MA 02148-4906

### **RE: Discriminatory Policies at Mystic Valley Regional Charter School**

We, the undersigned civil rights and education organizations, write to express our strong concern about Mystic Valley Regional Charter School's Hair/Make-Up policy and the school's recent and historical enforcement of it. We were deeply disturbed to learn that the school is disciplining several Black girls, including sisters Deanna and Mya Cook, for wearing their hair in braids with extensions.<sup>1</sup> We were equally disturbed to learn that the school forced a Muslim student to remove henna from her hands during Eid, despite the fact that it was applied in adherence with religious tradition. Mystic Valley's actions in each of these instances suggest that its Hair/Make-Up policy and its enforcement of it are unlawful and discriminatory. Apparently, to Mystic Valley, braids with extensions are "drastic," "unnatural" and/or "distracting" and the religiously motivated practice of applying henna to one's hands runs afoul of the rule prohibiting students from "writ[ing] or draw[ing] on themselves." Mystic Valley's policy, both as written and as applied, discriminates against students of color and burdens religious expression. It must be changed.

Mystic Valley's student handbook includes a number of unjustifiable restrictions on student dress and grooming. Among these is a general ban on hair extensions, pursuant to which Deanna and Mya were disciplined, despite the widespread and well-known use of hair extensions in braids worn by Black women and girls and a lack of pedagogical basis for the policy. As a result of this discriminatory policy, the Cook girls have been given numerous detentions and are currently not allowed to participate in after-school activities, including sports – which may affect their eligibility



for both college and scholarships – and the Prom. Moreover, some of their Black peers have been suspended for failing to adhere to this policy.

Mystic Valley’s justifications for its application of this policy to the Cook sisters, and others, are deeply flawed. The school claimed that such policies are necessary to reduce evidence of economic inequality amongst its students, citing the costs of extensions. However, the assumption that wearing braids with extensions constitutes a marker of wealth is erroneous for two reasons: (1) braids with extensions cost less than other hair styles that are permitted under the policy – including relaxed hair – and (2) the cost of the extensions and braids themselves can range in price from hundreds of dollars to next to nothing. Meanwhile, the school imposes significant costs for participation in athletic activities, which may limit participation in school-related activities to those who can pay to play. In addition, it is clear that the policy itself has been inconsistently enforced, raising more questions as to the discriminatory nature of Mystic Valley’s actions.

Most disturbingly, Mystic Valley claims hairstyles like Deanna and Mya’s are “distracting.” Let us be clear: braids and hair extensions are not distractions; rather, they are basic forms of grooming and expression adorned primarily by Black women and have deep historical and cultural roots. In addition, as Mystic Valley employs at most one Black educator on its staff of 160,<sup>ii</sup> the fact that Mystic Valley considers braids with extensions distracting further demonstrates a severe lack of cultural sensitivity in the school.

We know that Deanna and Mya are not the only Black students targeted by Mystic Valley’s discriminatory practices. Data collected by the Massachusetts Department of Elementary and Secondary Education reveal that Black students at Mystic Valley are nearly three times more likely to be suspended than white students, and for longer periods of time.<sup>iii</sup> The disparities are even more dramatic for Black girls at Mystic Valley: according to the most recent data from the U.S. Department of Education, every girl suspended by the school in the 2013-14 school year was Black.<sup>iv</sup>

Mystic Valley’s policies and practices clearly violate the civil rights laws that prohibit discrimination against students based on race and sex, including Title VI of the 1964 Civil Rights Act and Title IX of the 1972 Education Amendments.<sup>v</sup> The policies under which Deanna and Mya were punished discriminate against Black girls by directly targeting a culturally traditional hairstyle and grooming choice. On top of its prohibition on hair extensions, the Mystic Valley code also states that “hair more than 2 inch [sic] in thickness or height is not allowed.”<sup>vi</sup> Under such a policy, most white students who wear their hair naturally would face no penalty, while most Black students and students of other ethnicities in which tightly curled hair is common could face daily discipline for doing the same. The policy deploys harmful stereotypes about what a “good student” looks like and sends the message to children of color that only students who adhere to a narrow, Eurocentric aesthetic are acceptable. Further, a quick review of the school’s yearbooks shows that white girls in the school wear extensions and/or dye their hair in violation of the Hair/Make-Up policy, suggesting the school’s grooming policy is disproportionately applied to Black girls.

We call upon Mystic Valley to amend their school policies to be inclusive of all students and prioritize student learning over student appearance. To remedy the harm its policies have already caused, and to prevent future discrimination, Mystic Valley must retract the current disciplinary infractions imposed because of violations of the “Hair/Make-Up” policy, remove all mention of relevant disciplinary action in students’ records, and issue an apology to all affected students, including the Cook sisters. Mystic Valley must also agree to stop punishing students for wearing extensions in their braids, change its hair policies to permit all appearances that do not pose a threat to health, safety, or cleanliness, and institute mandatory cultural competence and anti-discrimination training for all staff. To the extent that Mystic Valley is unwilling to make these necessary reforms, we call upon the Massachusetts Board of Elementary and Secondary Education, which authorized Mystic Valley’s charter, to use the full extent of its oversight authority to remedy this matter and ensure that similar policies and practices are not employed by other schools under its purview.

Creating safe, inclusive schools requires educators, students, and the communities to understand what happens when bias goes unchecked. If Mystic Valley is truly interested in providing an opportunity for a world class education, they should focus on the development of an inclusive culture and respectful school climate, and not spend any more of their students’ time splitting hairs.

Sincerely,

(In alphabetical order)

Advancement Project

African American Juvenile Justice Project

Alliance for Educational Justice

American Association of University Women

American Civil Liberties Union of Massachusetts

Anti-Defamation League

Center for Collaborative Education

Center for Law and Education

Citizens for Juvenile Justice

Civil Rights Project at UCLA

Clearinghouse on Women's Issues

Education Law Center

The Evoluer House

FECT

Futures Without Violence

Institute for Compassion in Justice

Lawyers' Committee for Civil Rights and Economic Justice

Maryland Multicultural Coalition  
Massachusetts Advocates for Children  
Massachusetts Appleseed Center for Law & Justice  
Massachusetts Jobs with Justice  
Massachusetts Women of Color Coalition  
Mental Health Legal Advisors Committee  
Mystic Valley Branch of the NAACP  
NAACP Legal Defense and Educational Fund, Inc.  
National Alliance for Partnership in Equity (NAPE)  
National Organization for Women  
National Women's Law Center  
National Women's Political Caucus  
New England Regional Conference of the NAACP (NEAC)  
Power of Self Education (POSE) Inc.  
Public Counsel  
Public Justice  
Schott Foundation for Public Education  
Texas Appleseed  
Victim Rights Law Center  
Youth On Board  
(Updated to reflect additional signatures since the Mystic  
Valley Regional Charter School Board's meeting on  
Sunday, May 21, 2017)

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<sup>i</sup> Kay Lazar, *Black Malden Charter Students Punished for Braided Hair Extensions*, Boston Globe (May 12, 2017) at <https://www.bostonglobe.com/metro/2017/05/11/black-students-malden-school-who-wear-braids-face-punishment-parents-say/stWDLBSCJhw1zocUWR1QMP/story.html>

<sup>ii</sup> While Mystic Valley Charter School reported employing only one Black educator to the Massachusetts Department of Elementary and Secondary Education this school year, the families are unaware of any Black educators at Mystic Valley Charter School. See, Mass. Dep't of Elementary and Secondary Education, Staffing Data by Race, Ethnicity, Gender by Full-time Equivalents (2016-17), at:

<http://profiles.doe.mass.edu/profiles/teacher.aspx?orgcode=04700105&orgtypecode=6&leftNavId=817&>

<sup>iii</sup> See, Mass. Dep't. of Elem. and Second. Educ., *2015-16 Student Discipline Data Report* (2016), at <http://profiles.doe.mass.edu/ssdr/default.aspx?orgcode=04700000&orgtypecode=5&leftNavId=12565&TYPE=DISRICT&fycode=2016>; Mass. Dep't. of Elem. and Second. Educ., *2015-16 Student Discipline Days Missed Report* (2016), at

[http://profiles.doe.mass.edu/ssdr/ssdr\\_days\\_missed\\_detail.aspx?orgcode=04700000&orgtypecode=5&=04700000&](http://profiles.doe.mass.edu/ssdr/ssdr_days_missed_detail.aspx?orgcode=04700000&orgtypecode=5&=04700000&)

<sup>iv</sup> U.S. Dep't. of Educ., *2013-14 Civil Rights Data Collection* (2016) at <http://ocrdata.ed.gov/>.

<sup>v</sup> These laws apply to all schools that receive federal funding, including charter schools. Acknowledging that students may face discrimination on the basis of the intersection of their sex and race, federal courts and the U.S. Department of Education have also recognized joint claims under Title IX and Title VI. Prohibited forms of discrimination include disciplinary policies that target students based on their sex and/or race as well as facially neutral policies that are disproportionately applied to students on the same bases. Research shows that discrimination is often rooted in impermissible sex- and race-based stereotypes that have no place in classrooms.

<sup>vi</sup> Mystic Valley Regional Charter School, *Parent/Student Handbook* 17 (2017), at: <http://www.mvrcs.com/pdf/2016-2017%20Student%20Parent%20Handbook.pdf>.