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Gender Justice
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Course Reader – Volume 1

Introduction to the Course

January 28th: Introduction

- Chloe Malle, "Imperial Pink? The Wing Gears Up to Go Global," Vogue Magazine, August 8, 2018.

February 4th: Early Framing

- Jo Freeman, "The Revolution For Women In Law And Public Policy," in Women: A Feminist Perspective (Jo Freeman ed. 1995) pp. 365-404
- Kathleen Neal Cleaver, *Racism, Civil Rights, and Feminism*, in Critical Race Feminism: A Reader (Wing ed. 1997)
- Gayle Rubin, Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in Pleasure and Danger 267 (Carole S. Vance ed., 1984)

I. The Body As A Gender Justice Project

February 11th: Paradigms of Gender Equality

- Nancy Levit and Robert R.M. Verchick, *Feminist Legal Theories*, in Feminist Legal Theory, 11 (New York University Press, 2016).

February 18th: Gendering/Sexing the Body

- *In Re Estate of Gardiner*
- International Association of Athletics Federations, *Eligibility Regulations For The Female Classification (Athletes With Differences Of Sex Development)*, November 1, 2018
- *IAAF Rules To Limit Testosterone Levels For Female Runners*, CBC, April 26, 2018
- *Caster Semenya Files Legal Challenge Against 'Discriminatory' IAAF Rule*, CBC, June 18, 2018
- Katrina Karkazis and Rebecca Jordan-Young, *The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes*, Feminist Formations, Volume 30, Issue 2, Summer 2018, pp. 1-39

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Imperial Pink? The Wing Gears Up to Go Global

AUGUST 8, 2018 8:00 AM

by CHLOE MALLE

Wing cofounders Lauren Kassan (left, in Chloé) and Audrey Gelman (in Sara Battaglia) in the Jardin du Luxembourg.

Photographed by Olivia Arthur of Magnum Photos

Audrey Gelman climbs the curling marble staircase of a stately Haussmann address in a vintage paisley sundress, the clap of her Gucci mules kicking up a thin layer of dust. It is the longest day of the year, and she and Lauren Kassan, cofounders of the women's social-and-co-working club the Wing, have been touring Paris real estate since 9:00 a.m. They will visit eleven locations by the end of the day.

This one is a corner building on the Champs-Élysées with exquisite marble work in the stairwell and Rococo wall murals in the conference rooms. The first-floor tenant is Ladurée, the megalith *macaronier* whose pastel hues match the Wing's decor. There was a time when a box of the meringue cookies was a coveted gift from France; now that Ladurée is everywhere from Baku to D.C.'s Union Station, they feel decidedly less special. I ask how the Wing, a phenomenon since the first club opened in Manhattan's Flatiron district in October 2016, can avoid that fate as they gear up to go global.

"It's a delicate balance," concedes Kassan, a "Her Way or The Highway" T-shirt peeking out under her jean jacket.

"I mean, we are ambitious," says Gelman unapologetically. "The goal is to create spaces that women have never had before and to do it all over the world. From Detroit to Abu Dhabi."

She slips her cat-eye sunglasses back on as we emerge into the throng of tourists on the boulevard. How many Wings will there be by the end of this year? Gelman tallies outposts on her fingers, her nails painted a bright-yellow gingham: Flatiron, SoHo, Dumbo, D.C., San Francisco, and Los Angeles. In 2019, they will more than double that number, with openings planned in Williamsburg (Brooklyn), Chicago, Seattle, Boston, Toronto, London, and here in Paris.

"The bones are beautiful," says Kassan of the building we've just seen, "but I just think the location is too hectic." And with that we are off to the next, a newly renovated site near the Parc Monceau, where the drop ceiling cannot be opened. "No?" Kassan asks the French broker. "Ashvack," he replies mournfully. Kassan looks confused, then understands: "HVAC."

It's a bit of a Goldilocks exercise—one space has a trellised terrace but is deemed too sleepy a location; another is well situated but lacking in charm. "You have to kiss a lot of frogs," says Gelman as we glide past the Arc de Triomphe. "You definitely get an 'aha' moment, and you know in two minutes." That "aha" moment does arrive, in fact, in the form of a seventeenth-century limestone *hôtel particulier* in the heart of the Marais. The ground floor will be retail space, but the two stories above, with exposed wood beams and original ironwork railings overlooking an ivy-clad courtyard, will be 12,000 square feet of Wing world. The building was once the home of Louis XIV's famed mistress Madame de Montespan, who, legend says, forbade all men except servants to enter the premises. Too good to be true? This keeps happening—the Flatiron Wing is located in the historic Ladies' Mile, and the London location will be next door to what was once

Britain's first women's club. "My dream is to one day open in a former strip club," says Gelman.

"It feels like they can't open them fast enough," says ex–Planned Parenthood president and tote-carrying Wing member Cecile Richards. Indeed, the Wing's wait list has always rivaled its membership (the current member tally of 5,000 will likely double by the end of the year). I was an early joiner and have to admit I felt soothed the minute I settled in. Was it the thermostat fixed to 74 degrees, significantly warmer than most public spaces set to suit men, or the relief of interacting only with other women? "It becomes subconscious because we adapt to it even as young girls," says Gelman of the pressure of the male gaze. "To get to leave that at the door is such a freeing feeling." Everything inside is designed to buoy one's mood: The library (all books by or about women) is arranged into a rainbow by spine color, the plants are always green (they're plastic), the Spotify playlists are peppy and familiar, and the language of the place is injected with moxie—stickers in the bathroom stalls remind members to "Flush It Like You Mean It," a freekeh–and–poached egg dish is the "Fork the Patriarchy Bowl," and a cucumber-kombucha mocktail is "Reclaiming My Thyme" (another is the "Virgin Woolf").

Kassan and Gelman understood early that in our current gig economy, a co-working space is more than a desk and free coffee—it defines you in the way a choice of gym might have in the nineties. Gelman's original idea, hatched while working for the political PR firm SKDKnickerbocker, was a practical-minded third space for women between "work & werk"—as the broadsheet posters tacked to the wall in the Flatiron location proclaim—but when she met Kassan, then at the fitness app ClassPass, a grander idea of a women's community emerged. "Lauren's take was, Yes, a shower's great, but that wasn't why women would join a place like this," explains Gelman. And the Wing has become more and more far-reaching in its mission. Its networking events are packed, and its speaker series has featured everyone from Jennifer Lawrence to Hillary Clinton to Alexandria Ocasio-Cortez. All in all it has raised $42 million in funding—its latest round mostly from the co-working giant WeWork. Some have snarked that there is an irony in a feminist space that excludes men but is built largely on male venture-capital funds. Gelman is unfazed: "All money is touched by men one way or another."

It is almost 9:00 p.m. in Paris, but the summer solstice means it feels like late afternoon. We sit down to dinner at the ancient bistro Chez L'Ami Louis. Gelman drinks Coca-Cola Light while Kassan sips Sancerre. Both are petite, with long, coffee-colored hair; they wear matching gold Jennifer Fisher *W* necklaces ("They're like our Vice ring," jokes Gelman). They share two entrées, lamb and poulet rôti, followed by a flourless chocolate torte. "I'd be bullshitting if I said I wasn't exhausted," Gelman admits when asked how they have handled the brand's rapid growth. To decompress she searches cats on Instagram (she has three Persians) and shops on TheRealReal. Perusing StreetEasy relaxes Kassan. "I'm a psycho; I read everything," says Gelman of her media diet. "Audrey learns about things the minute they happen on Twitter; it's amazing!" says Kassan.

“You sound like my grandmother,” teases Gelman, plucking up a runaway fraise des bois from the linen tablecloth and popping it in her mouth.

Pastel hues prevail at The Wing in Dumbo, Brooklyn, which opened in early 2018.
Photo: Tory Williams

While Gelman is the face and voice of the brand, it quickly becomes clear that the Wing would not exist without the thoughtful, detail-oriented Kassan, whose natural inclination is to remain behind the scenes, a perfect foil to her partner. Gelman emerged in her early 20s as that rare Venn-diagram overlap of a “real woman with a serious job”—she worked as press secretary to Scott Stringer and on Hillary Clinton’s 2008 presidential campaign—who was also beautiful, stylish, and sample-size and so was pounced upon by every women’s magazine. Her love life (in 2016 she married Genius cofounder Ilan Zechory in a hipster fantasia in a former Ford factory in Detroit) and fraught friendship with Lena Dunham (she was the inspiration for the character Marnie on *Girls*) have been reported on and followed by a certain sector of New York cognoscenti with the same relish the rest of the country dedicates to the Real Housewives.

To some, Gelman’s many facets present a bewildering contradiction: Two weeks after watching the Golden Globes in a time’s up T-shirt with a group of fellow women’s-rights activists, she sat front row at Chanel couture, her many tattoos peeking out from her metallic mini. “You can exist as a person of substance in the world and enjoy those things,” she says. She’s right, of course, but she is also a victim of the tendency among some women to be harshest on their own sex. “Audrey’s a go-getter, and if you’re a go-

getter you're bound to ruffle some feathers," says Wing founding member Tina Brown. "Plenty of men are go-getters, but people tend to express great consternation when that's allied to an attractive young woman who's got the same kind of business brio."

Then there are the questions around the way the club markets its quippy brand of Instagrammable feminism: Wing merch currently includes a pale-pink "internet herstory" baseball cap and a "no-man-icure" and "sharpen your claws" emery-board set. "I think a lot of women have been skeptical of the Wing, like 'What is this millennial-pink feminism actually going to *do* for us?' " says actress Hari Nef, also a founding member. "But if you look closely at who is showing up, it puts those anxieties to rest." She means people like Valerie Jarrett and the feminist writer Jessica Valenti, who speaks to me from the Wing Dumbo. "I feel like feminism is the only social-justice movement where the aesthetic of it comes into question," she says. "Can you imagine someone in the environmental movement being like 'This is too green'?"

Rebecca Traister, author of the forthcoming *Good and Mad: The Revolutionary Power of Women's Anger*, is ambivalent about a company's profiting from a social-justice movement but notes the political importance of the Wing's kind of accessible feminism. (She is the proud owner of one of the club's best-selling Andrea Dworkin pins.) "Are they laughing all the way to the bank? Sure," she says. "Did Al Gore? Did Michael Moore? Whom do we hold to account for profiting from probably fundamentally good politics?"

"If we can accept that the Wing is what it is, which is one business among many, and one that happens to sell women something that they really want, then that's great," says feminist blogger and bellwether Sady Doyle, who says she would love to work out of the Wing but balked at the membership fees ($2,350–$2,700 a year). "It's when we start placing the burden on what is essentially a profit-driven business to represent what feminism is in the twenty-first century that we start running into trouble."

Indeed, the Wing's price tag limits the club's economic diversity. Most co-working spaces cost the same or more, but this one's feminist mission can add new expectations of inclusivity. In May, the Wing introduced a scholarship program offering 100 free two-year memberships as well as professional mentoring. It has received over 10,000 applications so far.

"Historically women of color and the LGBTQ community have been left out of the feminist movement," says Atima Lui, a member who was brought on as a diversity consultant, "and the Wing is intentional about making sure people like me—and people who don't look like me—feel comfortable here." Diversity has been a priority and is addressed in Wing programming and staff resources—there is a full-time diversity manager and community managers who track the demographics of each space. The beauty rooms are stocked with hair products for different hair textures, and the wallpaper depicting trios of naked nymphs in the SoHo "pump room" was customized to include women with different skin tones.

Men, however, are not welcome, and this has proved more controversial than perhaps anyone anticipated. In March, Jezebel reported that the New York Human Rights Commission was investigating the Wing for potential violation of the city's Human Rights Law barring certain public businesses from gender-based discrimination. Almost immediately, everyone from Roxane Gay to Monica Lewinsky tweeted her fealty with the hashtag #IStandWithTheWing. Mayors of other cities came out with public statements of support, including Rahm Emanuel, who went so far as to send a letter inviting them to open in Chicago (winter 2019). When asked for an update, a spokesperson from the commission would say only that it "continues its investigation into the Wing." According to Gelman, "they sent us a letter—on the first day of Women's History Month—wanting to learn more about the business. It's not like the Mueller investigation. They've backed off."

Others have not. "I think in 2018 for a company to have a business model that is discriminatory, even if seems in a benign sort of way, feels very untimely," says Katherine Franke, Sulzbacher Professor of Law, Gender, and Sexuality Studies at Columbia University and author of a petition advocating for the commission's enforcement of the Sex Discrimination Law (it was signed by a dozen lawyers and gender-studies and law professors). There's also the evolving question of who qualifies as a woman. "We have just tried to lean into having the most broad definition possible," Gelman says, noting that membership is not restricted only to people who are born female or identify as female but also includes those outside the gender binary.

Global expansion will present its own set of challenges. In Paris, Hélène Bidard, Mayor Anne Hidalgo's deputy for women's equality, feels "quite certain there will be a place for this kind of business," noting that there have already been others of its kind popping up on a smaller scale. But Lauren Bastide, a feminist journalist and podcast producer, wonders if the French tradition of prioritizing universalist versus communitarian values may provoke pushback to a club that is self-segregating. For example, last summer Mayor Hidalgo blocked the Afro-feminist group MWASI from hosting workshops exclusively for black women. "*Communautarisme* in France is a very bad word," explains Bastide. "It sounds like you want to destroy the republic to say you're doing something with your community."

"We're not advocating for a world in which genders cease to interact with each other," says Gelman, slouched but alert in the backseat of a taxi on the way to Charles de Gaulle. She's removed the makeup from a *Vogue* photo shoot earlier in the day and has changed into an eyelet Ulla Johnson dress for the flight home. But she admits that "one day the Wing could look different." Other female co-working spaces (of which there are a few—California's Hera Hub, Toronto's Shecosystem) accept men on a selective basis, and Gelman concedes such a thing "could be a reality in the future. I think our attitude has been to keep an open mind."

As we sit at the gate waiting for our flight home, Kassan stares at her phone maternally. I ask if she's looking at photos of her five-month-old, Quincy, but she is in fact checking Luma camera monitors at the Wing. Gelman eagerly logs in to hers as well. "I check at least once a day," admits Kassan. They toggle between the different areas of the four

locations, and coos of “Oh, SoHo’s not that crowded!” and “Dumbo’s so pretty” erupt from our corner of the waiting area. It is the end of a weeklong trip that included a three-day vacation with their husbands in Portofino on the way to the Cannes Lions festival, where Gelman was a speaker. It is the first time they have both been away from the Wing. “I miss it,” says Gelman wistfully, watching the screen as if it were a baby monitor.

In this story:
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Women

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The Revolution for Women in Law and Public Policy

Jo Freeman

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.[1]

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

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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."[2] 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.[3]

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.[4]

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.[5] 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.[6]

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.[7] 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.[8]

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.[9] 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.[10] 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.[11]

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.[12] 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."[13] 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."[14] 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.[15]

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,[16] 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.[17]

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.[18]

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.[19] 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.[20]

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.[21]

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.[22]

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, untrammeled 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.[23]

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.[24] 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."[25] The prohibi-tion on racial discrimination was soon expanded to include national origin[26] and alienage.[27] 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.[28]

This umbrella did not protect everyone or every right. Instead, in the post–New Deal era, two tiers of equal protection analysis emerged.[29] 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.[30]

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,"[31] 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.[32] 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.[33] 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.[34] Despite the Court's assertion that "the Constitution does not require legislatures to reflect sociological insight, or shifting social standards,"[35] 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 indiviously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.[36]

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.[37] 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.[38]

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."[39]

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.[40] 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."[41]

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.[42]

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,[43] alimony for wives but not for husbands,[44] welfare benefits to families with unemployed fathers but not unemployed mothers,[45] and worker's compensation death benefits to widows, but to widowers only if they could prove economic dependency.[46]

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.[47] Alabama's total exclusion was found unconstitutional under the Fourteenth Amendment by a three-judge federal district court in 1966.[48] 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."[49] 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."[50]

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".[51]

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."[52]

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.[53]

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.[54]

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.[55] 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.[56] 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."[57]

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.[58]

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;[59] 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.[60]

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 disctrict 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.[61]

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."[62]

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,"[63] 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."[64]

Schlesigner 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."[65] 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.[66]

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."[67] 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."[68]

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 nonveterans. 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."[69]

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.[70] 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.[71]

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.[72] In 1976 Congress amended the Unemployment Compensation Act to prohibit denial of claims solely on the basis of pregnancy or termination of pregnancy.[73] 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."[74]

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.[75] 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.[76] It also upheld two Georgia statutes permitting unwed mothers but not unmarried fathers to veto the adoption[77] or sue for the wrongful death of a child.[78] 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.[79] 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.[80] 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.[81] 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.[82] 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.[83]

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."[84] 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.[85]

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.[86] 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.[87] 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.[88]

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.[89]

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.[90] 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.[91]

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.[92]

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.[93] 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,[94] 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.[95]

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*.[96] 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.[97] 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[98] and prohibiting girls from having paper routes before age eighteen.[99]

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.[100]

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.[101]

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.[102] 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.[103] 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.[104] 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.[105]

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.[106]

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.[107] 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.[108]

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.[109]

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[110] but women could not be guards in male prisons.[111] 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.[112]

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.[113]

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.[114]

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.[115]

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.[116] 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.[117]

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.[118]

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.[119]

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.[120]

"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,[121] 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.[122]

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.[123]

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.[124] Others found that "neither husband nor wife is liable for necessaries supplied to the other."[125] 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."[126] 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.[127] In 1967 it found unconstitutional laws that prohibited interracial marriage.[128] In 1968 it overturned those that discriminated against the children of extramarital unions[129] or reduced the welfare benefits of needy children whose mothers were illicitly cohabiting.[130] 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.[131] In 1976 it rejected an absolute parental veto over a minor's wish to obtain an abortion.[132] And in 1977 it decided that local zoning laws could not discriminate against extended families.[133] 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.[134] 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.[135]

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."[136]

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 "breadwinners" (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 Katherine Wing

Foreword by Derrick Bell

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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.[1] Feminists have drawn inspiration and legal ammunition[2] 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.[3]

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."[4] 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.[5] And where there were grassroots, there were women, as Kay Mills wrote in her biography of Fannie Lou Hamer.[6] 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.' "[7]

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.[8] 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.[9] 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.[10] And the stigma of that social death inherent in the slave condition has imprinted itself on the entire cultural fabric.[11]

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."[12] Their social position was so degraded, Taney wrote, "that they had no rights which the white man was bound to respect."[13] 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."[14]

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.[15] 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.[16]

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.[17] 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."[18] 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,[19] whose race reserved them a place within the dominant society from which black women were barred.[20] 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.[21] 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.[22] Everything great, everything fine, everything really successful in human culture was seen as white.[23] 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.[24] Race, particularly in the United States, has come to serve as a "metalanguage" for the construction of social relations.[25] 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.[26] 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-e17 (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* 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,* 17 Signs 251, 254 (1992).

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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* 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,* 17 Signs 251, 254 (1992).

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.

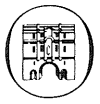
24. In his introduction to *The Souls of Black Folk,* W. E. B. Du Bois wrote that he intended to reveal the strange meaning of being black at the dawning of the twentieth century, which was important because "the problem of the twentieth century is the problem of the color line."

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

26. *Id.*

PLEASURE and DANGER: exploring female sexuality

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

Press, vol. 31, no. 2, June 1979.

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, Raqiya, *Sisters in Affliction: Circumcision and Infibulation of Women in Africa*, Zed Press, London, 1980.)

4 Bernstein, Hilda, *For Their Triumphs and for Their Tears: Women in Apartheid South Africa*, International Defence Fund, 104 Newgate St, London, 1975.

5 Holt and Van deVelde, *Psychological Operations and American Foreign Policy*, University of Chicago Press, 1960.

6 Ellul, Jacques, *Propaganda: The Formation of Men's Attitudes*, Knopf, New York, 1965.

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[1]

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.[2] 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.[3] 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.[4] 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.[5]

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."[6] 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.[7]

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.[8]

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.[9] 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.[10] 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.[11] The FBI began systematic surveillance and harassment of homosexuals which lasted at least into the 1970s.[12]

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."[13]

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.[14] 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.[15]

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.[16] 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.[17]

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.[18]

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.[19]

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. Consequently, 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 underaged 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.[20]

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.[21] 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.[22]

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.[23] He thus neatly linked "the anti-gay fight in the domestic arena and the anti-communist battles in foreign policy."[24]

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.[25] 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.[26] 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 flagellist, 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.*[27]

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, asocial, 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.[28] Many historians have come to see the contemporary institutional forms of heterosexuality as an even more recent development.[29] 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.[30]

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.[31]

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.[32] 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."[33]

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.[34] 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.[35]

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.[36] 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).[37] 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."[38] 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.[39]

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.[40] 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

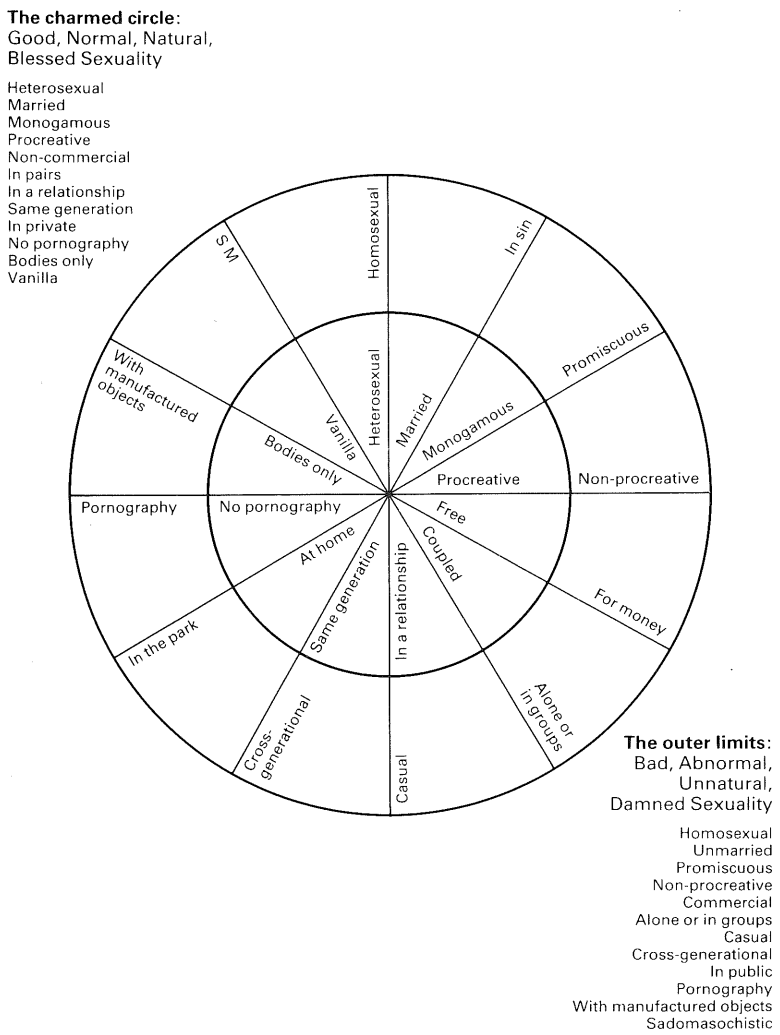

Figure 1 The sex hierarchy: the charmed circle vs the outer limits

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).

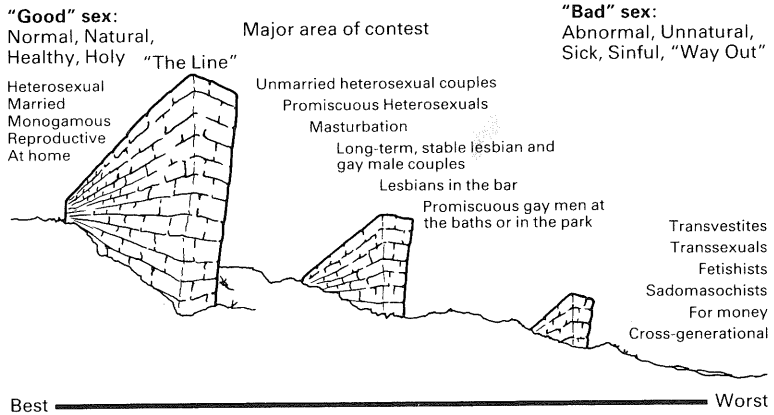

Figure 2 The sex hierarchy: the struggle over where to draw the line

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.[41] Among Kinsey's successors, John Gagnon and William Simon have pioneered the application of sociological understandings to erotic variety.[42] 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.[43]

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[44]

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 speciation. 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 speciation. 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.[45] 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."[46] 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 buggered 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.[47]

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.[48]

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.[49] 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.[50] 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[51]

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 adamantine 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 sediment 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."[52] 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.[53] 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 "precocity."

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.[54] 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.[55]

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."[56] 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 ghettoes 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.[57]

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[58]

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.[59] 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 contracters 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.[60] 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).[61] 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."[62]

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 ready-made 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.[63]

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."[64] 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."[65] 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 veneral 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[66]

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.[67] 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.[68] Most gay male conduct, all casual sex, promiscuity, and lesbian behavior that does involve roles or kink or non-monogamy are also censured.[69] Even sexual fantasy during masturbation is denounced as a phallocentric holdover.[70]

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. Whatever 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 Hirshfeld, 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."[71]

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.[72] Although the anti-porn forces have attempted to weed anyone who disgrees with them out of the movement, the fact remains that feminist thought about sex is profoundly polarized.[73]

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."[74] 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.[75] 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."[76] 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.[77] 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.[78] 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."[79] Before the consenting

adults 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.[80]

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."[81] 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.[82]

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."[83] 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."[84] 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.[85] 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."[86] 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."[87]

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 tarting 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."[88] 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."[89] 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.[90]

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."[91] This analytic strategy in turn rests on a decision to "use sex and gender relatively interchangeably."[92] 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[93]

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.[94]

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.[95] 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.

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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, Semiotext(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.

4 Sarah Senefield Beserra, Sterling G. Franklin, and Norma Clevenger (eds), *Sex Code of California*, Sacramento, Planned Parenthood Affiliates of California, 1977, p. 113.

5 Ibid., pp. 113-17.

6 Walkowitz, "Male Vice and Feminist Virtue", op. cit., p. 83. Walkowitz's entire discussion of the *Maiden Tribute of Modern Babylon* and its aftermath (pp. 83-5) is illuminating.

7 Walkowitz, "Male Vice and Feminist Virtue", op. cit., p. 85.

8 Beserra et al, op. cit., pp. 106-7.

9 Commonwealth of Massachusetts, *Preliminary Report of the Special Commission Investigating the Prevalence of Sex Crimes*, 1947; State of New Hampshire. *Report of the Interim Commission of the State of New Hampshire to Study the Cause and Prevention of Serious Sex Crimes*, 1949; City of New York, *Report of the Mayor's Committee for the Study of Sex Offences*, 1939; State of New York, *Report to the Governor on a Study of 102 Sex Offenders at Sing Sing Prison*, 1950; Samuel Hartwell, *A Citizen's Handbook of Sexual Abnormalities and the Mental Hygiene Approach to Their Prevention*, State of Michigan, 1950; State of Michigan, *Report of the Governor's Study Commission on the Deviated Criminal Sex Offender*, 1951. This is merely a sampler.

10 Estelle B. Freedman, " 'Uncontrolled Desire': The Threat of the Sexual Psychopath in America, 1935-1960", paper presented at the Annual Meeting of the American Historical Association, San Francisco, December 1983.

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 Comix*, 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.

16 "Chicago is Center of National Child Porno Ring: The Child Predators", "Child Sex: Square in New Town Tells it All", "U.S. Orders Hearings On Child Pornography: Rodino Calls Sex Racket an 'Outrage' ", "Hunt Six Men, Twenty Boys in Crackdown", *Chicago Tribune*, May 16, 1977; "Dentist Seized in Child Sex Raid: Carey to Open Probe", "How Ruses Lure Victims to Child Pornographers", *Chicago Tribune*, May 17, 1977; "Child Pornographers Thrive on Legal Confusion", "U.S. Raids Hit Porn Sellers", *Chicago Tribune*, May 18, 1977.

17 For more information on the "kiddie porn panic" see Pat Califia, "The Great Kiddy Porn Scare of '77 and Its Aftermath", *Advocate*, October 16, 1980; Pat Califia, "A Thorny Issue Splits a Movement", *Advocate*, October 30, 1980; Mitzel, *The Boston Sex Scandal*, Boston, Glad Day Books, 1980; Gayle Rubin, "Sexual Politics, the New Right, and the Sexual Fringe", in Daniel Tsang (ed.), *The Age Taboo*, Boston, Alyson Publications, 1981; on the issue of cross-generational relationships, see also Roger Moody, *Indecent Assault*, London, Word Is Out Press, 1980; Tom O'Carroll, *Paedophilia: The Radical Case*, London, Peter Owen, 1980; Tsang, *The Age Taboo*, op. cit., and Paul Wilson, *The Man They Called A Monster*, New South Wales, Cassell Australia, 1981.

18 "House Passes Tough Bill on Child Porn", *San Francisco Chronicle*, November 15, 1983, p. 14.

19 George Stambolian, "Creating the New Man: A Conversation with Jacqueline Livingston", *Christopher Street*, May 1980; "Jacqueline Livingston", *Clothed With the Sun*, vol. 3, no. 1, May 1983.

20 Paul H. Gebhard, "The Institute", in Martin S. Weinberg (ed.), *Sex Research: Studies from the Kinsey Institute*, New York, Oxford University Press, 1976.

21 Phoebe Courtney, *The Sex Education Racket: Pornography in the Schools (An Exposé)*, New Orleans, Free Men Speak, 1969; Dr Gordon V. Drake, *SIECUS: Corrupter of Youth*, Tulsa, Oklahoma, Christian Crusade Publications, 1969.

22 *Pavlov's Children (They May Be Yours)*, Impact Publishers, Los Angeles, California, 1969.

23 Norman Podhoretz, "The Culture of Appeasement", *Harper's*, October 1977.

24 Alan Wolfe and Jerry Sanders, "Resurgent Cold War Ideology: The Case of the Committee on the Present Danger", in Richard Fagen (ed.), *Capitalism and the State in U.S.-Latin American Relations*, Stanford, Stanford University Press, 1979.

25 Jimmy Breslin, "The Moral Majority in Your Motel Room", *San Francisco Chronicle*, January 22, 1981, p. 41; Linda Gordon and Allen Hunter, "Sex, Family, and the New Right", *Radical America*, winter 1977-8; Sasha Gregory-Lewis, "The Neo-Right Political Apparatus", *Advocate*, February 8, 1977; Sasha Gregory-Lewis, "Right Wing Finds New Organizing Tactic", *Advocate*, June 23, 1977; Sasha Gregory-Lewis, "Unravelling the Anti-Gay Network", *Advocate*, September 7, 1977; Andrew Kopkind, "America's New Right", *New Times*, September 30, 1977; Rosalind Pollack Petchesky, "Anti-abortion, Anti-feminism, and the Rise of the New Right", *Feminist Studies*, vol. 7, no. 2, summer 1981.

26 Rhonda Brown, "Blueprint for a Moral America", *Nation*, May 23, 1981.

27 James Barr, *Quatrefoil*, New York, Greenberg, 1950, p. 310.

28 This insight was first articulated by Mary McIntosh, "The Homosexual Role", *Social Problems*, vol. 16, no. 2, fall 1968; the idea has been developed in Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*, New York, Quartet, 1977, and in Weeks, *Sex, Politics and Society*, op. cit.; see also D'Emilio, *Sexual Politics, Sexual Communities*, op. cit.; and Gayle Rubin, "Introduction" to Renée Vivien, *A Woman Appeared to Me*, Weatherby Lake, Mo., Naiad Press, 1979.

29 Bert Hansen, "The Historical Construction of Homosexuality", *Radical History Review*, no. 20, Spring/Summer 1979.

30 Walkowitz, *Prostitution and Victorian Society*, op. cit.; and Walkowitz, "Male Vice and Female Virtue", op. cit.

31 Michel Foucault, *The History of Sexuality*, New York, Pantheon, 1978.

32 A very useful discussion of these issues can be found in Robert Padgug, "Sexual Matters: On Conceptualizing Sexuality in History", *Radical History Review*, no. 20, spring/summer 1979.

33 Claude Lévi-Strauss, "A Confrontation", *New Left Review*, no. 62, July-August 1970. In this conversation, Lévi-Strauss calls his position "a Kantianism without a transcendental subject."

34 Foucault, op. cit., p. 11.

35 See the discussion in Weeks, *Sex, Politics and Society*, op. cit., p. 9.

36 See Weeks, *Sex, Politics and Society*, op. cit., p. 22.

37 See, for example, "Pope Praises Couples for Self-Control", *San Francisco Chronicle*, October 13, 1980, p. 5; "Pope Says Sexual Arousal Isn't a Sin If It's Ethical", *San Francisco Chronicle*, November 6, 1980, p. 33; "Pope Condemns 'Carnal Lust' As Abuse of Human Freedom", *San Francisco Chronicle*, January 15, 1981, p. 2; "Pope Again Hits Abortion, Birth Control", *San Francisco Chronicle*, January 16, 1981, p. 13; and "Sexuality, Not Sex in Heaven", *San Francisco Chronicle*, December 3, 1981, p. 50. See also footnote 62 below.

38 Susan Sontag, *Styles of Radical Will*, New York, Farrar, Strauss, & Giroux, 1969, p.46.

39 See Foucault, op. cit., pp. 106-7.

40 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental and Physical Disorders*, 3rd edn, Washington, DC, American Psychiatric Association.

41 Alfred Kinsey, Wardell Pomeroy, and Clyde Martin, *Sexual Behavior in the Human Male*, Philadelphia, W.B. Saunders, 1948; Alfred

Kinsey, Wardell Pomeroy, Clyde Martin, and Paul Gebhard, *Sexual Behavior in the Human Female*, Philadelphia, W.B. Saunders, 1953.

42 John Gagnon and William Simon, *Sexual Deviance*, New York, Harper & Row, 1967; John Gagnon and William Simon, *The Sexual Scene*, Chicago, Transaction Books, Aldine, 1970; John Gagnon, *Human Sexualities*, Glenview, Illinois, Scott, Foresman, 1977.

43 Havelock Ellis, *Studies in the Psychology of Sex* (two volumes), New York, Random House, 1936.

44 Foucault, op. cit., p. 43.

45 Gilbert Herdt, *Guardians of the Flutes*, New York, McGraw-Hill, 1981; Raymond Kelly, "Witchcraft and Sexual Relations", in Paula Brown and Georgeda Buchbinder (eds), *Man and Woman in the New Guinea Highlands*, Washington, DC, American Anthropological Association, 1976; Gayle Rubin, "Coconuts: Aspects of Male/Female Relationships in New Guinea", unpublished ms., 1974; Gayle Rubin, review of *Guardians of the Flutes*, *Advocate*, December 23, 1982; J. Van Baal, *Dema*, The Hague, Nijhoff, 1966; F.E. Williams, *Papuans of the Trans-Fly*, Oxford, Clarendon, 1936.

46 Caroline Bingham, "Seventeenth-Century Attitudes Toward Deviant Sex", *Journal of Interdisciplinary History*, spring 1971, p. 465.

47 Stephen O. Murray, "The Institutional Elaboration of a Quasi-Ethnic Community", *International Review of Modern Sociology*, July-December 1979.

48 For further elaboration of these processes, see: Bérubé, "Behind the Spectre of San Francisco", op. cit.; Bérubé, "Marching to a Different Drummer", op. cit.; D'Emilio, "Gay Politics, Gay Community", op. cit.; D'Emilio, *Sexual Politics, Sexual Communities*, op. cit.; Foucault, op. cit.; Hansen, op. cit.; Katz, op.cit.; Weeks, *Coming Out*, op. cit.; and Weeks, *Sex, Politics and Society*, op. cit.

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.

51 Foucault, op. cit., p. 40.

52 Karl Marx, in David McLellan (ed.), *The Grundrisse*, New York, Harper & Row, 1971, p. 94.

53 Clark Norton, "Sex in America", *Inquiry*, October 5, 1981. This article is a superb summary of much current sex law and should be required reading for anyone interested in sex.

54 Bessera et al., *op. cit.*, pp. 165-7.

55 Sarah Senefeld Beserra, Nancy M. Jewel, Melody West Matthews, and Elizabeth R. Gatov (eds.), *Sex Code of California*, Public Education and Research Committee of California, 1973, pp. 163-8. This earlier edition of the *Sex Code of California* preceeded the 1976 consenting adults statute and consequently gives a better overview of sodomy laws.

56 Esther Newton, *Mother Camp: Female Impersonators in America*, Englewood Cliffs, New Jersey, Prentice-Hall, 1972, p. 21, emphasis in the original.

57 D'Emilio, *Sexual Politics, Sexual Communities*, op. cit., pp. 40-53, has

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.

58 Weeks, *Sex, Politics and Society*, op. cit., p. 14.

59 Lysander Spooner, *Vices Are Not Crimes: A Vindication of Moral Liberty*, Cupertino, CA, Tanstaafl Press, 1977.

60 I have adopted this terminology from the very useful discussion in Weeks, *Sex, Politics and Society*, op. cit., pp. 14-15.

61 See Spooner, op. cit., pp. 25-9. Feminist anti-porn discourse fits right into the tradition of justifying attempts at moral control by claiming that such action will protect women and children from violence.

62 "Pope's Talk on Sexual Spontaneity", *San Francisco Chronicle*. November 13, 1980, p. 8; see also footnote 37 above. Julia Penelope argues that "we do not need anything that labels itself purely sexual" and that "fantasy, as an aspect of sexuality, may be a phallocentric 'need' from which we are not yet free." in "And Now For the Really Hard Questions", *Sinister Wisdom*, no. 15, fall 1980, p. 103.

63 See especially Walkowitz, *Prostitution and Victorian Society*, op. cit., and Weeks, *Sex, Politics and Society*, op. cit.

64 *Moral Majority Report*, July 1983. I am indebted to Allan Bérubé for calling my attention to this image.

65 Cited in Larry Bush, "Capitol Report", *Advocate*, December 8, 1983, p. 60.

66 Cited in H. Montgomery Hyde, *A History of Pornography*, New York, Dell, 1965, p. 31.

67 See for example Laura Lederer (ed.), *Take Back the Night*, New York, William Morrow, 1980; Andrea Dworkin, *Pornography*, New York, Perigee, 1981. The *Newspage* of San Francisco's Women Against Violence in Pornography and Media and the *Newsreport* of New York Women Against Pornography are excellent sources.

68 Kathleen Barry, *Female Sexual Slavery*, Englewood Cliffs, New Jersey, Prentice-Hall, 1979; Janice Raymond, *The Transsexual Empire*, Boston, Beacon, 1979; Kathleen Barry, "Sadomasochism: The New Backlash to Feminism", *Trivia*, no. 1, fall 1982; Robin Ruth Linden, Darlene R. Pagano, Diana E. H. Russell, and Susan Leigh Starr (eds), *Against Sadomasochism*, East Palo Alto, CA, Frog in the Well, 1982; and Florence Rush, *The Best Kept Secret*, New York, McGraw-Hill, 1980.

69 Sally Gearhart, "An Open Letter to the Voters in District 5 and San Francisco's Gay Community", 1979; Adrienne Rich, *On Lies, Secrets, and Silence*, New York, W.W. Norton, 1979, p. 225. ("On the other hand, there is homosexual patriarchal culture, a culture created by homosexual men, reflecting such male stereotypes as dominance and submission as modes of relationship, and the separation of sex from emtional involvement – a culture tainted by profound hatred for women. The male 'gay' culture has offered lesbians the imitation role-stereotypes of 'butch' and 'femme', 'active' and 'passive,' cruising, sado-masochism, and the violent, self-destructive world of 'gay'

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.

70 Julia Penlope, op. cit.

71 Sheila Jeffreys, "The Spinster and Her Enemies: Sexuality and the Last Wave of Feminism", *Scarlet Woman*, no. 13, part 2, July 1981, p. 26; a further elaboration of this tendency can be found in Judith Pasternak, op. cit.

72 Pat Califia, "Feminism vs. Sex: A New Conservative Wave", *Advocate*, February 21, 1980; Pat Califia, "Among Us, Against Us – The New Puritans", *Advocate*, April 17, 1980; Califia, "The Great Kiddy Porn Scare of '77 and Its Aftermath", op. cit.; Califia, "A Thorny Issue Splits a Movement", op. cit.; Pat Califia, *Sapphistry*, Tallahassee, Florida, Naiad, 1980; Pat Califia, "What Is Gay Liberation", *Advocate*, June 25, 1981; Pat Califia, "Feminism and Sadomasochism", *Co-Evolution Quarterly*, no. 33, spring 1981; Pat Califia, "Response to Dorchen Leidholdt", *New Women's Times*, October 1982; Pat Califia, "Public Sex", *Advocate*, September 30, 1982; Pat Califia, "Doing It Together: Gay Men, Lesbians, and Sex", *Advocate*, July 7, 1983; Pat Califia, "Gender-Bending", *Advocate*, September 15, 1983; Pat Califia, "The Sex Industry", *Advocate*, October 13, 1983; Deirdre English, Amber Hollibaugh, and Gayle Rubin, "Talking Sex", *Socialist Review*, July-August 1981; "Sex Issue", *Heresies*, no. 12, 1981; Amber Hollibaugh, "The Erotophobic Voice of Women: Building a Movement for the Nineteenth Century", *New York Native*, September 26-October 9, 1983; Maxine Holz, "Porn: Turn On or Put Down, Some Thoughts on Sexuality", *Processed World*, no. 7, spring 1983; Barbara O'Dair, "Sex, Love, and Desire: Feminists Struggle Over the Portrayal of Sex", *Alternative Media*, spring 1983; Lisa Orlando, "Bad Girls and 'Good' Politics", *Village Voice*, Literary Supplement, December 1982; Joanna Russ, "Being Against Pornography", *Thirteenth Moon*, vol. VI, nos 1 and 2, 1982; Samois, *What Color Is Your Handkerchief*, Berkeley, Samois, 1979; Samois, *Coming to Power*, Boston, Alyson, 1982; Deborah Sundahl, "Stripping For a Living", *Advocate*, October 13, 1983; Nancy Wechsler, "Interview with Pat Califia and Gayle Rubin", part I, *Gay Community News*, Book Review, July 18, 1981, and part II, *Gay Community News*, August 15, 1981; Ellen Willis, *Beginning to See the Light*, New York, Knopf, 1981; for an excellent overview of the history of the ideological shifts in feminism which have affected the sex debates, see Alice Echols, "Cultural Feminism: Feminist Capitalism and the Anti-Pornography Movement", *Social Text*, no. 7, spring and summer 1983.

73 Lisa Orlando, "Lust at Last! Spandex Invades the Academy", *Gay Community News*, May 15, 1982; Ellen Willis, "Who Is a Feminist? An Open Letter to Robin Morgan", *Village Voice*, Literary Supplement, December 1982.

74 Ellen Willis, *Beginning to See the Light*, op. cit., p. 146. I am indebted to Jeanne Bergman for calling my attention to this quote.

75 See, for example, Jessica Benjamin, "Master and Slave: The Fantasy of Erotic Domination", in Snitow et al., op. cit., p. 297; and B. Ruby Rich, review of *Powers of Desire*, *In These Times*, November 16-22, 1983.

76 B. Ruby Rich, op. cit., p. 76.

77 Samois, *What Color Is Your Handkerchief*, op. cit.; Samois, *Coming To Power*, op. cit.; Pat Califia, "Feminism and Sadomasochism", op. cit.; Pat Califia, *Sapphistry*, op. cit.

78 Lisa Orlando, "Power Plays: Coming To Terms With Lesbian S/M", *Village Voice*, July 26, 1983; Elizabeth Wilson, "*The Context of 'Between Pleasure and Danger': The Barnard Conference on Sexuality", Feminist Review*, no. 13, spring 1983, especially pp. 35-41.

79 *Taylor* v. *State*, 214 Md. 156, 165, 133 A. 2d 414, 418. This quote is from a dissenting opinion, but it is a statement of prevailing law.

80 Bessera, Jewel, Matthews, and Gatov, op. cit., pp. 163-5. See note 55 above.

81 "Marine and Mom Guilty of Incest", *San Francisco Chronicle*, November 16, 1979, p. 16.

82 Norton, op. cit., p. 18.

83 *People* v. *Samuels*, 250 Cal. App. 2d 501, 513, 58 Cal. Rptr. 439, 447 (1967).

84 *People* v. *Samuels*, 250 Cal. App. 2d. at 513-514, 58 Cal. Rptr. at 447.

85 Mariana Valverde, "Feminism Meets Fist-Fucking: Getting Lost in Lesbian S & M", *Body Politic*, February 1980; Wilson, op. cit., p. 38.

86 Benjamin, op. cit. p. 292, but see also pp. 286, 291-7.

87 Barbara Ehrenreich, "What Is This Thing Called Sex", *Nation*, September 24, 1983, p. 247.

88 Gayle Rubin, "The Traffic in Women", in Rayna R. Reiter (ed.), *Toward an Anthropology of Women*, New York, Monthly Review Press, 1975, p. 159.

89 Rubin, "The Traffic in Women", op. cit., p. 166.

90 Foucault, op. cit., p. 106.

91 Catherine MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory", *Signs*, vol. 7, no. 3, spring 1982, pp. 515-16.

92 Catherine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", *Signs*, vol. 8, no. 4, summer 1983, p. 635.

93 Colette, *The Ripening Seed*, translated and cited in Hannah Alderfer, Beth Jaker, and Marybeth Nelson, *Diary of a Conference on Sexuality*, New York, Faculty Press, 1982, p. 72.

94 John Lauritsen and David Thorstad, *The Early Homosexual Rights Movement in Germany*, New York, Times Change Press, 1974.

95 D'Emilio, *Sexual Politics, Sexual Communities*, op. cit.; Bérubé "Behind the Spectre of San Francisco", op. cit.; Bérubé, "Marching to a Different Drummer", op. cit.

Feminist Legal Theory

A Primer

SECOND EDITION

Nancy Levit and Robert R. M. Verchick

Foreword by Martha Minow

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To Tim, Aaron, Dylan, and Jon,

with love and gratitude.

N. E. L.

To my mother, Sue,

and my wife, Heidi.

R. V.

1

Feminist Legal Theories

Feminism is a dirty word. . . . Misconceptions abound. Feminists are portrayed as bra-burners, manhaters, sexists, and castrators. Our sexual preferences are presumed. We are characterized as bitchy, . . . aggressive, confrontational, and uncooperative, as well as overly demanding and humorless.
—Leslie Bender, "A Lawyer's Primer on Feminist Theory and Tort"

[W]oman is the Other.
—Simone de Beauvoir, *The Second Sex*

My life is a sheer privilege because my parents didn't love me less because I was born a daughter. My school did not limit me because I was a girl. My mentors didn't assume that I would go less far because I might give birth to a child one day. These influences are the gender equality ambassadors that made me who I am today. They may not know it but they are the inadvertent feminists needed in the world today. We need more of those.
—Emma Watson, Hermione from *Harry Potter* and UN Goodwill Ambassador, speech to UN HeForShe Campaign

What is distinctive about feminist *legal* theory? Do criteria exist for who can be a "feminist"? Are there compulsory feminist beliefs? What is the meaning of equality?

The development of feminist legal theory was intertwined with the growth of feminism generally. Many of the first rights the women's movement fought for were political rights, like the right to vote. Some of the early strategies—such as Sojourner Truth's claim to equal treatment because she had "ploughed and planted" just like a man—

foreshadowed visions of equality that would emerge as important *legal* theories in later years. Often, feminist political action preceded feminist legal theory. While feminist lawyers were urging courts in the 1960s and early 1970s to address gender inequalities, it was not until the later 1970s and early 1980s that legal scholars developed distinct branches of feminist legal theory.

Feminist legal theory comes in many varieties, with some overlap. But all the theories share two things—the first an observation, the second an aspiration. First, feminists recognize that the world has been shaped by men, who for this reason possess larger shares of power and privilege. All feminist legal scholars emphasize the rather obvious (but unspoken) point that nearly all public laws in the history of existing civilization were written by men. If American law historically gave men a leg up, this news can hardly come as a surprise. Second, all feminists believe that women and men should have political, social, and economic equality. But while feminists agree on the goal of equality, they disagree about its meaning and about how to achieve it.

Equal Treatment Theory

> Sex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man.
> —Wendy W. Williams, "Equality's Riddle"

The first wave of feminist legal theory began in the early 1960s with the emergence of equal treatment theory (also referred to as "liberal" or "sameness" feminism). Equal treatment theory is based on the principle of formal equality that inspired the suffrage movement, namely, that women are entitled to the same rights as men. The theory drew from liberal ideals in philosophy and political theory that endorse equal citizenship, equal opportunities in the public arena, individualism, and rationality.[1] The equal treatment principles were simple: the law should not treat a woman differently from a similarly situated man. Also, the law should not base decisions about individual women on generalizations (even statistically accurate ones) about women as a group.

Early efforts to attain equal treatment for women pursued two goals. The first was to obtain equivalent social and political opportunities, such as equal wages, equal employment, and equal access to government benefits. The second was to do away with legislation intended to protect women by isolating them from the public sphere. Examples of such protective legislation included limiting women's career options or employment hours. Perhaps in part as a reaction to the historical treatment of women as in need of special protection, equal treatment theorists stressed the ways women were similar to men, and used this as the platform for claiming equal employment and economic benefits.

In the 1970s and 1980s, organizations such as the American Civil Liberties Union (ACLU), the National Organization for Women, and the League of Women Voters won a series of lawsuits in the Supreme Court that helped dismantle barriers for women as breadwinners, property owners, and economic players. In the 1970s, the ACLU created a Women's Rights Project (WRP) to bring sex discrimination lawsuits. Under the direction of future Supreme Court Justice Ruth Bader Ginsburg, the WRP followed the strategy of civil rights pioneers in seeking formal equality. To obtain equal treatment under the Constitution, women had to establish that they were "similarly situated" to men, so the WRP argued that women did not differ from men in ways that should matter legally. In 1971 in *Reed v. Reed,* they persuaded the Supreme Court that men and women were equally qualified to administer estates, so a law that preferred male relatives over female relatives as administrators of a decedent's estate was unconstitutional.[2] Two years later, in *Frontiero v. Richardson,*[3] the WRP argued in an amicus brief[4] that female members of the military deserved the same family benefits as male service members. In *Frontiero* the Supreme Court held unconstitutional a benefits policy in the military that presumed that all wives of servicemen were financially dependent on their husbands but did not make the same presumption in the case of *husbands* of service *women*. In his opinion for the Court, Justice Brennan observed that "our Nation has had a long and unfortunate history of sex discrimination . . . rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[5]

The WRP initially adopted a strategy that used male plaintiffs to challenge laws that, at least superficially, favored women. WRP lawyers surmised that since most judges were men, they would see discrimination best if they could envision themselves as its possible victims. The strategy produced mixed results. The Court upheld a law giving widows, but not widowers, a property tax exemption. The state tax exemption, in the Court's view, was an appropriate equalizing measure for the discrimination that women encounter in the job market, because the 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."[6] On the other hand, the Court struck down a law that prohibited the sale of low-alcohol beer to females under the age of eighteen and males under the age of twenty-one, basing its decision on the supposedly greater traffic-safety risks posed by underage males.[7] When the state presented only weak empirical evidence of a correlation between gender and driving drunk (0.18 percent of females and 0.2 percent of males between eighteen and twenty-one were arrested for driving under the influence), the Court rejected the stereotype that young men were more reckless than young women.

One of the strengths of Ginsburg's approach in litigating the equal treatment cases was that she directly attacked the notion that "natural" differences justified dissimilar treatment under the law. She showed that many of these differences were socially constructed—that social norms prescribed different roles for men and women. She also argued that if biological differences distinguished the sexes, discrimination based on these immutable differences justified a higher level of judicial scrutiny.

During the late 1970s and the 1980s, the formal equality tactic was usually successful in eliminating explicit barriers to equal treatment. The Supreme Court found that a statute imposing obligations only on husbands to pay alimony violated equal protection, as did a congressman's discharge of a female administrative assistant because of her sex.[8] Nursing schools could not reject potential students because they were male; attorneys could not reject potential jurors because they were female.[9] In some cases, though, the Court permitted women to recoup such benefits as extra Social Security allotments as compensation for market disadvantages they experience.[10]

Equal treatment theory achieved immense gains in access for women, particularly in the areas of education and employment. Its rationale was easy to understand and was accepted by the mainstream. Part of the reason the strategy won public support was that it targeted individual instances of inequality and sought only gradual change. But, this meant the theory was tame, incremental, and slow moving. In addition, equal treatment lawsuits remained focused on public activities—such as taxes, liquor sales, and education—rather than on the more controversial realm of personal behavior.

Equal treatment theory accepts male experience as the reference point or norm. Women attain equality only to the extent that they are similarly situated with men. One flaw in this symmetrical approach is that its emphasis on similarity disadvantages women on issues related to pregnancy, childbirth, and allocation of property at divorce.[11] In response, a second group of theorists challenged the equal treatment framework, arguing that women's rights should be defined without reference to a male baseline. This premise gave rise to cultural feminism.

Cultural Feminism

> I will never be in a man's place, a man will never be in mine. Whatever the possible identifications, one will never exactly occupy the place of the other—they are irreducible the one to the other.
> —Luce Irigaray, *An Ethics of Sexual Difference*

Cultural feminism (also called "difference theory" or, sometimes pejoratively, "special treatment theory") argues that formal equality does not always result in substantive equality. Cultural feminists criticized the sameness model as male-biased, serving women only to the extent that they could prove they were like men. Purely formal equality of opportunity did not lead to equality of results. People judged women harshly on the basis of their inability to conform to the male norm. Gender-neutral laws can keep women down if they do not acknowledge women's different experiences and perspectives. This theory emphasizes the differences between men and women, whether the differences in question are biological differences related to childbearing or cultural

differences reflected in social relationships. Cultural feminists note that many institutions, such as the workplace, follow rules based heavily on male-dominated experiences, which can disadvantage women. For instance, the voluntary-quit rules of unemployment compensation typically disqualify from receiving benefits people (predominantly women) who leave their jobs because of work-family conflicts. Damages in most tort cases are based on anticipated losses of future earning capacity, so female plaintiffs often receive damage awards discounted by anticipated work absences during childrearing years. Traditional self-defense rules in criminal law, which require an imminent threat before a defense is allowed, offer limited protection to a battered woman who, though she lives in constant fear of a domestic attack, is unable to predict exactly when her partner will strike.

Cultural feminists argue that men and women should not be treated the same where they are relevantly different and that women should not be required to assimilate to male norms. They urge instead a concept of legal equality in which laws accommodate the biological and cultural differences between men and women. Some cultural feminists see the connectedness of women as rooted in biological as well as cultural origins. They maintain that women are "essentially connected" to other humans, through the physical connections of intercourse, pregnancy, and breastfeeding, and to humanity, through an ethic of care. The problem with legal theory, then, is that it "is essentially and irretrievably masculine" because it treats humans as distinct, physically unconnected, and separate from others.[12]

Cultural feminist theory in law drew on the "different voice" scholarship of educational psychologist Carol Gilligan.[13] Gilligan challenged the dominant theory in psychology, associated with Lawrence Kohlberg, that use of abstract concepts of justice and rights was correlated with higher stages of moral development. She advanced the theory that boys and girls learn different methods of moral reasoning. Girls are taught to value empathy, compassion, preservation of harmony, and a sense of community, while boys are taught to privilege abstract moral principles, rights, autonomy, and individualism. Girls grow into women who reason with "an ethic of care," emphasizing connections and relations with other people; boys become men who reason with "an ethic of justice" that values abstract rights, rules, and autonomy.

Advocates of special treatment urged a model that focuses on differences between the sexes, whether rooted in culture or biology: differences in reproductive functions, caretaking responsibilities, and even emotions and perceptions, such as the ways women perceive rape, sexual harassment, and various aspects of reproduction. Cultural feminists say that significant differences between men and women should be acknowledged and compensated legally where they disadvantage one sex. They have favored special maternity leaves, flexible work arrangements, or other workplace accommodations for women. Further, cultural feminists have advocated for female-centric standards in the law, such as the reasonable woman standard in sexual-harassment employment-discrimination cases, whereby the harassed female plaintiff has the option to instruct the jury to examine her claim from a woman's point of view, rather than a person's (arguably a male's) point of view.[14]

Some feminists have criticized Gilligan's methodology as anecdotal, arbitrary in its assignment of characteristics as masculine or feminine, and based on an inadequate sample of privileged subjects. A number of these critics deny that many differences exist along gender lines, and point out that more variation exists among women than between men and women.[15] Others say that creating social policies with an emphasis on differences will reinforce gender stereotypes. Gilligan has replied to these methodological critiques, and others have supported her findings, although the empirical support has not been strong.[16] But, intriguingly, these criticisms have not diminished the general acceptance of her theories.

Cultural feminism does more than identify women's differences; it applauds them: "Cultural feminists, to their credit, have reidentified these differences as women's strengths, rather than women's weaknesses. Women's art, women's craft, women's narrative capacity, women's critical eye, women's ways of knowing, and women's heart, are all, for the cultural feminist, redefined as things to celebrate."[17] In other words, "Vive la différence!"

Legal theorists argued that this distinctively feminine approach to moral and legal reasoning had been omitted, or at least discounted, in law. Feminist legal theorists used Gilligan's work to argue for a rethinking of some long-accepted rules of law. For instance, under traditional tort law, which values individual autonomy, citizens have no obligation

to assist strangers in need, even when they can do so without putting themselves in any jeopardy. In almost all states, one can watch a blind person walk into traffic with no legal obligation even to yell out a warning. (It is not nice, but it's not tortious.) Using the idea that law ought to encourage communal responsibilities of care, feminist legal scholars advocated the creation of tort duties to assist strangers who are in peril. Some cultural feminists argued that women, who more often organize their lives around caregiving relationships, have been harmed by gender-neutral custody standards. Others have advocated less adversarial, more cooperative styles of lawyering, such as a greater use of mediation as opposed to litigation. More generally, cultural feminists argued for a movement away from a male-oriented rights model and a greater incorporation into law of an ethic of care.

A primary criticism of cultural feminism is that it values women only if they adopt conventional social roles. In celebrating attributes associated with women—empathy, nurturing, caretaking—cultural feminism reinforces women's stereotypical association with domesticity. Another objection is that it characterizes women as needing special protection. As the Supreme Court observed, protectionist laws historically have disadvantaged women by putting them "not on a pedestal, but in a cage."[18]

The question of which model—formal equality or celebration of difference—leads to more fairness is known as the "equal treatment–special treatment" or "sameness-difference" debate. A key disagreement between equal treatment theorists and cultural feminists concerns pregnancy and maternity leave. A 1987 Supreme Court case, *California Federal Savings & Loan Association v. Guerra* ("*Cal Fed*"),[19] illustrates the positions of the two camps. In *Cal Fed* a California statute required employers to provide women up to four months of unpaid maternity leave, but did not require similar leave for other temporary disabilities. Cultural feminists and equal treatment theorists filed "friend of the court" briefs on opposite sides of the case. Equal treatment theorists, including the ACLU's Women's Rights Project and NOW's Legal Defense and Education Fund, argued that the state law violated federal Title VII provisions, because employers refused similar leaves to workers with other temporary "disabilities." They contended that special treatment for pregnant women reinforced stereotypes that women in the workforce need protective legislation. In support of the state law, a cultural feminist group, the Coalition for Reproductive Equality in the Workplace (CREW), argued that biological differences between men and women justified different leave policies and that accommodation of pregnancy would actually promote Title VII's goal of workplace equality: "without the statute, women were forced to choose between having children and maintaining job security—a choice not imposed on men."[20]

Thus, equal treatment theorists maintained that pregnancy should be treated the same as other disabilities, while cultural feminists countered that a pregnancy-specific disability policy was constitutional and sensible because pregnancy is a unique condition that burdens only women. The Supreme Court upheld the state law, noting that "[b]y 'taking pregnancy into account,' California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs."[21]

Following the *Cal Fed* debate, the sameness and difference camps attempted to join hands in support of the Family and Medical Leave Act (FMLA). Recent scholarship, though, demonstrates the recurrent divide between equal treatment and cultural feminist groups. For example, with respect to the FMLA, theorists have observed that, in practice, "only mothers take leave," which means that the statute "only accommodates women's caretaking, protection that gives them a measure of job security but at the same time preserves employers' incentive to prefer male employees."[22] One possible resolution is to require paid family leave, which would remove part of the disincentive for men to assume primary caregiving responsibilities.

Theorists continue to argue about which model better promotes true equality: the assimilation model that emphasizes the sameness between women and men or the accommodation model that stresses their differences. The debates continue with respect to such issues as a parent track that permits working parents to work less than full-time so that they can devote time to childrearing; custody rules that favor the "primary caregiver" (or the question of whether that presumption discriminates against men); and the issue of whether the principles of formal equality that underlie dramatic decreases in maintenance (alimony) result in poverty for nonworking mothers. Some feminists have tried to move beyond the equal treatment–special treatment divide by questioning basic institutional structures and the social ideas that perpetuate them. Joan Williams, for example, asks whether the work world needs to be built around

the norm of an "ideal worker" who can work full-time plus overtime and has no childcare responsibilities.[23] Theorists have recognized that equal treatment poses difficulties by ignoring real differences while different treatment "is a double-edged sword permitting unfavorable as well as favorable treatment against an historic background of separate spheres ideology."[24] For law professor Martha Minow, the difference dilemma boils down to a single question: "When does treating people differently emphasize their difference and stigmatize and hinder them on that basis, and when does treating people the same become insensitive to their differences and likely to stigmatize or hinder them on that basis?"[25]

Dominance Theory

Take your foot off our necks, and then we will hear in what tongue women speak.
—Catharine A. MacKinnon, *Feminism Unmodified*

Dominance theory rejects the sameness/difference debate and departs from equal treatment theory and cultural feminism, noting that both used the male standard as the primary benchmark—with equal treatment theorists emphasizing how similar women are to men and cultural feminists celebrating how different women are from men: "Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure," while "[u]nder the difference standard, we are measured according to our lack of correspondence with him."[26] The goal of both equal treatment theory and cultural feminism is equivalence between women and men; the goal of dominance theory is liberation from men.

Dominance theorists focus instead on the difference in *power* between women and men. First introduced in 1979 by Catharine MacKinnon, dominance theory (or radical feminism) focuses on the power relations between men and women. Dominance theory argues that the inequalities women experience as sex discrimination in the economic, political, and familial arenas result from patterns of male domination. This theory says that men are privileged and women are subordinated, and this male privileging receives support from most social institutions as well as a complex system of cultural beliefs. Law is complicit with other social institutions in constructing women as sex objects and inferior, dependent beings. Dominance theorists cite the lack of legal controls on pornography and sexual harassment, excessive restrictions on abortion, and inadequate responses to violence against women as examples of the ways laws contribute to the oppression of women.

In particular, dominance theory provided a different perspective on violence against women and children in areas such as rape, intimate violence, sexual harassment, and child pornography.[27] For instance, in 2011, when a police officer in Toronto observed that to "not be raped, women should 'avoid dressing like sluts,'" he inspired a series of grassroots protest rallies called SlutWalk that took place in Canada, India, Singapore, Mexico, Finland, Germany, South Africa, and numerous cities in the United States.[28] Equality theories were ill equipped to address these experiences, since they "failed to address the patriarchal structures of power that led to and perpetuated them."[29] Patriarchy means the rule or "power of the fathers." It is a system of social and political practices in which men subordinate and exploit women. The subordination occurs through complex patterns of force, social pressures, and traditions, rituals, and customs. This domination does not just occur in individual relationships, but is supported by the major institutions in society.

Within the family, men, as "heads of the household," control women. Domestic violence is domination in an extreme form. This dominance is tolerated, since the criminal justice system imposes lenient sentences on people who perpetrate violence against women. In the employment sphere, a gendered division of labor occurs whereby women are segregated into low-status jobs at lower wages. Dominance theorists have demonstrated the ways that laws, most of which have been drafted by men, assist in reinforcing male domination. For instance, in most states, a rape victim must prove she did not consent, even where violence occurs. As another example, in the law of unemployment insurance, if women are forced to quit jobs for family reasons (such as a lack of childcare), they are not eligible for compensation.

Patriarchy is created and reinforced by a system of beliefs that says men should be superior in education, employment, politics, and religion. It is "a political structure that values men more than women."[30] Women are relegated to the status of second-class citizens. Catharine MacKinnon describes the ways men are dominant and privileged:

> Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.[31]

The media display degrading images of women that treat women as possessions, while the legal system supports these demeaning depictions as protected speech. Women are forced into stereotypic molds that demand that they present themselves as feminine and deferential and that they assume a disproportionate share of the responsibility for housework, childcare, and eldercare. Patriarchy gives men control of women's sexuality, their reproductive freedom, and their lives.

Patriarchy includes sexual domination by men and sexual submission by women. Sexuality in this society focuses on men's desires and satisfaction. Women live with the fear of rape and sexual abuse. They learn to trade on their sexuality for advancement. Women are treated in the work environment as objects of attraction rather than as professional peers. Women are represented, in everything from fashion ads to pornography, as sexual objects or commodities.

In 1983, Andrea Dworkin and Catharine MacKinnon proposed an antipornography ordinance that created a cause of action for sex discrimination for pornography that showed "the graphic sexually explicit subordination of women, whether in pictures or in words" and women being "presented as sexual objects."[32] The outcome of the antipornography campaign is discussed in chapter 6, but for present purposes, this attempt to translate one type of feminist legal theory into law is an example of dominance theory's sweeping critique of patriarchy and the search for systematic and institutional remedies.

Patriarchy shapes men, too, when it values characteristics associated with traditional definitions of masculinity, so that men learn to reject intimacy and repress emotions. Both men and women are socialized toward stereotypic gender behaviors characteristic of their sex. Men who do not conform to traditional images of manliness and who act

in effeminate ways are considered a threat to masculinity and are not only subordinated like women but also often punished for their gender transgressions.[33]

One method of promoting the traditional patriarchal structure is to discourage same-sex relationships and compel heterosexuality. "Compulsory heterosexuality"[34] operates through legal rules, such as the military's former "Don't Ask, Don't Tell" policy, and through much more subtle forms of cultural indoctrination, ranging from the male fear of all things pink to the epidemic use of "faggot" among high school boys (just as popular in our day). Politicians, better than most, understand our subconscious attraction to the alpha male. Thus, in the 2004 Republican National Convention, California governor Arnold Schwarzenegger mocked critics of his party's economic plan by calling them economic "girlie men."[35]

When women live in a patriarchal society, they may internalize the beliefs of the dominant group. They may seek out, choose, and even enjoy dependent or submissive relationships or caretaking roles. "Women value care," according to MacKinnon, "because men have valued us according to the care we give them. . . . Women think in relational terms because our existence is defined in relation to men."[36] This psychological aspect of oppression is called "false consciousness."

To create awareness of oppression and expose this system of internalized beliefs, MacKinnon suggests that women engage in "consciousness-raising"—that they join women-only groups and discuss their experiences with housework, sexuality, caregiving, and menial jobs. Through this process women will make visible to themselves and each other the daily micro-inequities that are the product of male privilege and build collective knowledge about their experiences of oppression.

Other feminists have criticized the idea of false consciousness—that women cannot make independent choices—as "infuriatingly condescending," and the remedy of consciousness-raising as unworkable because relating personal experiences will not inevitably lead to political solutions.[37] Dominance theory has also drawn criticism for "gender essentialism"—the assumption that all women share the same experience, namely, that of victims. Critics have also charged that dominance theory mistakenly "universalize[s] the experience of white women as the experience of all women, ignoring differences of race, class, and ethnic-

ity," and that it devalues women's experiences as mothers.[38] Nonetheless, the theory has powerfully influenced legal thinking—particularly on the subjects of rape, sexual harassment, and pornography.

Anti-Essentialism

> [I]n feminist legal theory, as in the dominant culture, it is mostly white, straight, and socio-economically privileged people who claim to speak for all of us.
> —Angela P. Harris, "Race and Essentialism in Feminist Legal Theory"

Critical Race Feminism

In the mid- to late 1980s, a number of legal theorists, principally women of color and lesbians, complained that feminist legal theory omitted their experiences and concerns. By pointing the spotlight only on gender, traditional white feminists ignore important differences that exist *among* women, most notably, differences of race. They charged that feminist legal theory doted excessively on the needs of privileged white women. Mainstream feminists made universal assertions about women's experiences (for example, that all women experienced subordination or that women are generally more nurturing and compassionate than men). This phenomenon of "feminist essentialism"—that "a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience"—stifled the voices of lesbians and minority-race women "in the name of commonality."[39]

Opponents of essentialism—who call themselves "anti-essentialists"—argue that discrimination is best understood, not from the center of an oppressed group's membership (meaning, for women, white, middle-class, and heterosexual), but from the margins. In other words, discrimination functions differently depending on a person's combination of personal characteristics. Sexism surely affects all women, from Rosa Parks to Taylor Swift. But it is the *intersection* of characteristics like sex, race, wealth, and sexual orientation that really suggests how people will treat you.[40]

Critical race feminists argue that legal doctrines in various areas, such as rape, sexual harassment, and domestic violence, do not adequately address discrimination based on the intersections of these categories. As just one example, the requirement in employment discrimination for a black woman to identify either as a woman or as a racial minority and to claim either sex or race discrimination ignores the ways racism and sexism intertwine. In the job market, poor women of color must overcome a "triple" disadvantage, as they confront challenges of income, sex, and race. Immigrant women suffer intimate violence at higher rates than other populations; and, faced with threats of deportation, they lack support services, shelters, and legal representation. Men of color are prosecuted more often, convicted more readily, and sentenced more harshly than white men or women.[41] Critical race theorists reject formal equality as being empty, because formal guarantees of equality accept current measures of merit, such as one-dimensional standardized tests and traditional employment credentials.

The multiple categories of human identity suggest another insight of critical race feminism—that people exhibit multiple consciousness. A person occupies various positions or relationships all at once and slips seamlessly into many roles: daughter, perhaps mother, student, bank teller, Latina, and lesbian. This kaleidoscope of roles means not just that people feel oppression at different pressure points but that, with practice, people can begin to understand oppression from perspectives other than their own. This ability, which law professor Mari Matsuda calls "multiple consciousness," is more than (to use her words) "a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed."[42]

Multiple consciousness is important to the study and practice of law: it enables outsiders to use formal legal discourse without losing their empathic understanding—their consciousness—of oppression. This way of thinking makes it possible for lawyers to contemplate laws beyond current rigid doctrines that do not acknowledge powerlessness: to think about tort damages for racial hate speech, to understand the needs of same-sex clients who want to adopt, to envision reparations for slavery. Critical race feminism draws from the critical legal studies movement the idea that many laws are not neutral or objective, as they purport to be, but are actually ways that traditional power relationships are main-

tained. For example, traditional First Amendment law prohibits people who have been the victims of virulent hate speech from suing for damages. In allowing the vilification of women and people of color, law has been instrumental in continuing hierarchies of gender and race.

Critical race feminists sometimes employ a more personal kind of storytelling or narrative scholarship to explain how multiple forms of oppression shape the lives of people of color.[43] The experiences of women of color are not the experiences of most women. One way to blend minority experiences into legal analysis is to tell "stories." Such stories, or personal narratives, introduce readers to challenges and emotions that might otherwise not be considered by majority-group members.

When law professor Patricia Williams went Christmas shopping in New York City one year, a white teenager (chomping bubble gum) refused to press the buzzer to admit her to a Benneton store. In a well-known essay, Professor Williams later used this experience to explore the social connections among race, sex, crime, and commerce.[44] Adele Morrison tells stories of lesbian victims seeking shelter from intimate violence but having their batterers admitted to the safe house because they are also women.[45] Law professor Anthony Alfieri, a former legal aid lawyer, recalls an interview he once had with a woman seeking food stamps. In addition to legal need, the woman's story revealed to him the dignity and pride she felt caring for children and foster children.[46] As Richard Delgado observes, "Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."[47] The idea is to make law acknowledge the experiences of these outsiders.

Critical race theorists challenge the view that race is a biological phenomenon. Of course, if biological differences among races lead to innate performance differences, this would undermine affirmative action measures as an instrument in the movement toward equality. It also affirms *Bell Curve* concepts of educational tests as reflective of "merit."[48] Flatly, it justifies racism as a benign product of naturally occurring differences.

The very notion of race presents deep challenges. There is no question that many characteristics associated with race—skin color, hair, facial features, and other physical traits—are rooted in biology and evolutionary history. But biologists do not recognize genetic categories for human

races.[49] Indeed, the boundaries between one human race and another have frequently varied over time and across societies. In this way, race may be viewed as more of a social construct—a belief system about the importance of an individual's particular package of outward physical characteristics. This process of social construction means that the inferior and negative meanings attached to various races are also social inventions. The biological view of race led to laws in the recent past prohibiting interracial marriage and justifies contemporary resistance to transracial adoption. Critical race feminists have extended this critique of biological race to demonstrate its continuing influence on laws and legal decisions. They have shown how this belief in genetic race influences courts to make surrogacy decisions that view black women acting as gestational surrogates simply as breeders. They have also exposed how pregnant women of color who use drugs are more likely than white women to be prosecuted on drug charges or for child endangerment, abuse, or neglect.[50]

Critical race feminists believe that a jurisprudential method recognizing "that differences are always relational rather than inherent" can lead to liberation.[51] They also emphasize the instrumental value of storytelling or narrative. Because legal cases always begin with human stories, making sure the stories of oppression are told—"speaking truth to power"—is a first step toward equality.[52]

Lesbian Feminism

Lesbian legal theory focuses on the legal issues confronted by persons who identify as lesbian, gay, bisexual, or transgender (collectively "LGBT"). Beginning in the 1970s, some lesbian feminists wrote that sexual orientation is more about politics than desire. Lesbian theorists rejected the portrayal of LGBT people as deviant by drawing on scientific evidence about sexuality that showed the prevalence of same-sex inclinations and the spectrum of different sexualities. In law, numerous gay and lesbian theorists catalogued the basic civic rights that the government denies to nonheterosexuals: rights to marry, to serve openly in the military (the "Don't Ask, Don't Tell" policy), to adopt, and to hold jobs without discrimination. As this book goes to press in 2015, it is still legal in most states to fire lesbians, gay men, bisexuals, and the transgendered because of their sexual orientation or gender identity.[53]

Denounced in the 1970s by Betty Friedan, then president of the National Organization for Women, as the "lavender menace," lesbian feminists and their concerns have long been dismissed by the mainstream feminist movement. This marginalization is an example of the larger phenomenon of dominant subgroups excluding a subordinate one in order to leverage their own acceptance. Other theorists have made the point that lesbian feminists have excluded gay men and bisexuals from their analyses, given minimal attention to the voices of poor lesbians and gays and those of color, and have entirely omitted the impact of laws on transsexuals.[54]

Early lesbian and gay legal theorists revealed the links between heterosexism and sexism. They showed how traditional ideas of masculinity demanded segregation of the sexes, repression of feminine traits in men, and the exclusion, harassment, and vilification of those assumed to be sexually deviant. This promoted the supremacy of "masculinity over femininity as well as the elevation of heterosexuality over all other forms of sexuality."[55] They traced the penalties law imposes on lesbians and gay men and explained that this condemnation was tied to social meanings of gender that approve only of traditional familial arrangements (think: Ward, June, Wally, and the Beave). To escape the oppression, subordination, and exclusion, gay and lesbian legal theorists have tried a range of arguments, from constitutional (debating whether gays and lesbians are a suspect class deserving heightened scrutiny under the Equal Protection Clause) to communitarian (emphasizing the common humanity of all people).[56]

Concerns of lesbian feminists in law may differ from those of straight feminists—the latter may be trying to get male partners to assume more childcare responsibilities, while the former are fighting to obtain custody of their children. The daily lives of lesbians are affected in myriad ways by state exclusions from basic benefits, familial arrangements, and employment rights that straights take for granted. If you are gay or lesbian, disclosure of your sexual orientation can justify termination of employment. At the moment, same-sex marriage exists in most, but not all states. Thus, some same-sex partners are not entitled to the same insurance, property, inheritance, custody, or adoption rights as straight couples. The General Accounting Office has identified 1,049 federal laws in which "benefits, rights and privileges" are dependent upon marriage.[57] For this reason, gays and lesbians have worked hard campaigning and litigating for marriage equality. We'll look more at these issues in chapter 6.

Some legal theorists have written on whether sexual orientation has a biological basis. They have drawn on evidence from the sciences concerning the genetic and biological origins of sexuality: Simon LeVay's autopsy study revealing that a part of the brain, the hypothalamus, was twice as large in heterosexual men as in homosexual men; twin studies showing that if one twin is gay, a 50 percent chance exists that the other is as well; research showing that gays and lesbians who undergo "conversion therapy" or "reparative counseling" for the purpose of changing their sexual orientation experience a high failure rate.[58] Lesbian, gay, bisexual, and transgender (LGBT) legal theorists have used these scientific findings to argue that if sexual orientation exerts a strong biological influence, it should be a suspect classification, like race and gender, and should command heightened constitutional scrutiny. If sexuality originates in biology, how can a legal blame system be justified? Others, like law professor Sam Marcosson, argue that sexual orientation is "constructively immutable"—it is a characteristic that is immutable for "all relevant legal and political purposes . . . even if it is a product of social construction."[59] The point is that sexual orientation, perhaps like religious orientation, is so intimately connected to personal identity that even if it is not purely biological, it must be treated as something beyond voluntary choice. The social meanings attached to sexual orientation are so powerful in maintaining a disfavored social class that LGBT individuals need constitutional protection from discrimination.

In one sense, the structure of lesbian and gay legal theory has followed a pattern reminiscent of the sameness/difference debate in feminist legal theory. Some formal equality theorists have tried to show that LGBT couples are similar to the "ideal"—the heterosexual norm—as committed partners and loving parents. They try to demonstrate that LGBT identity is not just about sexuality and that differences in sexual orientation should not make a difference, socially or legally. Difference theorists (called, in this context, antisubordination theorists) critique the heterosexual norm as they challenge the ways society has artificially constructed sexual nonconformists as deviants. But perhaps it is not surprising at all that discussions of equality often return to concepts of sameness and difference, since one version of equality is treating similarly situated people alike.

Ecofeminism

> My first step from the old white man was trees. Then air. Then birds. Then other people. But one day when I was sitting quiet . . . it come to me: that feeling of being part of everything, not separate at all. I knew that if I cut a tree, my arm would bleed.
> —Alice Walker, *The Color Purple*

Ecofeminism describes women's rich and varied relationships with society and nature. First advanced in the 1970s,[60] ecofeminism has since flowered into a stunning array of variations, with emphases ranging from economics to spiritualism, from animal rights to international human rights. The most recent and, perhaps, most promising version of ecofeminism emphasizes the intersections of human oppression (sexism, racism, and so on) and environmental destruction. The analysis begins where all ecofeminism begins: with the premise that the oppression of nature and the oppression of women are closely connected.[61] In this view, sexism and environmental destruction flow from the same problem: a false duality in Western thought that favors the human mind and spirit over the natural world and its processes. Because Western culture often associates the masculine with mind and spirit (science, reason, Descartes) and the feminine with the natural world (sex, instinct, Mother Nature), this dualism casts a double whammy, subordinating nature and women at the same time. This hierarchy—as old as Adam[62]—has been used to explain everything from the country's obsession with damming rivers to the pope's opposition to premarital sex.

Most ecofeminists challenge this dominance of masculine ideals by promoting greater respect for the feminine, "nature-based" values, a strategy reminiscent of cultural feminism.[63] Other ecofeminists argue that the duality between male and female is overemphasized and should give way to a more unified attack on oppression in general. This strategy is reminiscent of dominance theory. For many ecofeminists, the dynamics of separation and control that enable sexism and environmental destruction also perpetuate other forms of oppression. This leads to a multilayered analysis of sexism and the abuse of power. As Ellen O'Loughlin explains, because most women "experience [discrimination] in more than one way (that is, through the dynamics of racism, classism, heterosexism, and ageism, as well as sexism), ecofeminism, in order to fight the oppression of women and nature, must look at more than just the ways in which sexism is related to naturism."[64]

Some of the affirmative contributions of environmental philosophy are its appreciation of aesthetics, its contemplation of equal access to natural resources, and its valuing of ecological ethics over human-centered utilitarianism. These ideas inform environmentalists' projects, such as efforts to preserve the Arctic National Wildlife Refuge for future generations instead of drilling it now in hopes of oil discovery. These same considerations of connections among living things and valuation of community over self dovetail in ecofeminism with feminist principles of respect, inclusion, and compassion for others.

One might be tempted to see ecofeminism as just a "green" interpretation of anti-essentialism. But the ecofeminist view of compound oppression contributes something new. First, ecofeminism holds *as its core principle* a recognition of shared oppression between women and nature. This principle not only encourages the examination of other shared oppressions but also makes avoidance of compound oppressions conceptually impossible: to take the "eco" or the "feminism" out of ecofeminism negates the whole idea.

Second, ecofeminism provides an important metaphor for understanding shared oppression: the ecological system. In fact, the concept of ecology provides us with an almost poetic image for understanding many difficulties that women face. Ellen O'Loughlin writes,

> An ecologist cannot just add up the parts of a pond and think she is coming close to describing that ecosystem and how it functions. A fish in a pond and a fish in an ocean, looked at ecologically, must be understood as inhabiting different, maybe similar but not the same, places. Likewise women are in different places. Whether I am in a field or an office, what I do there, my niche, is at least partially determined by the interconnection of societal environmental factors.[65]

It is precisely this emphasis on compound oppressions in the context of an ecological whole that makes the theory so useful in building coalitions among legal organizers.

Some good examples come from the environmental justice movement, a grassroots movement concerned with environmental dangers affecting the poor and people of color. In the United States, the environmental justice (EJ) movement is mainly populated and directed by women. This was a grassroots movement that in part grew up around kitchen tables across the country, as women compared notes on the illnesses their children were suffering and traced these shared ailments to contaminated well water or landfills that leached toxins into the ground.[66] As a result, EJ advocates emphasize pollution problems affecting families and children—childhood asthma in the inner city (which is aggravated by air pollution), lead-based paint in old houses, or contamination in the drinking water. Flexible collaborators, EJ advocates have joined forces with mainstream environmentalists, public health advocates, and poverty lawyers. The factor that holds these groups together is not necessarily love of nature, although that may be a part, but rather love of justice—the commitment to fight oppression in all its forms.

A social-justice perspective enables these new environmentalists to draw connections between contamination and discrimination. When national studies show correlations between neighborhood pollution and wealth or race,[67] EJ advocates question zoning laws that perpetuate the segregation of poor single mothers and minorities. When the federal government warns women of childbearing years to lower their intake of tuna because of mercury contamination,[68] EJ advocates question pollution limits that were made strict enough to protect men but not women.

The ecofeminist movement received a *global* boost when, in 2004, Kenyan activist Wangari Maathai won the Nobel Peace Prize for leading thousands of African women in crusades against deforestation, poverty, and authoritarian government. Each of these problems posed important challenges to women. Deforestation, for instance, deprived rural communities of firewood, requiring women and girls to trek miles in search of cooking fuel. In addition, many legal and social traditions limit African women's participation in the workforce and public life, making them particularly vulnerable to poverty and corrupt autocrats. Describing that year's choice, a representative of the Nobel Committee said, "We have added a new dimension to the concept of peace. We have emphasized the environment, democracy building, and human rights and especially women's rights."[69]

Maathai exhibited ecofeminist ideals through her work in the Green Belt Movement, which, among other things, assisted women in planting more than forty million trees on community properties and farms and around schools and churches in an effort to assist in poverty reduction for women through environmental conservation. While the ecofeminist movement appears to have its strongest following outside of the United States, its American advocates have proved to be very enthusiastic and creative. In the United States, ecofeminists have campaigned for animal rights, security for migrant farmworkers, better healthcare for women, and environmental protection for Native Americans.

Pragmatic Feminism

> We must look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep redeciding as time goes on. . . . [We must] confront each dilemma separately and choose the alternative that will hinder empowerment the least and further it the most. The pragmatic feminist need not seek a general solution that will dictate how to resolve all double bind issues.
>
> —Margaret Jane Radin, "The Pragmatist and the Feminist"

Pragmatic legal feminism offers as a primary insight that a search for contextual solutions is typically more useful than abstract theorizing. Feminist legal pragmatists draw on the works of the classical pragmatists in philosophy, such as John Dewey and Charles Sanders Peirce, especially their understanding that "truth is inevitably plural, concrete, and provisional."[70] This means that pragmatists reach tentative conclusions and know that their truths are usually incomplete and open to change. Feminist legal pragmatists criticize the universalism (e.g., all men dominate women) of some of the other types of feminist legal theories, and stress instead the importance of context and perspective. They recognize that "all observations are relative to a perspective," including "the time and place where they occur . . . [and] the set of prior beliefs and attitudes that are held by the observing party."[71]

Pragmatists generally steer away from abstractions: for them, abstract concepts do not dictate real-world practical solutions. Feminists as pragmatists do not look for solutions in formal legal rules, but instead view legal rules as partial explanations for outcomes in individual cases. Pragmatic feminists recognize that many of the debates among feminists are about different visions of an ideal means to reach the goal of equality. They also recognize that subordinated groups often face a "double bind" and that an outcome along ideal dimensions may leave individuals without a remedy. For instance,

> When we single out pregnancy, for example, for "special treatment," we fear that employers will not hire women. But if we do not accord special treatment to pregnancy, women will lose their jobs. If we grant special treatment, we bring back the bad old conception of women as weaker creatures; if we do not, we prevent women from becoming stronger in the practical world.[72]

Different times and contexts may necessitate different approaches or outcomes. Many feminist issues are presented in concrete, specific settings. For example, the issue might be whether a particular law firm should institute a nonpartnership track to allow parents more family time with their children. A concern of some feminists might be that this would become a "mommy track," a form of second-class citizenship utilized primarily or even exclusively by female lawyers. A pragmatic feminist might view the parent track not as a perfect outcome (a more ideal outcome might be to modify billable-hour requirements for all the lawyers in a firm), but as the best possible among less-than-ideal choices: a way of expanding the choices and assisting in the reconciliation of family/work conflicts for some individuals who are most affected at that place and time. Pragmatic feminists recognize the danger of universals and look for context-specific solutions.[73]

Some have criticized pragmatism generally for its emphasis on individual perspective, its uncertainty, and its refusal to commit to abstract theorizing. "Being a legal pragmatist," jokes law professor Jack Balkin, "means never having to say you have a theory."[74] The serious challenge, though, is finding, in the absence of any foundational theory, a workable standard of morality.

Consider, for example, how a pragmatic feminist's approach might differ from that of an equal treatment theorist. In some tribal societies, land is generally inheritable only by male heirs, but customary norms impose an obligation on families to care for unmarried daughters by giving them a piece of land. An unmarried or divorced daughter who has children of her own to care for might argue for an extension of those cultivation or occupancy rights to her situation—not on the basis that she should have rights equal to her brothers but on the basis that families have an obligation to care for all their daughters. The latter strategy has a much better chance of success in this culture than the former approach. This pragmatic approach may produce a favorable outcome in the individual case, but might not contribute to theoretically satisfactory or lasting egalitarian results: "For long-term gender equality, however, this recognition of customary rights is not a real victory. It is premised on the perception that women's interests in property belonging to their natal families are contingent. . . . Daughters are only accommodated in exceptional circumstances, namely when they fail to marry, or when their marriages fail."[75]

Pragmatism comes with no firm convictions but does offer perhaps an improved set of methods for coming to conclusions—tentative and partial though they might be. Feminist pragmatism contributes less in the way of concrete legal solutions and more in terms of methodological suggestions. Since one aspect of feminist methodology is to look at the realities of experience, pragmatic feminists find truths in the particulars of women's daily realities. Thus, for pragmatists, personal experiences help build theories, and theories need to incorporate the concrete situations of diverse individuals.

Postmodern Feminism

> I am in favor of localized disruptions. I am against totalizing theory.
> —Mary Joe Frug, "A Postmodern Feminist Legal Manifesto"

We have been thinking about different feminist legal theories as if they were so many flavors of ice cream. Some swear by vanilla; others like rocky road. But postmodern feminist theory (and to a lesser extent

pragmatism) is more of an interpretive tool than a uniform flavor. It's like an ice cream scoop.

Postmodern feminist legal theory presents another attempt to move beyond the categories of sameness and difference. Postmodern feminists argue that the comparative approaches of equal treatment ("women are like men") and cultural feminism ("women are *not* like men") inaccurately assume that *all* women are roughly the same, as are *all* men. This assumption is particularly false—and damaging—when one speaks of women or men across the lines of race, economics, or country of origin. Postmodern feminist legal theorists therefore reject notions of single truths and recognize instead that truths are multiple, provisional, and thus linked to individuals' lived experiences, perspectives, and positions in the world.

Postmodern feminism shares with critical feminist theories and with pragmatism a rejection of essentialism—the idea that all women share any single experience or condition. But postmodernists play on a whole different level of abstraction. Unlike anti-essentialists who find truth in a harmony of many voices, postmodernists think harmony is impossible. And truth, well, that's a figment of your imagination too.

As the name implies, postmodernism emerged as a response to modernism, an intellectual movement that rejected the formal structures of Victorian art (narrative in literature, realism in painting) in hopes of capturing a more immediate, less stylized picture of human experience. Modernists wanted truth boiled down to the bone. Postmodernists also reject traditional styles and forms but go further by rejecting the very notion of objective knowledge or experience. Postmodernists challenge the very possibility of truth or objectivity. In the postmodern view, knowledge can never be certain or empirically established since, as Peter Schanck explains, "[W]hat we think is knowledge is always belief"—and "[b]ecause language is socially and culturally constituted, it is inherently incapable of representing or corresponding to reality."[76] Boil truth down to the bone, and all that's left is steam.

Postmodern analysis begins with a technique called "deconstruction." Developed in the 1960s and '70s by French philosopher Jacques Derrida, deconstruction entails taking a hard look at historical, artistic, or linguistic details to reveal the political messages and biases hidden within. Textual accounts always encode hidden messages because language is unavoidably packed with explicit and implicit information that changes

with context. Consider the "Whites Only" signs of the Jim Crow South. One could say (as some politicians did) that the message was one of separation only, not subordination, but most people today would agree that the stronger, hidden message was about class power. This is the postmodern thesis: that when you get down to it, there is no such thing as justice, beauty, or truth—only power and the quest to maintain it. Pull up the floorboards of any opera, treatise, or constitution, and you will find a foundation built on the geometry of power. Every document, text, piece of language, work, or discussion contains hierarchies. Justice (or what passes for justice) belongs not to the ages but to today's ruling class, who define and shape it to their advantage, until, of course, a new class topples the first and imposes its own version. (If this reminds you of the French Revolution, you are getting the idea.) The trick for postmodernists is to identify these power structures through deconstruction and then to reverse those structures through political action.

Postmodern feminists use the tools of deconstruction to challenge the modernist idea of an unchangeable rule of law. Laws are not objective or impartial—they are crafted from political biases, so reliance on laws, and on traditional ways of practicing law, can reinforce inequalities. Postmodern practices critique many subtle hierarchies of power—even power hierarchies between lawyers and their clients. These strategies are intended to reveal the nonobvious ways that power works in relationships.

Postmodernism reveals that language, knowledge, and power are connected in ways that transmit cultural norms of gender. Because postmodernism focuses on oppression, it is especially concerned with how hierarchies are created and passed on in culture. Postmodernists suggest that we create and transmit hierarchies such as gender oppression by subtle and pervasive systems of speaking and acting (discourse and so-called discursive practices). For instance, women may internalize the expectations of advertisements that depict them as anorexically thin, perfectly coifed, and able to expertly wield cleaning products, just as they understood the messages of some older protectionist laws that limited the number of hours women could work in order to protect women from strenuous labor.

The postmodern strategy of understanding the connections between discourse and power is used to prompt rethinking of traditional gender

identities so that they are more fluid and less attached to biological sex or to cultural norms. Feminists influenced by postmodernism view gender not as natural, fixed, or objective but as socially constructed, relative, dependent on experiences, and mutable over time and according to situations. They stress that individuals have multiple identities and roles that they play. Gender is performed or presented (through, among other things, clothing, work, and mannerisms) differently each day. As an example of the ways language constructs identities, consider Judith Butler's postmodern explanation of how gender identity is "performatively constituted" by expressions:

> If I claim to be a lesbian, I "come out" only to produce a new and different "closet." The "you" to whom I come out now has access to a different region of opacity. Indeed, the locus of opacity has simply shifted. . . . so we are out of the closet, but into what? What new unbounded spatiality? The room, the den, the attic, the basement, the house, the bar, the university, some new enclosure. . . . For being "out" always depends to some extent upon being "in"; it gains its meaning only within that polarity. Hence, being "out" must produce the closet again and again in order to maintain itself as "out."[77]

Sometimes postmodern analysis, like the above paragraph, looks more like performance art than legal critique. The response is that such "transgressive" rants, or riffs, are riffs of resistance. By challenging the language of social relationships, and resisting proper forms of speaking and writing, postmodernists say they can neutralize subliminal messages of inequality transmitted by the dominant culture. Perhaps. Still, it's hard to locate and fight injustice if we can't even agree on the meaning of "out" or "in." In the words of Catharine MacKinnon, "Postmodernism as practiced often comes across as style—petulant, joyriding, more posture than position. . . . Postmodernism imagines that society happens in your head."[78]

Some feminists find postmodernism neither liberating nor effective. For them, the postmodern challenge of foundational truths undermines the stark realities of discrimination, intimate violence, and subordination that women have been trying to document. They worry that the emphasis on multiple perspective reduces the realities of rape, sexual

abuse, prostitution, and sexual harassment to just another set of "narratives." Furthermore, critics say that postmodernism operates at too a high a level of theory to be of political use:

> According to postmodernism, there are no facts; everything is a reading, so there can be no lies. Apparently it cannot be known whether the Holocaust is a hoax, whether women love to be raped, whether Black people are genetically intellectually inferior to white people, whether homosexuals are child molesters. To postmodernists, these factish things are indeterminate, contingent, in play, all a matter of interpretation.[79]

Postmodernists and dominance theorists have also battled over whether women have "agency"—free will to choose, for example, sadomasochistic sex. In the postmodern view, S/M might be "a potentially pleasurable and subversive sexual practice,"[80] while a dominance theorist might dismiss the idea that S/M practices can ever be freely chosen or argue that any such "choice" is actually a product of false consciousness.

This is just one example of the larger debate about postmodern approaches. Postmodernism counsels that people should adopt "subversive practices" and try to escape oppression. It rallies citizens to fight chauvinism and resist autocracy but shows little interest in what equality or democracy should really look like. When the oppressed have finally broken their chains and slipped through the bars, how will they know they are free?

Questions for Discussion

1. At the turn of the twenty-first century, the movement for gender equality seems to have stalled. Some of the most significant battles, such as the fight for suffrage, *Roe v. Wade*, basic equal pay cases, and men's rights to sue for sexual harassment, have already been fought. Many of the issues that remain are second-generation discrimination issues—such as the glass ceiling in employment, the absence of paid family leave, women doing a disproportionate share of unpaid domestic work, or simply societal beliefs about appropriate gender roles. Can you identify some others of these smaller second-

generation issues: the more subtle forms of discrimination that are not clearly proscribed by existing laws and the micro-inequities that it is difficult for law to even reach? Do any major or landmark legal issues still remain to be fought?

2. The diversity among feminist legal theorists raises the difficulties of building coalitions among oppressed groups. Some anti-essentialists call for greater coalition building. Others caution against it, because alliances among minorities or between minority and dominant groups usually operate to serve the more powerful groups, whose interests may diverge. Choose one of the issues you identified in question 1. Would coalition building be a critical strategy in addressing that issue?
3. Are some of these philosophies of feminism too bleak to gain many adherents or too critical to provide a positive platform? For instance, dominance theory seems to suggest that most, if not all, women are subordinated in many ways—and that they may not even know it (the problem of false consciousness). Individuals, in the postmodern view, are almost purely social and cultural creations. If, as postmodernism seems to suggest, women's experiences are not "homogeneous," this raises the question whether they "can ever ground feminist theory."[81] Will dominance theory gather supporters or will it be perceived as relegating women to permanent victim status? Will postmodernism lead to more fluid gender roles or create such anxiety over ambiguity that the status quo remains the preferred model of interpreting gender roles? Even if neither theory gains more adherents, how does its presence in the field of feminist theory affect other, more generally accepted theories?

7 Carrie Chapman Catt & Nettie Rogers Shuler, Woman Suffrage and Politics: The Inner Story of the Suffrage Movement 107–8 (1923).

8 410 U.S. 113 (1973).

CHAPTER 1. FEMINIST LEGAL THEORIES

1 *See* Mary Wollstonecraft, A Vindication of the Rights of Women (Carol H. Poston ed., 1988) (1779); John Stuart Mill, The Subjection of Women (Mary Warnock ed., 1986) (1869).

2 Reed v. Reed, 404 U.S. 71 (1971).

3 411 U.S. 677 (1973).

4 This is a story all its own: *see* Serena Mayeri, "*When the Trouble Started*": *The Story of* Frontiero v. Richardson, *in* Women and the Law Stories (Elizabeth Schneider & Stephanie M. Wildman eds., 2011).

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

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

7 Craig v. Boren, 429 U.S. 190 (1976).

8 Orr v. Orr, 440 U.S. 268 (1979); Davis v. Passman, 442 U.S. 228 (1979).

9 J.E.B. v. Alabama, 511 U.S. 127 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

10 *See* Califano v. Webster, 430 U.S. 313 (1977).

11 Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. Cin. L. Rev. 207, 211 (2010).

12 Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 2 (1988).

13 Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

14 *See, e.g.*, L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?* 82 Ind. L.J. 711, 743 (2007).

15 *See, e.g.*, Catherine G. Greeno & Eleanor E. Maccoby, *How Different Is the "Different Voice?"* 11 Signs 310, 315 (1986); Carol Stack, *The Culture of Gender: Women and Men of Color*, 11 Signs 321, 322–24 (1986).

16 *See* Nel Noddings, Caring: A Feminine Approach to Ethics and Moral Education 2, 128–30 (1984); Carol Gilligan, *Reply by Carol Gilligan*, 11 Signs 324 (1986); Sara Jaffee & Janet Shibley Hyde, *Gender Differences in Moral Orientation: A Meta-Analysis*, 126 Psychol. Bull. 703 (2000).

17 *See* West, *supra* note 12, at 18.

18 *Frontiero*, 411 U.S. at 684.

19 479 U.S. 272 (1987).

20 Martin H. Malin, *Fathers and Parental Leave*, 72 Tex. L. Rev. 1047, 1060 (1994).

21 479 U.S. at 289.

22 Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 Wash. U.J.L. & Pol'y 17, 18 (2004).

23 Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It 213 (2000).

24 Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L. REV. 151, 171 (1991).

25 MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990).

26 CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 35 (1987).

27 *See, e.g.,* Hanna Roos, *Trading the Sexual Child: Child Pornography and the Commodification of Children in Society*, 23 TEX. J. WOMEN & L. 131, 132 (2014).

28 Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1458 (2014).

29 Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 252 (1998).

30 West, *supra* note 12, at 4.

31 CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 224 (1989).

32 American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (2nd Cir. 1985), *cert. denied*, 475 U.S. 1132 (1986).

33 Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

34 Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (Ann Snitow et al. eds., 1983).

35 Arnold Schwarzenegger, *Remarks Prepared for Delivery at the 2004 Republican National Convention,* delivered Aug. 31, 2004, *available at* http://www.usatoday.com/news/politicselections/nation/president/2004–08–31-schwarzeneggerfulltext_x.htm.

36 CATHARINE A. MACKINNON, *supra* note 26, at 39.

37 Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1515 (2001).

38 April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?* 10 WIS. WOMEN'S L.J. 161, 214 n.241 (1995).

39 Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 41 STAN. L. REV. 580, 585, 589–90 (1990).

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

41 *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

42 Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989).

43 *See, e.g.,* Maritza I. Reyes et al., *Reflections on Presumed Incompetent: The Intersections of Race and Class for Women in Academia Symposium—the Plenary Panel*, 29 BERKELEY J. GENDER L. & JUST. 195 (2014).

44 PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44, 45 (1991).

45 Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN'S STUD. 81, 94 (2003).

46 Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

47 Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1988).

48 RICHARD J. HERRNSTEIN & CHARLES A. MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994).

49 Michael White, *Why Your Race Isn't Genetic: DNA Doesn't Determine Race; Society Does*, PACIFIC STANDARD, May 30, 2014, http://www.psmag.com/nature-and-technology/why-your-race-isnt-genetic-82475.

50 *See, e.g.*, Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 261–65 (1995); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938 (1997).

51 Harris, *supra* note 39, at 608.

52 ANITA HILL, SPEAKING TRUTH TO POWER (1997).

53 Tanya Ballard Brown, *Did You Know It's Legal in Most States to Discriminate Against LGBT People*, NPR, Apr. 28, 2015, http:www.npr.org/blogs/itsallpolitics/2015/04/28/402774189/activists-urge-states-to-protect-the-civil-rights-of-lgbt-people.

54 *See, e.g.*, Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997).

55 Valdes, *supra* note 33, at 125.

56 *See, e.g.*, Christopher R. Leslie, *Embracing* Loving: *Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077 (2014).

57 General Accounting Office, Memo from Office of the General Counsel to The Honorable Henry J. Hyde, Jan. 31, 1997, *available at* http://www.gao.gov/archive/1997/og97016.pdf at 2. Note that this count includes only those laws enacted prior to the passage of the Defense of Marriage Act precluding federal recognition of same-sex marriages on September 21, 1996.

58 Judy Foreman, *The Basis for Sexual Orientation*, L.A. TIMES, Dec. 8, 2003, at F8.

59 Samuel Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646 (2001).

60 French writer Françoise d'Eaubonne coined the term "*ecofeminisme*" in 1974. Carolyn Merchant, *Ecofeminism and Feminist Theory*, in REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM 100 (Irene Diamond & Gloria Feman Orenstein eds., 1990).

61 Janis Birkeland, *Ecofeminism: Linking Theory and Practice*, in ECOFEMINISM: WOMEN, ANIMALS, NATURE 13, 18 (Greta Gaard ed., 1993).

62 "And the LORD God took the man, and put him into the garden of Eden to dress it and to keep it." *Genesis* 2:15 (King James).

63 *See* Shelley Feldman, *Rethinking Development, Sustainability, and Gender Relations*, 22 CORNELL J.L. & PUB. POL'Y 649, 657 (2013).

64 Ellen O'Loughlin, *Questioning Sour Grapes: Ecofeminism and the United Farm Workers Grape Boycott*, in ECOFEMINISM, *supra* note 61, at 148.

65 *Id.* at 149–50.

66 Robert R. M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN'S L.J. 23 (1996).

67 *See, e.g.*, COMMISSION FOR RACIAL JUSTICE OF THE UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES 15 (1987).

68 U.S. DEP'T OF HEALTH AND HUMAN SERVICES AND U.S. ENVIRONMENTAL PROTECTION AGENCY, WHAT YOU NEED TO KNOW ABOUT MERCURY IN FISH AND SHELLFISH (Mar. 2004) (EPA-823-R-04–005), *available at* http://www.cfsan.fda.gov/~dms/admehg3.html.

69 Fred Barbash & Emily Wax, *Kenyan Environmental Activist Wins Nobel Peace Prize*, WASH. POST, Oct. 8, 2004, at A1.

70 Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1706 (1990).

71 Catharine Pierce Wells, *Why Pragmatism Works for Me*, 74 S. CAL. L. REV. 347, 357 (2000).

72 Radin, *supra* note 70, at 1706.

73 *See* Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U.L. REV. 453, 514 (2014).

74 J. M. Balkin, *The Top Ten Reasons to Be a Legal Pragmatist*, 8 CONST. COMMENT. 351, 361 (1991).

75 Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?* 41 HARV. INT'L L.J. 381, 416 (2000).

76 Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2508 (1992).

77 JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 33 (2nd ed. 1999).

78 Catharine MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT. L. REV. 687, 700–01 (2000).

79 *Id.* at 703.

80 Brenda Cossman, *Gender, Sexuality, and Power: Is Feminist Theory Enough?* 12 COLUM. J. GENDER & L. 601, 620 (2003).

81 Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 5, 3 (2001).

CHAPTER 2. FEMINIST LEGAL METHODS

1 *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836–37 (1990).

2 CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 34 (1987).

3 Bartlett, *supra* note 1, at 837.

7 Carrie Chapman Catt & Nettie Rogers Shuler, Woman Suffrage and Politics: The Inner Story of the Suffrage Movement 107–8 (1923).

8 410 U.S. 113 (1973).

CHAPTER 1. FEMINIST LEGAL THEORIES

1 *See* Mary Wollstonecraft, A Vindication of the Rights of Women (Carol H. Poston ed., 1988) (1779); John Stuart Mill, The Subjection of Women (Mary Warnock ed., 1986) (1869).

2 Reed v. Reed, 404 U.S. 71 (1971).

3 411 U.S. 677 (1973).

4 This is a story all its own: *see* Serena Mayeri, "*When the Trouble Started*": *The Story of* Frontiero v. Richardson, *in* Women and the Law Stories (Elizabeth Schneider & Stephanie M. Wildman eds., 2011).

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

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

7 Craig v. Boren, 429 U.S. 190 (1976).

8 Orr v. Orr, 440 U.S. 268 (1979); Davis v. Passman, 442 U.S. 228 (1979).

9 J.E.B. v. Alabama, 511 U.S. 127 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

10 *See* Califano v. Webster, 430 U.S. 313 (1977).

11 Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. Cin. L. Rev. 207, 211 (2010).

12 Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 2 (1988).

13 Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

14 *See, e.g.*, L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?* 82 Ind. L.J. 711, 743 (2007).

15 *See, e.g.*, Catherine G. Greeno & Eleanor E. Maccoby, *How Different Is the "Different Voice?"* 11 Signs 310, 315 (1986); Carol Stack, *The Culture of Gender: Women and Men of Color*, 11 Signs 321, 322–24 (1986).

16 *See* Nel Noddings, Caring: A Feminine Approach to Ethics and Moral Education 2, 128–30 (1984); Carol Gilligan, *Reply by Carol Gilligan*, 11 Signs 324 (1986); Sara Jaffee & Janet Shibley Hyde, *Gender Differences in Moral Orientation: A Meta-Analysis*, 126 Psychol. Bull. 703 (2000).

17 *See* West, *supra* note 12, at 18.

18 *Frontiero*, 411 U.S. at 684.

19 479 U.S. 272 (1987).

20 Martin H. Malin, *Fathers and Parental Leave*, 72 Tex. L. Rev. 1047, 1060 (1994).

21 479 U.S. at 289.

22 Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 Wash. U.J.L. & Pol'y 17, 18 (2004).

23 Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It 213 (2000).

24 Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L. REV. 151, 171 (1991).

25 MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990).

26 CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 35 (1987).

27 *See, e.g.,* Hanna Roos, *Trading the Sexual Child: Child Pornography and the Commodification of Children in Society*, 23 TEX. J. WOMEN & L. 131, 132 (2014).

28 Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1458 (2014).

29 Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 252 (1998).

30 West, *supra* note 12, at 4.

31 CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 224 (1989).

32 American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (2nd Cir. 1985), *cert. denied*, 475 U.S. 1132 (1986).

33 Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

34 Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (Ann Snitow et al. eds., 1983).

35 Arnold Schwarzenegger, *Remarks Prepared for Delivery at the 2004 Republican National Convention,* delivered Aug. 31, 2004, *available at* http://www.usatoday.com/news/politicselections/nation/president/2004–08–31-schwarzeneggerfulltext_x.htm.

36 CATHARINE A. MACKINNON, *supra* note 26, at 39.

37 Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1515 (2001).

38 April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?* 10 WIS. WOMEN'S L.J. 161, 214 n.241 (1995).

39 Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 41 STAN. L. REV. 580, 585, 589–90 (1990).

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

41 *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

42 Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989).

43 *See, e.g.,* Maritza I. Reyes et al., *Reflections on Presumed Incompetent: The Intersections of Race and Class for Women in Academia Symposium—the Plenary Panel*, 29 BERKELEY J. GENDER L. & JUST. 195 (2014).

44 PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44, 45 (1991).

45 Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN'S STUD. 81, 94 (2003).

46 Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

47 Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1988).

48 RICHARD J. HERRNSTEIN & CHARLES A. MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994).

49 Michael White, *Why Your Race Isn't Genetic: DNA Doesn't Determine Race; Society Does*, PACIFIC STANDARD, May 30, 2014, http://www.psmag.com/nature-and-technology/why-your-race-isnt-genetic-82475.

50 *See, e.g.*, Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 261–65 (1995); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938 (1997).

51 Harris, *supra* note 39, at 608.

52 ANITA HILL, SPEAKING TRUTH TO POWER (1997).

53 Tanya Ballard Brown, *Did You Know It's Legal in Most States to Discriminate Against LGBT People*, NPR, Apr. 28, 2015, http:www.npr.org/blogs/itsallpolitics/2015/04/28/402774189/activists-urge-states-to-protect-the-civil-rights-of-lgbt-people.

54 *See, e.g.*, Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997).

55 Valdes, *supra* note 33, at 125.

56 *See, e.g.*, Christopher R. Leslie, *Embracing* Loving: *Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077 (2014).

57 General Accounting Office, Memo from Office of the General Counsel to The Honorable Henry J. Hyde, Jan. 31, 1997, *available at* http://www.gao.gov/archive/1997/og97016.pdf at 2. Note that this count includes only those laws enacted prior to the passage of the Defense of Marriage Act precluding federal recognition of same-sex marriages on September 21, 1996.

58 Judy Foreman, *The Basis for Sexual Orientation*, L.A. TIMES, Dec. 8, 2003, at F8.

59 Samuel Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646 (2001).

60 French writer Françoise d'Eaubonne coined the term "*ecofeminisme*" in 1974. Carolyn Merchant, *Ecofeminism and Feminist Theory*, in REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM 100 (Irene Diamond & Gloria Feman Orenstein eds., 1990).

61 Janis Birkeland, *Ecofeminism: Linking Theory and Practice*, in ECOFEMINISM: WOMEN, ANIMALS, NATURE 13, 18 (Greta Gaard ed., 1993).

62 "And the LORD God took the man, and put him into the garden of Eden to dress it and to keep it." *Genesis* 2:15 (King James).

63 *See* Shelley Feldman, *Rethinking Development, Sustainability, and Gender Relations*, 22 CORNELL J.L. & PUB. POL'Y 649, 657 (2013).

64 Ellen O'Loughlin, *Questioning Sour Grapes: Ecofeminism and the United Farm Workers Grape Boycott*, in ECOFEMINISM, *supra* note 61, at 148.

65 *Id.* at 149–50.

66 Robert R. M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN'S L.J. 23 (1996).

67 *See, e.g.*, COMMISSION FOR RACIAL JUSTICE OF THE UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES 15 (1987).

68 U.S. DEP'T OF HEALTH AND HUMAN SERVICES AND U.S. ENVIRONMENTAL PROTECTION AGENCY, WHAT YOU NEED TO KNOW ABOUT MERCURY IN FISH AND SHELLFISH (Mar. 2004) (EPA-823-R-04–005), *available at* http://www.cfsan.fda.gov/~dms/admehg3.html.

69 Fred Barbash & Emily Wax, *Kenyan Environmental Activist Wins Nobel Peace Prize*, WASH. POST, Oct. 8, 2004, at A1.

70 Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1706 (1990).

71 Catharine Pierce Wells, *Why Pragmatism Works for Me*, 74 S. CAL. L. REV. 347, 357 (2000).

72 Radin, *supra* note 70, at 1706.

73 *See* Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U.L. REV. 453, 514 (2014).

74 J. M. Balkin, *The Top Ten Reasons to Be a Legal Pragmatist*, 8 CONST. COMMENT. 351, 361 (1991).

75 Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?* 41 HARV. INT'L L.J. 381, 416 (2000).

76 Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2508 (1992).

77 JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 33 (2nd ed. 1999).

78 Catharine MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT. L. REV. 687, 700–01 (2000).

79 *Id.* at 703.

80 Brenda Cossman, *Gender, Sexuality, and Power: Is Feminist Theory Enough?* 12 COLUM. J. GENDER & L. 601, 620 (2003).

81 Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 5, 3 (2001).

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3 Bartlett, *supra* note 1, at 837.

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 prepuberty 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 secondary 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.

[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 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.

"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.

ELIGIBILITY REGULATIONS FOR THE FEMALE CLASSIFICATION
(ATHLETES WITH DIFFERENCES OF SEX DEVELOPMENT)

(Published on 23 April 2018, coming into effect as from 1 November 2018)

In the case of queries regarding these regulations, please contact the IAAF Medical Manager (Doctor):

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CONTENTS

1. INTRODUCTION

1.1 The IAAF Council has approved the issue of these Regulations further to Competition Rule 141 to address the eligibility of athletes with differences of sex development to compete in the female category of competition in certain track events. These Regulations reflect the following imperatives:

(a) To ensure fair and meaningful competition in the sport of athletics, competition has to be organised within categories that create a level playing field and ensure that success is determined by talent, dedication, hard work, and the other values and characteristics that the sport embodies and celebrates. In particular:

(i) The IAAF wants athletes to be incentivised to make the huge commitment and sacrifice required to excel in the sport, and so to inspire new generations to join the sport and aspire to the same excellence. It does not want to risk discouraging those aspirations by having unfair competition conditions that deny athletes a fair opportunity to succeed.

(ii) Because of the significant advantages in size, strength and power enjoyed (on average) by men over women from puberty onwards, due in large part to men's much higher levels of circulating testosterone,[1] and the impact that such advantages can have on sporting performance, it is generally accepted that competition between male and female athletes would not be fair and meaningful, and would risk discouraging women from participation in the sport. Therefore, in addition to separate competition categories based on age, the IAAF has also created separate competition categories for male and female athletes.

(b) The IAAF also recognises, however, that:

(i) Biological sex is an umbrella term that includes distinct aspects of chromosomal, gonadal, hormonal and phenotypic sex, each of which is fixed and all of which are usually aligned into the conventional male and female binary.

(ii) However, some individuals have congenital conditions that cause atypical development of their chromosomal, gonadal, and/or anatomic sex (known as differences of sex development, or **DSDs**, and sometimes referred to as 'intersex').

(iii) As a result, some national legal systems now recognise legal sexes other than simply male and female (for example, 'intersex', 'X', or 'other').

(c) The IAAF respects the dignity of all individuals, including individuals with DSDs. It also wishes the sport of athletics to be as inclusive as possible, and to encourage and provide a clear path to participation in the sport for all. The IAAF therefore seeks to place conditions on such participation only to the extent necessary to ensure fair and meaningful competition. As a result, the IAAF has issued these Regulations, to facilitate the participation in the sport of athletes with DSDs.

(d) There is a broad medical and scientific consensus,[2] supported by peer-reviewed data and evidence from the field,[3] that the high levels of endogenous testosterone circulating in athletes with certain DSDs can significantly enhance their sporting performance. These Regulations accordingly permit such athletes to compete in the female classification in the events that currently appear to be most clearly affected only if they meet the Eligibility Conditions defined below.

(e) These Regulations exist solely to ensure fair and meaningful competition within the female classification, for the benefit of the broad class of female athletes. In no way are they intended as any kind of judgement on or questioning of the sex or the gender identity of any athlete. To the contrary, the IAAF regards it as essential to respect and preserve the dignity and privacy of athletes with DSDs, and therefore all cases arising under these Regulations must be handled and resolved in a fair, consistent and confidential manner, recognising the sensitive nature of such matters. Any breach of confidentiality, improper discrimination, and/or stigmatisation on grounds of sex or gender identity will amount to a serious breach of the IAAF Integrity Code of Conduct and will result in appropriate disciplinary action against the offending party.

1.2 These Regulations operate globally, regulating the conditions for participation in Restricted Events at International Competitions. As such, the Regulations are to be interpreted and applied not by reference to national or local laws, but rather as an independent and autonomous text, and in a manner that protects and advances the imperatives identified above. In the event that an issue arises that is not foreseen in these Regulations, it shall be addressed in the same manner.

1.3 All cases arising under these Regulations will be dealt with by the IAAF Health and Science Department, and not by the National Federation of the athlete concerned, or by any other athletics body, whether or not the athlete concerned has yet competed in an International Competition. Each National Federation is bound by these Regulations and is required to cooperate with and support the IAAF in the application and enforcement of these Regulations, and to observe strictly the confidentiality obligations set out below.

1.4 These Regulations will come into effect on 1 November 2018, and will apply both to cases that arose prior to that date and to cases arising after that date. They are binding on and must be complied with by athletes, National Federations, Areas, Athlete Representatives, Member Federation Officials, and all other Applicable Persons. They will be subject to periodic review, and may be amended with the approval of the IAAF Council from time to time following such review to take account of any new evidence and/or relevant scientific or medical developments.

1.5 Defined words and defined terms used in these Regulations (starting with capital letters) have the meaning given to them in Appendix 1 to these Regulations, or (if not listed in Appendix 1) have the meaning given to them in the IAAF Constitution and/or the IAAF Competition Rules.

2. SPECIAL ELIGIBILITY REQUIREMENTS FOR RESTRICTED EVENTS AT INTERNATIONAL COMPETITIONS

2.1 The special eligibility requirements set out in clause 2.3, below, apply only to participation by a Relevant Athlete in the female classification in a Restricted Event at an International Competition. They do not apply to any other athletes, or to any other events, or to any other

competitions (although if a Relevant Athlete does not meet the Eligibility Conditions then she will not be eligible to set a World Record in a Restricted Event at a competition that is not an International Competition).

2.2 For these purposes:

(a) A **Relevant Athlete** is an athlete who meets each of the following three criteria:

(i) she has one of the following DSDs:

(A) 5α-reductase type 2 deficiency;

(B) partial androgen insensitivity syndrome (PAIS);

(C) 17β-hydroxysteroid dehydrogenase type 3 (17β- HSD3) deficiency;

(D) congenital adrenal hyperplasia;

(E) 3β-hydroxysteroid dehydrogenase deficiency;

(F) ovotesticular DSD; or

(G) any other genetic disorder involving disordered gonadal steroidogenesis;[4] and

(ii) as a result, she has circulating testosterone levels in blood of five (5) nmol/L or above;[5] and

(iii) she has sufficient androgen sensitivity for those levels of testosterone to have a material androgenising effect.[6]

(b) **Restricted Events** are 400m races, 400m hurdles races, 800m races, 1500m races, one mile races, and all other Track Events over distances between 400m and one mile (inclusive), whether run alone or as part of a relay event or a Combined Event.

2.3 To be eligible to compete in the female classification in a Restricted Event at an International Competition, or to set a World Record in a competition that is not an International Competition, a Relevant Athlete must meet each of the following conditions (the **Eligibility Conditions**):

(a) she must be recognised at law[7] either as female or as intersex (or equivalent);

(b) she must reduce her blood testosterone level to below five (5) nmol/L[8] for a continuous period of at least six months (e.g., by use of hormonal contraceptives); and

(c) thereafter she must maintain her blood testosterone level below five (5) nmol/L continuously (i.e., whether she is in competition or out of competition) for so long as she wishes to maintain eligibility to compete in the female classification in Restricted Events at International Competitions (or to set a World Record in a Restricted Event at a competition that is not an International Competition).

2.4 For the avoidance of doubt, there are no other special conditions that a Relevant Athlete must

satisfy in order to participate in the female classification in a Restricted Event at an International Competition (or to set a World Record in a Restricted Event at a competition that is not an International Competition).[9] In particular, surgical anatomical changes are not required in any circumstances.

2.5 For the avoidance of doubt, no athlete will be forced to undergo any assessment and/or treatment under these Regulations. It is the athlete's responsibility, in close consultation with her medical team, to decide whether or not to proceed with any assessment and/or treatment.

2.6 A Relevant Athlete who does not meet the Eligibility Conditions (and any athlete who is asked by the IAAF Medical Manager to submit to assessment under these Regulations and fails or refuses to do so) will not be eligible to compete in the female classification in a Restricted Event at an International Competition (or to set a World Record in a Restricted Event at a competition that is not an International Competition). However, that athlete will be eligible to compete:

(a) in the female classification:

(i) at competitions that are not International Competitions: in all Track Events, Field Events, and Combined Events, including the Restricted Events; and

(ii) at International Competitions: in all Track Events, Field Events, and Combined Events, other than the Restricted Events; or

(b) in the male classification, at all competitions (whether International Competitions or otherwise), in all Track Events, Field Events, and Combined Events, including the Restricted Events; or

(c) in any applicable intersex or similar classification that may be offered, at all competitions (whether International Competitions or otherwise), in all Track Events, Field Events, and Combined Events, including the Restricted Events.

3. ASSESSMENT OF CASES

3A. Opening a case

3.1 An athlete who is or believes that she may be a Relevant Athlete must advise the IAAF Medical Manager if she wishes to compete in the female classification in a Restricted Event at an International Competition, so that her case may be assessed in accordance with these Regulations. Her National Federation has the same obligation. She must do so as far in advance of the International Competition in question as possible (at least three months prior to the final entry date), and must provide the necessary information (or cooperate in the collection of the necessary information) and submit to the assessment described below to determine whether she is a Relevant Athlete and (if so) to demonstrate her satisfaction of the Eligibility Conditions.

3.2 In addition, the IAAF Medical Manager may investigate at any time (including, without limitation, through analysis of blood and/or urine samples collected from athletes who are competing or entered to compete in the female classification in a Restricted Event at an International Competition) whether any athlete who has not advised the IAAF Medical Manager in accordance with clause 3.1 may be a Relevant Athlete whose case requires assessment under these Regulations. The Relevant Athlete agrees to provide samples for this purpose, and also

agrees that any samples that she provides or has previously provided for anti-doping purposes and/or any anti-doping data relating to her may also be used for this purpose.

3.3 Only the IAAF Medical Manager may initiate an investigation under clause 3.2, and he/she may only do so when acting in good faith and on reasonable grounds based on information derived from reliable sources, such as (for example, but without limitation) the athlete herself, the team doctor of the National Federation to which the athlete is affiliated, results from a routine pre-participation health examination, and/or information/data (including but not limited to blood testosterone levels) obtained from the collection and analysis of samples for anti-doping purposes.

3.4 The dignity and privacy of every individual must be respected at all times. All breaches of confidentiality and all forms of abuse and/or harassment are prohibited. Such conduct will be considered a serious breach of the IAAF Integrity Code of Conduct and will be subject to sanction accordingly. In particular (but without limitation):

(a) Any person or entity (including, without limitation, any other athlete and any Member Federation Official or other Applicable Person) that provides information to the IAAF Medical Manager for consideration under these Regulations is under a strict obligation:

(i) to ensure that the information is accurate and complete; and

(ii) not to provide any information in bad faith, to harass, stigmatise or otherwise injure an athlete, or for any other improper purpose.

(b) No stigmatisation or improper discrimination on grounds of sex or gender identity will be tolerated. In particular (but without limitation), persecution or campaigns against athletes simply on the basis that their appearance does not conform to gender stereotypes are unacceptable.

3.5 Each case will be investigated/assessed as quickly as is reasonably practicable in all of the circumstances. However, in no circumstance will the IAAF or the IAAF Medical Manager or any member of the Expert Panel be liable for any detriment allegedly suffered by the athlete or anyone else as a result of the length of time taken to complete the assessment. An athlete whose case is being investigated/assessed by the IAAF Medical Manager and/or the Expert Panel under these Regulations must cooperate fully and in good faith with the investigation/assessment (including, without limitation, by providing blood and/or urine samples upon request for analysis, and if needed, by submitting to medical physical examination), so that it can be completed as efficiently and quickly as possible. If in the IAAF Medical Manager's view the athlete fails to cooperate fully and in good faith, she may be declared ineligible to compete in the female classification in Restricted Events at International Competitions and to set a World Record in a Restricted Event at a competition that is not an International Competition pending satisfactory completion of the investigation/assessment.

3B. Appointment of athlete ombudsman

3.6 The IAAF Medical Manager and an athlete whose case arises for investigation and/or assessment under these Regulations (or her representative) may agree on the appointment of an independent ombudsman to assist the athlete in understanding and addressing the requirements of the Regulations.

3C. Case assessment

3.7 The IAAF Medical Manager will appoint a pool of independent medical experts from which a suitably qualified panel of experts (the **Expert Panel**) may be formed to review cases under these Regulations as they arise. It will appoint one of those experts to act as chair. The chair and other independent medical experts appointed by the IAAF to this pool as of the date of entry into force of these Regulations are identified in Appendix 2 to these Regulations.

3.8 The case will be assessed in accordance with the guidelines set out in Appendix 3 to these Regulations. The standard procedure may be summarised as follows:

(a) There will be an initial assessment by a suitably qualified physician, involving an initial clinical examination of the athlete, and compilation of her clinical and anamnestic data, as well as a preliminary endocrine assessment.

(b) If it appears the athlete may be a Relevant Athlete, the IAAF Medical Manager will then anonymise the file and send it to the chair, who will convene an Expert Panel to determine whether further assessment is warranted as to whether the athlete is a Relevant Athlete.

(c) If the Expert Panel considers that further assessment is warranted, the athlete will then be referred to one of the specialist reference centres listed at Appendix 4 to these Regulations for further assessment, in order to reach a diagnosis of the cause of the athlete's elevated levels of blood testosterone, and to consider further the degree of the athlete's androgen insensitivity (if any).

(d) The report of the specialist reference centre will then be sent back to the Expert Panel for consideration.

3.9 The Expert Panel will review the report of the specialist reference centre along with the rest of the file, and will then send its recommendation in writing to the IAAF Medical Manager, who will forward it to the athlete (with a copy to the athlete's physician and the athlete ombudsman, if any):

(a) If the Expert Panel considers that the athlete is a Relevant Athlete but that she has not (yet) met the Eligibility Conditions, it must explain in writing the reasons for its view. It should also specify what else the athlete must do to satisfy the Eligibility Conditions, should she wish to do so. In such a case, it will recommend that the athlete not be declared eligible to compete in the female classification in Restricted Events at International Competitions unless and until the IAAF Medical Manager decides that she has done what the Expert Panel considered remained necessary to satisfy the Eligibility Conditions.

(b) If the Expert Panel considers that the athlete is not a Relevant Athlete, or that she is a Relevant Athlete but that she has met the Eligibility Conditions, it will recommend that the IAAF Medical Manager confirm in writing to the athlete that she is eligible to compete in the female classification in Restricted Events at International Competitions (in the latter case, for so long as she continues to satisfy the Eligibility Conditions).

3.10 The IAAF Medical Manager's decision to adopt or not adopt any Expert Panel recommendation on behalf of the IAAF will be final and binding on all parties. It may only be challenged/appealed in accordance with clause 5.

3D. Continuing compliance

3.11 A Relevant Athlete will be solely responsible for continuing to comply with the Eligibility Conditions for as long as she wishes to compete in the female classification in a Restricted Event at International Competitions.

3.12 As part of its recommendation, the Expert Panel may specify particular means (e.g., further monitoring and/or reporting) to be used to enable a Relevant Athlete to demonstrate her continuing compliance with the Eligibility Conditions. In any event, unless and until a Relevant Athlete declares that she no longer wishes to be eligible to compete in the female classification in Restricted Events at International Competitions, the IAAF Medical Manager:

(a) may require her to produce specific evidence of her continuing satisfaction of the Eligibility Conditions, such as laboratory reports (obtained by her personal physician) of the testosterone levels in blood samples collected from her periodically;

(b) may monitor her continuing satisfaction of the Eligibility Conditions at any time, with or without notice, by any appropriate means, including (without limitation) by having samples of the athlete's blood (an 'A' sample and a 'B' reserve sample) collected and transported to an appropriate laboratory to determine her blood testosterone levels. The Relevant Athlete agrees to provide samples for this purpose, and also agrees that any samples that she provides for anti-doping purposes and/or any anti-doping data relating to her may also be used for this purpose;

(c) may consult with the chair of the Expert Panel at any stage during this process as he/she considers necessary; and

(d) may, if circumstances warrant, refer the Relevant Athlete back to the Expert Panel for further assessment.

3.13 If any of the following occurs:

(a) the athlete refuses or fails to provide the evidence of her continuing satisfaction of the Eligibility Conditions requested by the IAAF Medical Manager;

(b) the athlete refuses or fails to submit to the testing and/or other monitoring of her continuing satisfaction of the Eligibility Conditions that is directed by the IAAF Medical Manager; or

(c) it is determined by the IAAF Medical Manager (following consultation with the chair of the Expert Panel, if necessary) that the athlete has failed to maintain her circulating blood testosterone levels continuously at a concentration of less than five (5) nmol/L;

then the athlete will not be eligible to compete in the female classification in a Restricted Event at an International Competition or to set a World Record in a Restricted Event at a competition that is not an International Competition until she demonstrates to the satisfaction of the IAAF

Medical Manager (in consultation with the chair of the Expert Panel, if necessary) that she is satisfying the Eligibility Conditions again, and in particular that she has maintained her circulating levels of blood testosterone below five (5) nmol/L for a new continuous period of at least six months.

3.14 If it is determined at any time that a Relevant Athlete has competed in the female classification in one or more Restricted Events at an International Competition while having blood testosterone levels of five (5) nmol/L or more, or that she set a World Record in a Restricted Event at a competition that is not an International Competition while having blood testosterone levels of five (5) nmol/L or more, then (without prejudice to any other action that may be taken) the IAAF may in its absolute discretion disqualify the individual results obtained by the athlete in such Restricted Events at that competition, with all resulting consequences, including forfeiture of any medals, ranking points, prize money, or other rewards awarded to the athlete based on those results.

3E. Costs

3.15 The IAAF will bear the costs of assessment and diagnosis of the athlete under these Regulations (including the standing costs of the Expert Panel and all costs of the doctors and experts involved in such assessment and diagnosis), as well as any costs incurred further to clause 3.12(b).

3.16 The athlete will bear the costs of her personal physician(s) and of any treatment prescribed for her by her personal physician(s), including any treatment required to satisfy the Eligibility Conditions, as well as the costs of providing the evidence of continuing satisfaction of the Eligibility Conditions requested by the IAAF Medical Manager in accordance with clause 3.12(a).

3.17 To ensure the independence of any athlete ombudsman appointed in accordance with clause 3.6, the IAAF and the athlete will share the costs of the athlete ombudsman equally.

3F. Athlete consent

3.18 Any athlete who wishes to compete in the female classification in a Restricted Event at an International Competition and/or to be eligible to set a World Record in a Restricted Event at a competition that is not an International Competition agrees, as a condition to such participation/eligibility:

(a) to comply in full with these Regulations;

(b) to cooperate promptly and in good faith with the IAAF Medical Manager and the Expert Panel in the discharge of their respective responsibilities under these Regulations, including (without limitation):

(i) providing them with all of the information and evidence they request to determine whether she is a Relevant Athlete and (if so) to assess her compliance and to monitor her continuing compliance with the Eligibility Conditions, including (without limitation) submitting to testing in accordance with these Regulations;

(ii) ensuring that all information and evidence provided is accurate and complete, and that nothing relevant is withheld;

(iii) providing appropriate consents and waivers (in a form satisfactory to the IAAF Medical Manager) to enable her physician(s) to disclose to the IAAF Medical Manager and the Expert Panel any information that the Expert Panel deems necessary to its assessment;

(c) (to the fullest extent permitted and required under all applicable data protection and other laws) to the collection, processing, disclosure and use of information (including sensitive personal information) as required to implement and apply these Regulations effectively and efficiently; and

(d) to follow the procedures set out in clause 5 to challenge these Regulations and/or to appeal decisions made under these Regulations, and not to bring any proceedings in any court or other forum that are inconsistent with that clause.

3.19 Upon request by the IAAF, the athlete will provide written confirmation of her agreement to the matters set out in clause 3.18, in such form as may be requested by the IAAF from time to time. However her agreement will be effective and binding upon her whether or not confirmed in writing.

4. CONFIDENTIALITY

4.1 All cases arising under these Regulations, and in particular all athlete information provided to the IAAF under these Regulations, and all results of investigations, examinations and assessments conducted under these Regulations, will be dealt with in strict confidence at all times. All medical information and data relating to an athlete will be treated as sensitive personal information and the IAAF Medical Manager will ensure at all times that it is processed as such in accordance with applicable data protection and privacy laws. Such information will not be used for any purpose not contemplated in these Regulations, and will not be disclosed to any third party save (a) as is strictly necessary for the effective application and enforcement of these Regulations; or (b) as is required by law.

4.2 The IAAF will not comment publicly on the specific facts of a case arising under these Regulations except in response to public comments made by the athlete or the athlete's representatives.

4.3 Each member of the Expert Panel will sign an appropriate conflict of interest declaration and confidentiality undertaking in relation to his/her work as a member of the panel.

5. DISPUTE RESOLUTION

5.1 Any breach of these Regulations by a National Federation or Area will be addressed in accordance with the relevant provisions in the IAAF Constitution. Any other breach of these Regulations amounts to a breach of the IAAF Integrity Code of Conduct and will accordingly be subject to investigation by the Athletics Integrity Unit under the IAAF Athletics Integrity Unit Reporting, Investigation and Prosecution Rules (Non-Doping) and possible prosecution before the IAAF Disciplinary Tribunal in accordance with the IAAF Disciplinary Tribunal Rules.

5.2 Any dispute arising between the IAAF and an affected athlete (and/or her Member Federation) in connection with these Regulations will be subject to the exclusive jurisdiction of the CAS. In

particular (but without limitation), the validity, legality and/or proper interpretation or application of the Regulations may only be challenged (a) by way of ordinary proceedings filed before the CAS; and/or (b) as part of an appeal to the CAS made pursuant to clause 5.3.

5.3 The affected athlete may appeal the following decisions (and only the following decisions) made under these Regulations to the CAS, in accordance with this clause 5, by filing a Statement of Appeal with the CAS and with the IAAF within thirty days of the date of communication of the written reasons for the decision (and the IAAF will be the respondent to the appeal):

(a) a decision that an athlete is a Relevant Athlete who does not satisfy the Eligibility Conditions and so is not eligible to compete in the female classification in a Restricted Event at an International Competition or to set a World Record in a Restricted Event at a competition that is not an International Competition;

(b) a decision that an athlete who is asked by the IAAF Medical Manager to submit to assessment under these Regulations and fails or refuses to do so (or fails to cooperate fully and in good faith the investigation/assessment under these Regulations) is not eligible to compete in the female classification in a Restricted Event at an International Competition or to set a World Record in a Restricted Event at a competition that is not an International Competition;

(c) a decision that a Relevant Athlete has failed to continue to satisfy the Eligibility Conditions, with the consequences set out in clause 3.13; and

(d) a decision to disqualify results further to clause 3.14.

5.4 The CAS will hear and determine the dispute or appeal definitively in accordance with the relevant provisions of the CAS Code of Sports-Related Arbitration, provided that in any appeal the athlete will have fifteen days from the filing of the Statement of Appeal to file his/her Appeal Brief, and the IAAF will have thirty days from its receipt of the Appeal Brief to file its Answer. The law governing the dispute or appeal will be the IAAF Constitution and the IAAF Rules and Regulations (including these Regulations), with the laws of Monaco applying subsidiarily, and in the case of any conflict between any of the above instruments and the CAS Code currently in force, the above instruments will take precedence. The proceedings before the CAS will be conducted in English, unless the parties agree otherwise. Pending determination of the dispute or appeal by the CAS, the Regulations and the decision under appeal will remain in full force and effect unless the CAS orders otherwise.

5.5 The decision of the CAS will be final and binding on all parties, and no right of appeal will lie from that decision. All parties waive irrevocably any right to any form of appeal, review or recourse by or in any court or judicial authority in respect of such decision, insofar as such waiver may be validly made.

APPENDIX 1 - DEFINITIONS

A1. Capitalised terms used in these Regulations have the following meanings:

Applicable Persons has the meaning given to it in the Integrity Code of Conduct.

CAS means the Court of Arbitration for Sport in Lausanne, Switzerland.

Differences of sex development (or **DSDs**) has the meaning given to that term in clause 1.1(b)(i).

Eligibility Conditions has the meaning given to that term in clause 2.3.

Expert Panel has the meaning given to that term in clause 3.7.

IAAF Competition Rules means the rules of competition of the IAAF, as amended from time to time. The current version is available at www.iaaf.org/about-iaaf/documents/rules-regulations.

IAAF Integrity Code of Conduct means the IAAF Integrity Code of Conduct, as amended from time to time. The current version is available at www.iaaf.org/about-iaaf/documents/rules-regulations.

IAAF Medical Manager means a medically qualified person within the IAAF Health and Science Department who is appointed by the IAAF to act on its behalf in matters arising under these Regulations or (in the absence of the IAAF Medical Manager) his/her nominee.

Regulations means these regulations setting out eligibility requirements for the female classification, as amended from time to time.

Relevant Athlete has the meaning given to that term in clause 2.2.

Restricted Events has the meaning given to that term in clause 2.2.

A.2 References to provisions of the Constitution or of any IAAF rules or regulations shall be deemed to include references to any successor provisions thereto as may be issued after the Effective Date.

APPENDIX 2 - LIST OF MEDICAL EXPERTS

	Name	Area of expertise
1	Prof. Martin Ritzen (SWE) (chair)	Pediatrics/endocrinology
2	Prof. Peter Lee (USA)	Pediatrics/endocrinology
3	Prof. Berenice Mendonca (BRA)	Endocrinology/genetics
4	Prof. Tsutomu Ogata (JAP)	Genetics
5	Prof. Zi-Jiang Chen (CHN)	Gynecology/polycystic ovary syndrome
6	Prof. George Werther/Prof. Jeffrey D. Zajac (AUS)	Pediatrics/endocrinology
7	Prof. Patrick Fenichel (FRA)	Gynecology/endocrinology
8	Prof. Angelica Lindén Hirschberg (SWE)	Gynecology/endocrinology
9	Prof. Myron Genel (USA)	Pediatrics/endocrinology
10	Prof. Ieuan Hughes (UK)	Pediatrics/endocrinology
11	Prof. Joe Leigh Simpson (USA)	Genetics/obstetrics/gynecology
12	Prof. Peggy Cohen-Kettenis (NED)	Psychology
13	Dr. Rinus Wiersma (RSA)	Pediatrics/surgery
14	Prof. Maria New (USA)	Pediatrics/genetics
15	Prof. David Handelsman (AUS)	Endocrinology/andrology

APPENDIX 3 - FRAMEWORK FOR ASSESSMENT OF CASES

1. This Appendix sets out an overall framework for the assessment of cases arising under the Regulations. The specific procedure to be adopted in each case will depend on the nature, timing and/or complexity of the case. For example, depending on the circumstances of the case, the Level 1 and Level 2 Assessments may be performed together, or the athlete may be referred directly to the Level 3 Assessment.

Level 1 Assessment – initial clinical examination and compilation of data and preliminary endocrine assessment

2. When a case first arises for assessment under the Regulations, the first step will normally be an initial clinical examination of the athlete and compilation of her clinical and anamnestic data, together with a preliminary endocrine assessment (together, the **Level 1 Assessment**), in order to (i) confirm that the athlete's blood testosterone level is 5 nmol/L or greater; (ii) gather information to assist in diagnosing the cause of her elevated level of blood testosterone; and (iii) gather information to assist in assessing whether the athlete is androgen insensitive (and, if so, to what degree).

3. To the extent that such information has already been gathered by the athlete's own physician, and is provided by that physician (having obtained the athlete's informed consent) to the IAAF Medical Manager for use in assessing the athlete's case under the Regulations, the IAAF Medical Manager will not repeat the process but will rely on that information, provided it appears adequate and reliable.

4. If not all of the necessary information has been gathered, however, the IAAF Medical Manager will refer the athlete to an appropriate examining physician, who should be a gynaecologist, endocrinologist or pediatrician with extensive experience of DSDs and other conditions leading to female hyperandrogenism. The examining physician should be familiar with the relevant literature, including (1) *American Association of Clinical Endocrinologists – medical guidelines for clinical practice for the diagnosis and treatment of hyperandrogenic disorders*, Goodman et al, Endocrine Practice 2001 Mar-Apr;7(2):120-34; (2) Lee et al, *Consensus Statement on Management of Intersex Disorders*, International Consensus Conference on Intersex, Pediatrics 2006; 118:E488-E500; and (3) Lee et al, *Global Disorders of Sex Development, Update since 2006: Perceptions, Approach and Care*, Horm Res Paediatr 2016;85:158-180.

5. Prior to conducting the Level 1 Assessment, the examining physician will explain to the athlete the purpose of the assessment, the nature of the testing to be conducted, and the potential consequences both for the athlete's health and for her eligibility under the Regulations. Where the athlete is a minor, the examining physician will provide such explanation to the athlete's parents or legal guardian(s). The examining physician will satisfy him/herself that the fully informed consent of the athlete (or athlete's parents or legal guardian(s), where the athlete is a minor) has been obtained before starting the Level 1 Assessment.

6. The athlete (or athlete's parents or legal guardian(s), where the athlete is a minor) will designate a physician to be the recipient of the results of the Level 1 Assessment on her behalf.

7. The examining physician will then take a full medical history and conduct a careful clinical examination of the athlete designed to ensure accurate assessment and diagnosis. The examining physician will assess the athlete in particular for clinical features associated with

pronounced and chronic cases of female hyperandrogenism. The IAAF Medical Manager may provide a check-list to assist in the collection of all potentially relevant information.

8. For the preliminary endocrine assessment, urine and blood (serum) samples will be collected from the athlete under conditions prescribed by the IAAF Medical Manager, for analysis by a laboratory approved by the IAAF.

   (a) The laboratory will analyse the athlete's urine for at least the following hormones and their urinary metabolites: testosterone, epitestosterone, androsterone, etiocholanolone, 5α-androstanediol, 5β-androstanediol, dihydrotestosterone and dehydroepiandrosterone sulphate.[10]

   (b) The laboratory will analyse the athlete's blood (serum) to determine the concentration of testosterone.[11]

   (c) Depending on the circumstances of the case, to assist with diagnosis the IAAF Medical Manager may also decide to have the athlete's blood analysed for additional hormones/substances, including but not limited to dihydrotestosterone, luteinizing hormone, follicle-stimulating hormone, estradiol, prolactin, anti-mullerian hormone, inhibin B, 17-OH-Progesterone, dehydroepiandrosterone sulfate, delta 4 androstenedione, and/or sex hormone-binding globulin.

9. The laboratory's reports of the results of the above analyses, the report of the examining physician in respect of the initial clinical examination of the athlete, and the clinical and anamnestic data compiled, will be transmitted confidentially to the athlete's designated physician and to the IAAF Medical Manager.

10. The IAAF Medical Manager will review the results of the Level 1 Assessment to decide whether there is sufficient information for the Expert Panel to carry out the Level 2 Assessment. As part of this review, the IAAF Medical Manager may:

    (a) arrange for the collection and analysis of one or more further urine and/or blood samples from the athlete to exclude the possibility that the athlete's results are the consequence of an exogenous administration of androgens;

    (b) arrange for the collection and analysis of further blood and/or urine samples from the athlete in order to confirm the results obtained from the preliminary endocrine assessment and/or as an additional tool for diagnosis; and/or

    (c) seek an advisory opinion on a confidential basis from such person(s) as he/she considers appropriate.

Level 2 Assessment – assessment by an Expert Panel

11. Once the necessary information has been gathered and a blood testosterone concentration above 5 nmol/L has been confirmed, the IAAF Medical Manager will send the file (in anonymised form) to the chair of the Expert Panel,[12] who will either review the case alone or choose at least three experts (which may include him/herself) from the list at Appendix 2 to review the case. A person may not sit on the Expert Panel for the case if he/she was involved in any prior medical examination of the athlete.

12. The Expert Panel (whether one person or more) will review the athlete's file to determine whether further investigation is warranted as to whether the athlete meets the following criteria (and so is to be considered a 'Relevant Athlete' for purposes of the Regulations):

    (a) she has one of the following DSDs:

        (i) 5α-reductase type 2 deficiency;

        (ii) partial androgen insensitivity syndrome (PAIS);

        (iii) 17β-hydroxysteroid dehydrogenase type 3 (17β- HSD3) deficiency;

        (iv) congenital adrenal hyperplasia;

        (v) 3β-hydroxysteroid dehydrogenase deficiency;

        (vi) ovotesticular DSD; or

        (vii) any other genetic disorder involving disordered gonadal steroidogenesis;[13] and

    (b) as a result, she has blood testosterone levels of 5 nmol/L or above; and

    (c) she has sufficient androgen sensitivity for those levels of testosterone to have a material androgenising effect. To assess this third criterion, the Expert Panel will look at the results of the clinical examination and the data collected as part of the Level 1 Assessment in order to determine the nature and extent of the androgenising effect, with the benefit of any doubt on this issue being resolved in favour of the athlete.

13. The Expert Panel may make such enquiries or investigations as it considers necessary to carry out the required assessment effectively, including (without limitation) requesting further data or information from the athlete or the athlete's physician and/or obtaining additional expert opinion(s), in which case the IAAF Medical Manager will organise the collection and provision of such data or information to the Expert Panel. The athlete and her personal physician must cooperate and assist with that process.

14. If the Expert Panel considers that further investigation is warranted as to whether the athlete meets the criteria to be a Relevant Athlete, then the Expert Panel will recommend a full examination and diagnosis under level 3 (the **Level 3 Assessment**).

15. If the Expert Panel considers that further investigation is not warranted and that the athlete does not meet the criteria to be a Relevant Athlete, then the athlete will be eligible as far as the Regulations are concerned to compete in the female classification in Restricted Events at

International Competitions and to set World Records in competitions that are not International Competitions.

16. The IAAF Medical Manager will notify the athlete and her designated physician of the Expert Panel's view as soon as reasonably practicable. Where the Expert Panel considers that the athlete is not a Relevant Athlete because her elevated levels of blood testosterone were not caused by one of the conditions referenced above, it will be for her designated physician to follow up on any comments made by the Expert Panel as to the potential cause of her elevated levels of blood testosterone.

Level 3 Assessment – assessment by a specialist reference centre

17. Where the Expert Panel refers a case for a Level 3 Assessment, the purpose of that assessment will be (a) to reach a diagnosis of the cause of the athlete's elevated levels of blood testosterone; and (b) to consider further the degree of the athlete's androgen insensitivity (if any). The assessment will take place as soon as possible after notification to the athlete and her designated physician, at the specialist reference centre listed in Appendix 4 of the Regulations that is located closest geographically to the athlete's habitual place of residence, unless the athlete prefers for legitimate reasons to be examined in another specialist reference centre on the list (or another reference centre not on the list but accepted by the IAAF). The costs of the Level 3 Assessment, including the athlete's travel costs, will be borne by the IAAF.

18. If the athlete is permitted to continue to compete in the female classification in one or more Restricted Events at International Competitions while her case is assessed, the Level 3 Assessment will take place on an expeditious basis, and the IAAF Medical Manager may impose a deadline for this purpose.

19. Prior to conducting the Level 3 Assessment, the examining physician will explain to the athlete the purpose of the assessment, the nature of the testing to be conducted, and the potential consequences both for the athlete's health and for her eligibility under the Regulations (where the athlete is a minor, the examining physician will provide such explanation to the athlete's parents or legal guardian(s)). The athlete will provide her fully informed written consent to the examination in accordance with applicable laws. Where the athlete is a minor, parental or legal guardian consent will be obtained.

20. The specialist reference centre will conduct a full examination on the athlete and will carry out a diagnosis of the athlete in accordance with best medical practice. In cases of DSDs, the diagnosis will further be made in accordance with the recommendations for diagnostic evaluation set out in the Consensus Statement on Management of Intersex Disorders (and update paper) cited above. The Level 3 Assessment will normally include the following different types of test: physical, laboratory (including urine and blood analysis and appropriate genetic testing for mutations in the genes involved in the conditions at issue), imaging, and psychological assessment.

21. Following completion of the Level 3 Assessment, the results (including the athlete's diagnosis and any prescribed medical treatment) will be transmitted confidentially by the reference centre to the athlete's designated physician and to the IAAF Medical Manager.

Recommendation by the Expert Panel

22. The IAAF Medical Manager will forward the results of the Level 3 Assessment (in anonymised form) to the Expert Panel, so that the Expert Panel may conduct a further comprehensive review of the athlete's case and make an informed decision as to whether she meets the criteria to be a Relevant Athlete. As part of that review, the Expert Panel will consider all of the information in the athlete's file, as well as any written submission or other evidence that it may request (via the IAAF Medical Manager) from the athlete, and any further expert opinion(s) that it considers necessary to obtain (on an anonymised basis). If the Expert Panel has any concerns about the adequacy of the evidence provided by the athlete on any particular point, and it could in theory be possible for her to address those concerns, it must give the athlete a fair opportunity to try to address those concerns before it comes to a final view.

23. The Expert Panel will only recommend that the athlete be treated as a Relevant Athlete if it is satisfied that she meets all of the criteria set out at paragraph 12 of this Appendix. In this analysis, the benefit of any doubt shall be resolved in favour of the athlete.

APPENDIX 4 - IAAF-APPROVED SPECIALIST REFERENCE CENTRES

Centre	Expert	Address
Stockholm (SWE)	Prof. Martin Ritzen	Dept. of Women's and Children's Health, Paediatric Endocrinology, Karolinska University Hospital, Stockholm
	Prof. Angelica Lindén Hirschberg	Dept. of Gynecology and Reproductive Medicine, Karolinska University Hospital, Stockholm
Nice (FRA)	Prof. Patrick Fenichel	Service d'endocrinologie et médecine de la reproduction, Hôpital de l'Archet, CHU de Nice, BP 3079, 06202 Nice cedex 03
Hershey, PA (USA)	Prof. Peter Lee	Dept. Pediatrics, Penn State College of Medicine, Hershey, Pennsylvania
Melbourne (AUS)	Prof. George Werther	The Royal Children's Hospital, 50 Flemington Road, Parkville, Victoria 3052, Melbourne
	Prof. Jeffrey D. Zajac	Dept. of Medicine, The University of Melbourne, Austin Health & Northern Health, Studley Road, Heidelberg, Victoria 3084, Melbourne
Tokyo (JAP)	Prof. Tsutomu Ogata	National Research Institute for Child Health and Development, Tokyo
Sao Paolo (BRA)	Prof. Berenice Mendonca	Unidade de Endocrinologia do Desenvolvimento e Laboratório de Hormônios e Genética Molecular, Disciplina de Endocrinologia, Hospital das Clínicas, Faculdade de Medicina da Universidade de São Paulo, Sao Paolo
London (GBR)	Professor Sarah Creighton Professor Gerard Conway	University College London Hospitals, Elizabeth Garrett Anderson Wing

End notes

[1] A survey of published, peer-reviewed studies reporting concentrations of serum testosterone measured by mass spectrometry methods indicates that (i) women (including elite female athletes) without DSDs have serum levels of testosterone of between 0.12 and 1.79 nmol/L (95% two-sided confidence limit); (ii) women with polycystic ovary syndrome have serum levels of testosterone with an upper limit of 3.1 nmol/L (95% one-sided confidence limit) and 4.8 nmol/L (99.99% one-sided confidence limit); and (iii) the normal range of serum testosterone levels in men is 7.7 to 29.4 nmol/L (95% two-sided confidence limit). Meanwhile women (including female athletes) with DSDs covered by these Regulations can have serum levels of testosterone above 5 nmol/L and well into (or even above) the normal male range. See Handelsman, Hirschberg and Bermon (2018), *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, Endocrine Reviews (publication pending).

[2] See, for example, Handelsman, Hirschberg and Bermon (2018), *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, Endocrine Reviews (publication pending); Auchus (2017) *Endocrinology and Women's Sports: The Diagnosis Matters*, 80 LAW & CONTEMP. PROBS., no.4, 2017, p.127; Allen (2016) *Hormonal eligibility criteria for 'includes females' competition: a practical but problematic solution*, Horm Res Paediatr 85:278–82; Bermon et al (2015), *Women with Hyperandrogenism in Elite Sports: Scientific and Ethical Rationales for Regulating*, J Clin Endocrinol Metab Jan 14:doi:jc.2014-3603; Ritzén et al (2015), *The regulations about eligibility for women with hyperandrogenism to compete in women's category are well founded. A rebuttal to the conclusions by Healy et al.,* Clin Endocrinol 82:307–8; Sanchez et al (2013), *The New Policy on Hyperandrogenism in Elite Female Athletes is not about "Sex Testing"*, J Sex Res, February, 50:112-115; Wood & Stanton (2012), *Testosterone and Sport: Current Perspectives*, Horm Behav January; 61:147-155; Ballantyne et al (2012), *Sex and gender issues in competitive sports: investigation of a historical case leads to a new viewpoint*, Br J Sports Med, 46:614-617; Gooren (2011), *The significance of testosterone for fair participation of the female sex in competitive sports*, Asian Journal of Andrology 13, 653-654; Hercher (2010), *Gender Verification: A Term Whose Time Has Come and Gone*, J Genet Counsel, 19:551-553; Handelsman and Gooren (2008), *Hormones and sport*, Asian Journal of Andrology, 10, 348-50; Hipkin (1992), *The XY female in sport: the controversy continues*, Br J Sp Med, 27:150156. Cf Healy et al (2014), *Endocrine profiles in 693 elite athletes in the post-competition setting*, Clinical Endocrinology, 81:294-305; Sonksen et al (2014), *Medical and Ethical Concerns Regarding Women with Hyperandrogenism and Elite Sport*, J Clin Endocrinol Metab:doi:10.1210/jc.2014-3206; Sonksen (2016), *Determination and regulation of body composition in elite athletes*, Br J Sports Med, 2016;0;1-13; doi:10.1136/bjsports-2016-096742. See also Huang and Basaria (2017), *Do anabolic-androgenic steroids have performance-enhancing effects in female athletes* Mol Cell Endocrinol. 2018 Mar 15;464:56-64.

[3] Peer-reviewed data from the IAAF World Championships in Daegu (2011) and Moscow (2013) indicate that women in the highest tertile (top 33%) of testosterone levels performed significantly better than women in the bottom tertile (bottom 33%) in the following events: **400m hurdles** (top tertile, with mean T concentration of 1.94 nmol/L, outperformed bottom tertile, with mean T concentration of 0.43 nmol/L, by 3.13%; **400m** (top tertile, with mean T concentration of 7.39 nmol/L, outperformed bottom tertile, with mean T concentration of 0.40 nmol/L, by 1.50%; and **800m** (top tertile, with mean T concentration of 3.28 nmol/L, outperformed bottom tertile, with mean T concentration of 0.39 nmol/L, by 1.60%): Bermon and Garnier (2017), *Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes*, Br J Sports Med 2017;0:1-7, additional material at http://bjsm.bmj.com/content/51/17/1309.

In addition, female athletes with DSDs causing serum testosterone concentrations in the normal male range performed on average 5.7% better when their serum testosterone levels were unrestricted, compared to when their serum testosterone levels were suppressed below 10 nmol/L: Bermon (2017), *Androgens and athletic performance of elite female athletes*, Curr Opin Endocrinol Diabetes Obes 2017;24:246–51.

[4] These Regulations do not apply to any other conditions (including, without limitation, polycystic ovary syndrome), even if such conditions cause the individual to have blood testosterone levels above the normal female range. If, as a result of an assessment conducted under these Regulations, it is established that an athlete has any other condition, she may be recommended to obtain appropriate medical assistance, but her participation in the sport of athletics will not be restricted in any way by these Regulations.

[5] For purposes of these Regulations, references to testosterone in blood are to total testosterone in serum or plasma, and all measurements of circulating testosterone levels must be conducted by means of gas or liquid chromatography coupled with mass spectrometry using a validated method.

[6] A woman who has androgen insensitivity syndrome (AIS) is completely (CAIS) or partially (PAIS) insensitive to testosterone, thereby eliminating (CAIS) or reducing (PAIS) the physiological effect of that testosterone. An athlete with CAIS is not a Relevant Athlete. An athlete with PAIS will only be a Relevant Athlete if she is sufficiently androgen-sensitive for her elevated testosterone levels to have a material androgenising effect. The benefit of any doubt on this issue will be resolved in favour of the athlete.

[7] For example, in a birth certificate or passport.

[8] As noted above (see endnote 1), the available data on serum testosterone levels in men and women indicate that the upper limit of the normal female range (including elite female athletes) is 1.79 nmol/L (95% two-sided confidence limit), the upper limit for women with PCOS is 3.1 nmol/L (95% one-sided confidence limit) and 4.8 nmol/L (99.99% one-sided confidence limit), and the lower limit of the normal male range is 7.7 nmol/L (95% two-sided confidence limit). Therefore, a concentration of 5 nmol/L is an appropriate decision limit for purposes of these Regulations.

[9] The standard eligibility conditions set out in the IAAF Competition Rules will continue to apply to all athletes, including Relevant Athletes seeking to participate in the female classification in a Restricted Event at an International Competition. Nothing in these Regulations will be deemed to permit, excuse or justify non-compliance with any of the standard eligibility conditions, including (without limitation) the anti-doping rules.

[10] If the athlete has had urine samples tested for such substances as part of anti-doping testing, she will provide the IAAF Medical Manager with the results of such testing.

[11] Due to circadian and cyclic fluctuations in the blood levels of testosterone, the blood sample(s) should be collected (a) between 8 am and 10 am; and (b) (where the subject menstruates) between the third and the eighth day of the menstrual cycle. Interaction with certain other medications has to be taken into account, especially if the patient is taking estrogens and/or progestagens or glucocorticosteroids. A wash-out period from these treatments should therefore be considered prior to investigation.

[12] If the case involves a suspected violation of the anti-doping rules, the IAAF Medical Manager will instead, or also (as appropriate), send the file to the IAAF Athletics Integrity Unit.

[13] These Regulations do not apply to any other conditions (including, without limitation, polycystic ovary syndrome), even if such conditions cause the individual to have testosterone levels in her blood above the normal female range. However, such conditions may have implications for the athlete's health, and diagnosis can often help to improve the conditions, avoid metabolic disorders, and possibly reduce the risk of later cardiovascular events and gynaecological cancers. A serious underlying medical condition should always be suspected if the onset of symptoms is fast and/or intense. In such cases, the possibility of an androgen-secreting tumour should always be investigated. All relevant information should be provided to the athlete's personal physician to determine the appropriate treatment (the Expert Panel may make recommendations in this regard).

CBC

More Track and Field

IAAF rules to limit testosterone levels for female runners

Move could force Olympic champ Semenya to forgo middle-distance races

The Associated Press · April 26, 2018

South Africa's Caster Semenya, seen celebrating her 800-metre win at the Commonwealth Games earlier this month, would require daily medication to lower her testosterone to continue competing in middle-distance races. (Mark Schiefelbein/Associated Press)

New rules for female athletes with high natural testosterone levels which could force two-time Olympic 800-metre champion Caster Semenya to stop running middle-distance races.

- **Is Caster Semenya playing fair?**

From Nov. 1, the IAAF will limit entry for all international events from 400m through the mile to women with testosterone levels below a specified level.

Women with elevated testosterone must reduce their level for "six months (e.g., by use of hormonal contraceptives)" before being eligible to run, and maintain that lowered level.

"We have a responsibility to ensure a level playing field for athletes ... where success is determined by talent, dedication and hard work rather than other contributing factors," IAAF president Sebastian Coe said in a statement. "Our evidence and data show that testosterone, either naturally produced or artificially inserted into the body, provides significant performance advantages in female athletes."

Semenya would need daily medication

Semenya now faces taking daily medication or start racing at 5,000. Without the rules, the 27-year-old South African would likely defend her 800 world title in Doha, Qatar, next year. She also took bronze in the 1,500 at the 2017 worlds in London.

In 2011, the IAAF enacted a rule to force athletes with hyperandrogenism to artificially lower their testosterone levels to be eligible to compete. Two years earlier, Semenya clocked one minute 55 seconds to win her first world title as a teenager in Berlin. While the previous rules were enforced, her season-best times were around 1:59 or slower.

The previous rules were challenged at the Court of Arbitration for Sport by sprinter Dutee Chand of India and overturned before the 2016 Olympics. In Rio, Semenya retained her Olympic title, running 1:55.28.

Caster Semenya
@caster800m

7,076 8:58 AM - Apr 25, 2018

2,335 people are talking about this

The new IAAF rules could yet be challenged at CAS.

Still, the IAAF said Thursday there is "broad medical and scientific consensus, supported by peer-reviewed data and evidence" to back its position.

"There is a performance advantage in female athletes with DSD (Differences of Sexual Development) over the track distances covered by this rule," Dr. Stephane Bermon, who works in the IAAF medical and science department, said in the statement.

Research over a decade showed 7.1 in every 1,000 elite track and field athletes had elevated testosterone levels — 140 times greater than the female population.

"The treatment to reduce testosterone levels is a hormone supplement similar to the contraceptive pill taken by millions of women around the world," Bermon said. "No athlete will be forced to undergo surgery."

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Caster Semenya files legal challenge against 'discriminatory' IAAF rule

Regulation would limit testosterone levels for female runners in 400-1,500m events

Jamie Strashin · CBC Sports · June 18, 2018

Caster Semenya is challenging a new IAAF regulation that would limit testosterone levels in female athletes. (Vidar Ruud/NTB scanpix via Associated Press)

Olympic champion Caster Semenya is challenging a recently introduced IAAF regulation, calling it "discriminatory."

The two-time Olympic gold medallist in the 800 metres filed a legal case on Monday before the Court of Arbitration for Sport in Lausanne, Switzerland, challenging the IAAF's recently introduced Eligibility Regulations for Female Classification.

"I am very upset that I have been pushed into the public spotlight again. I don't like talking about this new rule," the South African athlete said in a release. "I just want to

run naturally, the way I was born."

"It is not fair that I am told I must change. It is not fair that people question who I am."

- IN DEPTH **What's the real problem with Caster Semenya?**
- IN DEPTH **Is track and field picking on Caster Semenya?**

According to Semenya and her legal team, the IAAF regulation requires women who compete in athletics at the international level to submit to medically unnecessary interventions to lower their natural testosterone levels.

"Ms. Semenya contends that the regulations are objectionable on numerous grounds, including that they compel women with no prior health complaints to undergo medical interventions to lower their testosterone levels in the absence of support by the available science," said her legal team, which includes lawyers in South Africa and Toronto's James Bunting, who has had previous success at the CAS challenging the IAAF's testosterone rules.

Her team also contends the new regulation "continues the offensive practice of intrusive surveillance and judging of women's bodies which has historically haunted women's sports."

"The regulations stigmatize and cause harm to women, and legitimize discrimination against women in sport who are perceived as not adhering to normative ideas about femininity."

Unfair advantage? Some opponents think so

Though she has identified as a woman her entire life, the 27-year-old is also considered intersex, meaning she was born with a reproductive or sexual anatomy that does not conform to traditional definitions of male or female. Semenya has a medical condition known as hyperandrogenism, characterized by elevated levels of male sex hormones — such as testosterone — in the female body.

Since testosterone is one of the key ingredients contributing to an athlete's strength and speed, many — including some of her competitors — feel Semenya has an unfair advantage.

After Semenya won both the 800 and 1,500 in convincing fashion at April's Commonwealth Games, Australian runner Brittany McGowan suggested it wasn't possible to keep up with her.

"It's tough for a lot of women in the 800, 400 and 1,500 at the moment to compare ourselves and be judged by our governing bodies on those times," McGowan said.

South Africa's Caster Semenya set a new women's 800m meet record, at the IAAF Diamond League's Prefontaine Classic in Eugene Oregon, with a time of 1:55.92 5:47

At the 2016 Rio Olympics, Poland's Joanna Jozwik was even more pointed after finishing fifth in the 800 final. Francine Niyonsaba of Burundi and Kenya's Margaret Wambui, who finished second and third in the race, respectively, have also faced questions about their powerful-looking physiques.

"It is a little strange that the authorities do nothing about this," Jozwik said. "These colleagues have a very high testosterone level, similar to a male's, which is why they look how they look and run like they run."

Latest chapter in lengthy saga

Semenya and her elevated testosterone levels have long been the focus of the IAAF. In July 2015, the CAS ruled the IAAF's initial testosterone-limiting move was discriminatory and suspended it.

The IAAF, though, was given time to shore up its case and bring it back to the court. It was told to prove that athletes like Semenya with elevated testosterone levels have an advantage in the range of 10-12 per cent over other women.

It took nearly three years, but the IAAF responded last month with a new set of regulations for what it calls Athletes with Differences of Sexual Development (DSD) — backed by a study that was quickly called into question.

Semenya won the women's 800m race at the opening Diamond League event in Doha. Under a new and controversial rule, Semenya will be forced to suppress her hormone levels in order to compete, beginning November 1. 7:27

Under the new rules, which are set to take effect Nov. 1, in order to be allowed to compete in women's track events between 400 and 1,500 metres, so-called DSD athletes must be recognized by law as either female or intersex and must maintain testosterone levels of five nanomoles per litre of blood or less.

"We want athletes to be incentivized to make the huge commitment and sacrifice required to excel in the sport, and to inspire new generations to join the sport and aspire to the same excellence," IAAF president Sebastian Coe said.

'Arbitrary' rule called into question

Since Coe and the IAAF introduced the new rules, many have questioned the intent.

"The IAAF has a duty to show that there is a reasonable scientific basis for this rule," said lawyer Paul Greene, who has argued numerous cases to the CAS.

"To me, this rule is even more arbitrary in that it includes some events and not other events. It doesn't make any sense to me. How could testosterone help a woman in the 400 or 800 but not in the 100 or 200?"

"They were arguing just two years ago that a 100-metre runner couldn't compete because her testosterone level was too high. Now, two years later, they are saying a 100-metre runner can compete. Maybe their science backs that up. Maybe they have new science and different studies. But I know just a few years ago, when they made similar arguments, they were rejected," Greene said.

- **New testosterone rules for athletes discriminatory, Ottawa group says**

Semenya's lawyers said this challenge is being filed "to ensure, safeguard and protect the rights of all women," calling the new regulations "discriminatory, irrational, unjustifiable, and in violation of the IAAF Constitution and the Olympic Charter."

The timing of this is key. The new IAAF regulation comes into effect in November and women must show lowered testosterone levels for a minimum of six months before they can be considered eligible to compete. Semenya is asking the IAAF to suspend the implementation of the rule until her legal challenge is decided.

"I am Mokgadi Caster Semenya. I am a woman and I am fast," says Semenya.

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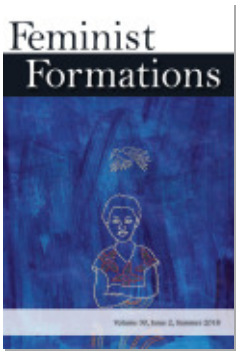
The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes



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The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes

Katrina Karkazis and Rebecca M. Jordan-Young*
* *Both authors contributed equally to this manuscript.*

Using strategies from critical race studies and feminist studies of science, medicine, and the body, we examine the covert operation of race and region in a regulation restricting the natural levels of testosterone in women athletes. Sport organizations claim the rule promotes fair competition and benefits the health of women athletes. Intersectional and postcolonial analyses have shown that "gender challenges" of specific women athletes engage racialized judgments about sex atypicality that emerged in the context of Western colonialism and are at the heart of Western modernity. Here, we introduce the concept of "T talk" to refer to the web of direct claims and indirect associations that circulate around testosterone as a material substance and a multivalent cultural symbol. In the case we discuss, T talk naturalizes the idea of sport as a masculine domain while deflecting attention from the racial politics of intrasex competition. Using regulation documents, scientific publications, media coverage, in-depth interviews, and sport officials' public presentations, we show how this supposedly neutral and scientific regulation targets women of color from the Global South. Contrary to claims that the rule is beneficent, both racialization and medically-authorized harms are inherent to the regulation.

Keywords: health / hyperandrogenism / racialization / sex and gender / science / sport / T talk / violence

Prelude 1: Olympic Summer Games, Rio de Janeiro, 2016

Long after the last competitor left Rio, a decidedly un-Olympic image haunted our memories.[1] At the finish line of the women's 800-meter final, South African runner Caster Semenya extends her arms to fellow competitors Melissa

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Bishop of Canada and Lynsey Sharp of Great Britain, who are locked in a tight embrace. Semenya has just won the gold; Sharp has placed sixth and Bishop has taken fourth. The two disregard Semenya's gesture, remaining closed in one another's arms.

The photo was a sad endnote to a vitriolic media uproar that had raged intermittently for years and especially during the month leading up to the race, sounding unfairly on Semenya's right to compete. For the seven years since the International Association of Athletics Federations (IAAF) broke their own confidentiality policy and confirmed it was investigating her under its ad hoc "gender verification" policy, Semenya has endured relentless hostility and a deluge of cruel harassment from both traditional and online media. Of the investigation, she has said, "I have been subjected to unwarranted and invasive scrutiny of the most intimate and private details of my being" (Associated Press 2010). In intervening years, the extraordinary scrutiny from journalists and the public has persisted. A security team was reportedly provided for her in Rio due to concerns the hostility might turn violent (Brook 2016). South Africa as a nation pushed back with #handsoffcaster and a petition to stop bullying created by "People against racist bullies" (Amandla Awethu 2016).

Semenya is the world's most scrutinized and violated athlete despite having done nothing wrong. She has neither doped nor cheated. She also had the support of the Court of Arbitration for Sport (CAS), the world's highest adjudicating body for sport (CAS 2015). A year earlier, CAS slapped a two-year suspension on the IAAF regulation that, along with an analogous regulation adopted by the International Olympic Committee (IOC), places a ceiling on a woman athlete's natural testosterone (T) level (IAAF 2011; IOC 2012).[2] IAAF and IOC officials claim that high T is a "male" trait, that T is the "main reason" men generally outperform women in tests of strength and speed, and that women with high T (whom they call "hyperandrogenic") therefore have an "unfair" advantage over their competitors.[3] Under the regulation, if a woman athlete's natural T level is deemed by the IAAF to give her "unfair" advantage, she must lower it through surgery or drugs, or forego competing forever.

But when teenaged Indian sprinter Dutee Chand challenged the same IAAF regulation in 2015, the arbitrators at CAS ruled in her favor. They found that the IAAF had failed to demonstrate that the policy was scientifically justified. The IAAF had not provided sufficient evidence that female athletes with T levels in the "male range" have a performance advantage over their peers with lower T levels that is comparable to the 10–12 percent advantage that men typically have over women. The arbitrators suspended the regulation for two years, allowing the IAAF this period to return to CAS with sufficient scientific evidence, or else the policy would be void.

Semenya was first targeted in fall 2009, fifteen months before this T regulation took effect. The agreement between Semenya and the IAAF that allowed

her to return to competition in 2010 has never been released. Nevertheless, the ire of those unhappy with the suspension of the regulations has been focused squarely on Semenya. She is the athlete they single out as supposedly proving not only the need for a regulation, but T's unparalleled role in athletic performance (e.g., McRae 2016; O'Sullivan 2016). Observers have attributed her athleticism to a single molecule—testosterone—as though it alone earned her the gold, undermining at once her skill, preparation, and achievement.

In writing of Semenya, we risk repeating the problems raised so eloquently by Neville Hoad and Keguro Macharia including our own "participat[ion] in an ongoing spectacularization" (Macharia 2009). Hoad questions

> broaching the topic at all. Caught in a double demand to resist spectacularizing Semenya in the long and intractable representational history of racialized and sexualized African bodies, and a participation in a LGBTQ praxis of freedom that wants to render visible and celebrate gender variance (here the speed, grace, power and beautiful butchness of Semenya), finding an ethical entry into the question of Caster Semenya becomes difficult. (2010, 398)

Feeling this double bind, in an earlier piece, we included a discussion of Semenya that soon thereafter filled us with deep regret for our complicity in this spectacularization (Karkazis et al. 2012). Among other harms, we made repeated references to her "case"—a distancing, medicalizing and, ultimately, dehumanizing way to refer to her. In this paper, we felt that no mention of her might serve as a cultural lobotomy that was equally distancing. We thus decided to do so in a way that resists the dominant story with counternarratives, details, and context that seek to underscore the human(s) at the core of this regulation without recapitulating harm and without erasing what is ugly and painful here that requires daylight.

On the eve of the 2016 Summer Olympics, IAAF president Sebastian Coe announced that the organization would challenge the suspension of the regulation (Guardian Sport 2016), repeating this avowal just before the 800-meter finals with a timing that seemed specifically aimed to cast doubt on Semenya's right to compete. "We were surprised by the CAS decision, and I think the IOC was too," Coe said after a meeting of the IAAF Council. "We are looking again at this issue and will be talking to CAS at some time over the next year" (Rowbottom 2016). Coe immediately followed this statement with a half-hearted reminder that "these are human beings," likely knowing that his comments would throw into question not only Semenya's participation but possibly others' too. With a tinderbox left smoldering, one breath of accusation was all that was needed to reignite the "debate." As if determined to maintain a veil of suspicion over these athletes, Coe subsequently made similar pronouncements during both the 2017 Asian Athletics Championships held in Chand's hometown of Bhubaneswar, India and the 2017 World Championships in Athletics held in London.

It is no surprise, then, that athletes such as Sharp, who have also worked hard and sacrificed for their sport, seemed to feel frustrated and usurped even though they were not. Or that in their anger, grace failed them. Poland's Joanna Jozwik, who finished fifth between Bishop and Sharp, bitterly called into question the three black medalists, saying, "I'm glad I'm the first European, the second white." It is impossible to miss the optics of this controversy—the three black women from sub-Saharan Africa ebullient on the podium and the three white Global North women feeling they should be there instead. These polarized perspectives reflect the racial politics that shape the T regulation and its asymmetrical burdens and benefits.

Prelude 2: Marseilles, France, IAAF Specialist Reference Center

The scrutiny aimed at Semenya was achingly personal for her, but not unique. Other women from the Global South have also been subject to physical and psychological invasions under this regulation. In 2013, doctors affiliated with the IAAF published a report that gives insight into what happens when women are investigated under this regulation.

Four young women, aged 18–21 and from "rural and mountainous regions of developing countries," were identified through various means as having high T, and were each sent to the IAAF-approved specialist reference center in southern France for a workup to see whether they have an intersex variation (Fénichel et al. 2013).[4] A large, multidisciplinary team of clinicians conducted extensive investigations aimed at assessing sex-linked biology, beginning with endocrine, karyotype, and genetic analyses. They also inspected the women's breasts, genitals, body hair patterns, internal reproductive organs, and basic body morphology in detail, and interviewed them as to gender identity, behavior, and sexuality. From these exams, the doctors determined that these women had testes and high functional testosterone levels. By using the term "functional," the authors signal that the women's bodily tissues respond to T and thus that they do not have a diagnosis that renders them completely insensitive to the hormone. Although the doctors acknowledged that leaving the women's testes intact "carries no health risk," they also told the women that gonadectomy would "allow them to continue elite sport in the female category." But the medical team aimed for more than lowering T. The doctors' "proposed" the surgical and medical interventions long practiced for gender normalization of people with atypical sex-linked biology (intersex), including "a partial clitoridectomy with a bilateral gonadectomy, followed by a deferred feminizing vaginoplasty and estrogen replacement therapy" (Fénichel et al. 2013, E1057).

The genital surgeries described in the report suggest that something beyond T and athletic performance motivates the regulation, and indicate that it is not just compliance with the T regulation that drives the interventions. Martin Ritzén, a pediatric endocrinologist specializing in children with atypical

sex-linked biology, who was a key architect of the IAAF regulation, was reportedly "furious" about the genital surgeries, declaring that they were "against the rules of the IAAF" (de Visser 2013).[5] Although the report on the four women was coauthored by Stéphane Bermon of the the IAAF medical commission, it's publication nevertheless angered other IAAF officials. Interviewed for a Dutch newspaper, an unnamed IAAF official said of the publication, "This is a flagrant violation of professional secrecy" (de Visser 2013), indicating that the IAAF had violated its own "principle" of "respect for confidentiality in the medical process and the need to avoid public exposure of young females with hyperandrogenism who may be psychologically vulnerable" (IAAF 2011, 1). An IAAF official interviewed by Lisa Bavington in 2013 called the publication "unfortunate" and said that he did not know about its existence "until it was too late for the authors to withdraw the paper," adding that "[s]o far, you seem to be the only one to pick up this issue, and I hope that no media will try to identify them" (2016, 154).

The paper violates the athletes' privacy and confidentiality and should not have been published. It sheds light, however, on an implementation process that is otherwise kept under wraps, and further highlights whom this regulation burdens. Sport authorities, through public talks, publications, and interviews, have consistently indicated that the women investigated for high levels of naturally occurring T are exclusively from the Global South, and all indications are that they are black and brown women.[6] Because race is not a biological category, a biological criterion such as T levels should be race-neutral, applying to women irrespective of ethnoracial categorization. So why is there racial and regional bias in the regulation's effects? How are race and region connected to the problem of "unfair advantage" that this regulation is purportedly designed to prevent?

Framework

We use critical race theories and feminist studies of science, medicine, and the body to examine the covert operation of race and region in the putatively neutral T regulation. Following scholars such as Holloway (2011) and Ticktin (2011), who combine critical race studies with feminist intersectional studies of medicine, we show how this supposedly neutral and scientific regulation targets women of color from the Global South. Contrary to claims that the rule is beneficial, both racialization and medically authorized harms are inherent to the regulation.

We and others have previously demonstrated that the anxieties about "unfair advantage" codified in this regulation and rehearsed through its application are blatant conflicts over the boundaries between women and men (Karkazis et al. 2012; Cooky and Dworkin 2013; Karkazis and Jordan-Young 2015; Henne 2015; Bavington 2016; Browning 2016; Pieper 2016). Sport officials insist that the T regulation is not "sex testing," and some of the public controversy

over the regulation has focused on resolving the question of whether it is or is not.[7] Here we are primarily concerned with showing that the regulation is indeed yet another version of "sex testing," accomplished by racializing sex and associating "failures" of dichotomous sex with failures of modernity, characteristic of countries or regions outside the industrialized West. Other scholars have drawn on intersectional and postcolonial analyses to show how discourses on Semenya's eligibility engage racialized judgments regarding sex atypicality and nonconformity that emerged in the context of Western colonialism and that are at the heart of Western modernity (Nyong'o 2010; Hoad 2010; Munro 2010; Schuhmann 2010; Schultz 2011; Cooky, Dycus, and Dworkin 2013; Doyle 2013; Adjepong and Carrington 2014; Magubane 2014).

Many of these scholars have noted that "sex testing" of women athletes has rested on invasive genital and physical inspections that are both hauntingly reminiscent and a continuation of the prurient European gaze directed at black women's bodies. The experience of Saartjie Baartman, a black South African Khoikhoi woman, is the quintessential example of European exploitation and commodification of African women, often enacted under the guise of scientific progress. Brought to Europe in the early 1880s under false pretenses by a British doctor, Baartman was displayed mostly naked and often caged before huge crowds in London and Paris, and in private homes where observers could touch her. In a stunning example of dehumanization, the renowned naturalist Georges Cuvier arranged for Baartman to be studied by zoologists and other scientists, and he pronounced her to be "a link between animals and humans." After her death, her preserved body parts including her genitals remained on display in Paris' *Musée de l'Homme* until 1974 (SAHO 2017).

Munro traces the inspections of women athletes to a "familiar prurient/Enlightenment will-to-know" which, she notes, works in tandem with racialized ideals about women's bodies to construct women who do not fit the ideal as "pre-modern" and "reinforce a post-imperial sense of the 'natural' global order." Munro argues that in this context "the untamed, 'simple' African body is one that has not yet been streamlined into 'modern' norms" (2010, 391). Locating the problem not in the women's bodies, but in systems that figure their bodies as problematic or unintelligible, Doyle observes, "What makes their stories catastrophic are the terrorizing systems that take the fact of these women's existences—rather than racism, sexism, or homophobia—as a conflict that must be resolved" (2013, 423).[8]

While the racial politics of "sex testing" in sport have been critiqued extensively, the question of how and why black and brown women from the Global South come to be the exclusive targets of the supposedly new, neutral, and scientific T regulation remains unanswered.[9] Scholars calling attention to the racial and regional politics of this regulation have pointed out how historic associations of hegemonic femininity with whiteness continue to bring women of color under particular scrutiny (Karkazis et al. 2012; Cooky and Dworkin 2013;

Pieper 2014). Lisa Bavington (2016) has shed light on the racist and nationalist concerns that animated earlier forms of sex-testing and fueled the morphing of sex testing into its current testosterone-based version. Here, we examine in detail the systems this regulation participates in and concretely show how the racialization of gender and national or regional tropes of "the modern West" are operationalized via this regulation.

"T talk" is a term we developed to signal a web of direct claims and indirect associations that circulate around testosterone both as a material substance and as a multivalent cultural symbol. T talk seamlessly weaves together folklore and science, as scientific claims about T seemingly validate cultural beliefs about the structure of masculinity and the "natural" relationship between women and men. T talk includes and goes beyond the "sex hormone" concept, which has been extensively critiqued by biologists and other feminist scholars for both shaping the way that scientific information is gathered and interpreted about T, and also actively blocking the recognition and acceptance of scientific evidence that does not fit the model of "male" and "female" hormones (Oudshoorn 1994; van den Wijngaard 1997; Fausto-Sterling 2000; Nehm and Young 2008). One indication that the sex hormone concept is still powerful is that T is constantly coded as "the male sex hormone," which invites multiple inaccurate assumptions. For example, tagging T as male signals that T is restricted to men and is dangerous or a "foreign substance" in women's bodies, though women also produce T and require it for healthy functioning. Tagging T as a "sex hormone" signals that T's functions are restricted to sex and sex differences, though T is required for a broad range of functions that are common to all humans and are unrelated to reproductive structures and physiology, such as liver function. With the sex hormone concept, T and its "partner" estrogen have been framed as a heteronormative pair: binary, dichotomous, and exclusive, with each "belonging" to one sex or the other. They are viewed as both complementary and antagonistic, locked into an inevitable and natural "war of the sexes."

T talk goes beyond the sex hormone concept in at least two ways. First, as a domain of folklore, T talk is not bound by formal logics or demands for consistency. "T makes men athletically superior to women" feels like a truth, despite the fact that millions of men the world over have vastly more T than do 95 percent of elite women athletes, yet are not as fast or as strong as those women. While we have the semijoking language of "testosterone poisoning" to naturalize bad behavior in men, testosterone is viewed as actually poisonous only to women. "Too much T," medicalized as "hyperandrogenism," is a concept that does not apply to men, whereas women whose T values fall outside the typical range are by default assumed to have a medical problem (even if the woman has no known functional problems).

Second, while T is a synecdoche for masculinity, T can also symbolize biology or nature in general, as well as science and the associated values of precision and objectivity. Because T is coded as natural and in the realm of

biology, T talk fundamentally serves scientism, which elevates scientific values, evidence, and authority above all others, even as it paradoxically obviates the need for evidence. Scientism equates scientific knowledge with knowledge itself, especially valorizing the natural sciences. Scientism thus lends added weight and substance to the scientific arguments about the regulation. For example, in the CAS decision, the arbitrators read a 2012 paper in which we criticized the regulation on both ethical and scientific grounds. They judged our analysis of ethical principles (e.g., fairness, eligibility and notions of normal; health treatment and the question of medical need; confidentiality leaks and whisper triggers) not only to be utterly outside the relevant evidence for judging the regulation, but as outside the purview of "knowledge" itself, calling it "sociological opinion, which does not equate to scientific and clinical knowledge and evidence" (CAS 2015, 134).

Following Stephen Colbert, we might say that T lends truthiness to the rationale for the regulation: unburdened by the factual, the ubiquitous commonsense notion of T as an overwhelming "super substance" not only substitutes for evidence, but makes calling for concrete, empirical details about what T actually does for women athletes seem puzzling or obtuse. In the same 2012 paper that CAS dismissed as irrelevant, we pointed out the lack of reliable and pertinent data to support the regulation's grandiose claims about what high T does to and for women athletes. This paper led to numerous media interviews, many of which were perplexing to us because interviewers had a difficult time grasping, or perhaps believing, that there was so little evidence linking high T to exceptional athleticism. Short of repeating our full critique of the evidence on T and athleticism here, a few key points merit attention. Studies in sports science overwhelmingly confirm that T, while relevant to athleticism, is far from determinative: T levels cannot predict athletic performance; better-performing athletes do not have higher T levels (baseline or pre-competition); individual variability in response to T is enormous. While higher T has been linked to greater strength, speed, and muscle size at the *group* level, at the *individual* level these relationships are inconsistent. Some athletes get little or no benefit from increased levels of T, while others get considerable benefits. These facts fly in the face of received wisdom, while the IAAF's and IOC's claims fit T folklore neatly. As a result, interviewers often had a hard time accepting our arguments, even when they were accompanied by concrete scientific references. As a consequence, several interviewers repeatedly questioned why T is not a good proxy for athleticism.

T talk has both enabled this regulation and has been increasingly elaborated as a post hoc justification for it. T talk obscures the fact that this regulation is still "sex testing." T talk also deflects attention away from the racial politics of intrasex competition in women's sport and diverts attention from structural arrangements and how the regulation under question is about power asymmetries not only between athletes, but between nations. It is difficult to frame

the harms of the regulation in terms of T: invasion of athletes' privacy, humiliation, loss of career, and medically unnecessary surgeries must be discussed on other grounds. Thus, in relation to the regulation, T talk succeeds in a range of obfuscations and distortions.

T talk is rarely directly about race or global power relations, which makes this story challenging to tell. The gender politics of this regulation can be read directly from the texts that introduce, explain, and justify it, but identifying its co-occurring politics of race and region requires a different sort of work. Logic and rationality are inadequate guides. Moreover, racial hierarchies are often not explicit nor are they rational and ordered; they are chaotic and camouflaged, but operate foundationally. Thus, we must look to the way that the T regulation and its enforcement alchemizes ideas about gender, race, and "advantage" through sideways moves, indirect logics, resonances, reinforcements, and disavowals, relying on images and aesthetics as much as words, and on the wide circulation of unspoken tropes of gender, race, and modernity or civilization (barely hidden within references to nation or region), especially as they are entangled.

There is not just one story here, but a linked and enmeshed series of distinct and related narratives. There's a story about T and advantage, a story about health, a story about ethnic and regional variations in hyperandrogenism, among others. One common thread in all these stories is a scientific rationale for and driver of the regulation. Sport officials and other proponents of the regulation insist that it is only and thoroughly a scientific matter, a domain in which only explicit language, direct logic, scientific evidence, and deliberate and intended meanings register as "real." This piece works in a different register—one of affect, of images, of slips in logic, of how stories brush up against each other and generate new meanings. Together, the narratives activate offstage relationships and assumptions that create strong but implicit associations with race, a relationship we've referred to elsewhere as "race as a ghost variable" (Jordan-Young and Karkazis 2017).

Two recent feminist studies (Holloway 2011; Ticktin 2011) offer further insight into how we can understand medically authorized harms of this regulation as the predictable effect of power relations, rather than as "accidental" or "incidental" failures of the regulation that ironically has been promoted as a vehicle for fairness and health. Specific harms are *inherent* to the regulation, which was developed within and amplifies the "matrix of domination" (Collins 1990) that distributes power hierarchically along axes of race, sex/gender, and geopolitical region. In this paper, we show that what happened to the young women described in Prelude 2 is what Karla Holloway (2011) would call a "predictable failure," a concept she uses to analyze medical and legal scenarios where, despite a formal right to privacy, particular people are systematically subject to humiliations and intrusions. These "failures" of privacy are utterly predictable in light of the specific social location of the individuals involved and the material scaffolding that supports the supposedly generalized right to

privacy. Privacy is not, then, a general right, but a specific form of privilege that is reserved for those with favored racial, gender, sexual, class, or national status. This regulation makes some women athletes' bodies permanently available for surveillance and public "reading," probing, and coercion. Our analysis of this regulation shows that the concept of "predictable failures" applies to other protections, such as fairness or health, which are constructed around the needs of those who already enjoy privilege.

To understand how the language of medical benevolence is used to justify surveilling and intervening on women athletes who have high T, we also draw on Miriam Ticktin's (2011) critique of humanitarianism, which perversely enables the harsh, anti-immigrant policies of contemporary France. While France generally blocks legal status for refugees, migrant laborers, and other immigrants, humanitarian "exceptions" are extended to those who are recognized as having undergone "exceptional" suffering, which is medicalized. For example, scars may be examined and validated by medical personnel as being consistent with having endured torture; the absence of such scars may make it difficult to be taken seriously as a refugee from violence. The context of the T regulation is different from the situation Ticktin analyzes in important ways. Notably, women athletes do not actively seek to be seen as "sick," but resist it. Nevertheless, several elements of her analysis serve as a guide for seeing the effects of invoking "care" for the same people who are targeted with special surveillance and intervention, such as the claim that "suffering" is an objective matter to be judged by medical science, the coupling of bodily pathology with cultural pathology, and the way in which what she calls "regimes of care" depend upon a toggling of perspective, such that "suffering victims" are rapidly refigured as dangerous or delinquent.

The T regulation can be understood as similar to other "regimes of care" in that those who are targeted for "care" are "visible as victims . . . and hence in need of help, rescue—not equal rights" (Ticktin 2011, 4–5). As we show, women athletes with high T are not considered to be part of the group of athletes whose need for "fairness" is supposedly served by this regulation. Framing interventions to lower T as medical need activates what Ticktin calls a "moral imperative to act" that justifies practices that can be read as violence done in the name of care. Consequently, "regimes of care end up reproducing inequalities and racial, gendered, and geopolitical hierarchies" (Ticktin 2011, 5).

For our larger project, we draw on regulation documents, scientific publications in which officials describe and defend the regulation, media coverage, and in-depth interviews with policymakers, athletes, and scientists from 2012 through 2016. Our analysis here leans heavily on two presentations made by sport officials about this regulation at the 2012 International Convention on Science, Education and Medicine in Sport (ICSEMIS), the official scientific conference that accompanies the Olympic Games (Ljungqvist 2012, Bermon 2012). We quote extensively from these presentations below; unless a specific

document is cited, the quotations in the text are from unpublished recordings of their respective ICSEMIS presentations. Unlike the relatively terse text of the IOC regulation and the IAAF's regulation and explanatory notes, the presentations were expansive, including both images and information about regulation development and implementation that has never been published. Thus, these presentations make the "ghost connections" among the regulation, gender, race, and region explicit in a way that documents alone do not, and show how they exist not in the abstract as formal rules, but how they intersect with material conditions to produce distinctive effects on specific people.

In the sections that follow, we show how, via T talk, sex biology is reshaped from messy distributions into clean dimorphism, which is reintroduced as the natural state of human biology; a racialized aesthetic of gender is made to appear "normal/natural" and biological, not cultural; "sex testing" is disavowed and repackaged as a health intervention "for the good of the athlete"; and the operations of power and harm in the regulation are inverted—the least advantaged are figured as "unfairly advantaged," and the extraordinary harms of interventions are framed as beneficial.

Perfect and Modified Phenotypes: T Is the Key

The T regulation was officially unveiled a week prior to the 2012 London Olympics just four hundred miles north in Glasgow at the ICSEMIS conference. ICSEMIS is an international sport science conference that stemmed from a 2006 agreement between the IOC and the International Federation of Sports Medicine (FIMS) among other organizations to put on "one large multi-disciplinary, professional conference" around the Olympics (ICSEMIS 2016). Designed to bring together international experts "in professional and academic sectors linked to sports science and education," the unveiling of the regulation here, of all places, lent it a scientific air, even if what followed was far from scientific.

One of the two presenters, Stéphane Bermon, a member of the IAAF Medical and Anti-Doping Commission since 2006, has been the IAAF's lead player in developing, promoting, and implementing the regulation. Bermon presented the rationale for banning women with high T, and in his presentation, we saw T talk in action, especially the opening segment that relied on a visual argument about male and female forms.

He began with a slide entitled "Men and Women: Different Phenotypes" consisting of two side-by-side images. On the left was Francisco Goya's late 18th-century masterpiece *La Maja Desnuda*, an idealized Venus of a woman: sensual, curved, nude, her opaline skin lustrous [see figure 1].[10] In contrast to that milky complexion is a small thatch of dark pubic hair. Her cheeks are rosy and her brown hair falls in curly tendrils. She reclines, arms raised behind her

Figure 1. La Maja Desnuda by Francisco Goya (c. 1797–1800)

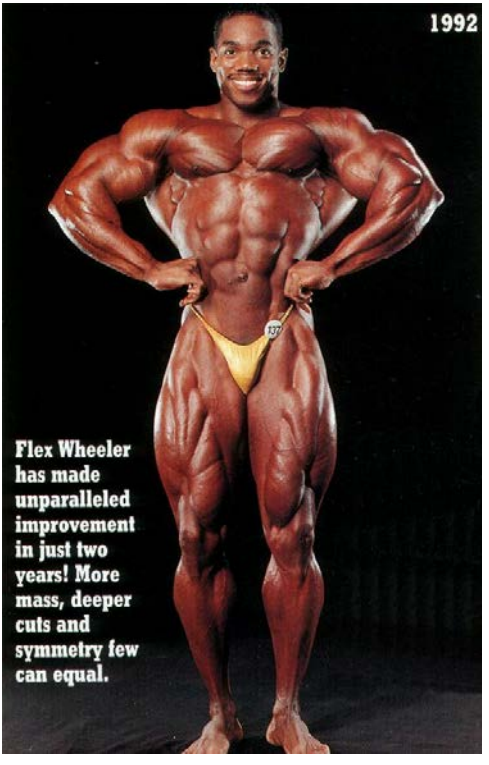

Figure 2. Flex Wheeler from *Joe Weider's Muscle & Fitness* (1992)

head, eyes looking straight at the viewer: she is so luxuriously sedentary, she looks as though she may never move from her velvet divan.

The photo on the right could not present a starker contrast. With his oiled, dark brown skin stretched tight over superhumanly developed muscles, Kenneth "Flex" Wheeler smiles at the viewer [see figure 2]. The bodybuilder, whom Arnold Schwarzenegger called "one of the greatest," stands in a "front lat spread," a banana-colored Speedo just covering his genitals: fists on his narrow waist, arms bent at a right angle, pectorals pushed up and protruding out, elbows pivoting forward, thighs and biceps bulging, with stomach sucked in. Every inch of him is dense, striated, and rippled. A sculpted, comic book hero with approximately zero body fat, Wheeler is the very image of power.

We do not think we were alone in our surprise when *La Maja Desnuda* was the image Bermon displayed as "the female phenotype" in a talk about elite women athletes, nor that he paired it with that of a twentieth-century 'roided out male bodybuilder. Though Bermon acknowledged that he "took some extreme examples," even alluding to Wheeler's myostatin-inhibiting gene mutation (which allows for nearly unlimited muscle growth), he hewed closely to these two images as evidence of what should be considered "normal male and female." Meanwhile, the ideal female phenotype Bermon presented was not a woman *per se*, but an artistic interpretation of one. His choice of Wheeler as the archetypal normal male was also ironic given that Wheeler is widely known to have doped for nearly two decades, but hardly surprising since a photo of a pot-bellied man would not have served his visual argument.

Sweeping his own disclaimer aside, Bermon plowed on. "This difference in phenotype of course explains the difference in performances, because as you know, men are much more slender, tall, and strength [*sic*] than female and it's very easy to be convinced about that." With a brisk review of sex differentials in various world records in track and field, Bermon offered an explanation for men's consistent dominance: "androgenic levels," which he explained are ten times higher in males than females. "So, you clearly see that what we call normal male and female, we should not have any overlap in testosterone concentration, as well as you do not have any overlap in world best performances, whatever the event considered."

Reference to testosterone is all it took to transform a conversation about stereotyped cultural images into a supposedly scientific presentation. In a series of moves so familiar they can be hard to see, Bermon built up an argument about sexual dimorphism—the idea that the sexes represent two distinct, non-overlapping forms—and the possibility of reading not just athleticism but T from the body's superficial appearance. If high T is what causes Flex Wheeler's muscles to bulge and strain, low T must be responsible for *La Maja*'s lack of muscular definition, her eroticized softness, her pose that relishes in its own idleness. But what does T have to do with her whiteness?

Bermon did not make the explicit claim that T is what caused Flex's darkness, nor lack of T *La Maja*'s lightness. But insisting that T is what drives the difference in the male and female phenotype, and presenting these as black and white, respectively, nonetheless attaches T to a package of existing associations about race and gender. While Bermon probably did not consciously or deliberately choose the image of a white woman for this presentation, it could hardly have been an accident, either: whiteness is an essential part of the traditional image of ideal femininity in the West. Similarly, the choice of a black male bodybuilder to show the "extreme phenotype" of masculinity ties into longstanding associations of black men with hypermasculinity, and blackness in general with athleticism. Keep these pictures in mind as we follow the rest of Bermon's presentation.

The next section of Bermon's talk was an argument about sex dimorphism. To start, he said that women and men are dimorphic not just in phenotype, but also in sport performance and in T levels. To make this argument, he began with a table comparing women's and men's world records in track and field events, showing that these differed by ten to fifteen percent "in favor of the male of course," and then extending this difference to all other sports. Second, he painted T as the "fundamental" dimorphism, the characteristic that causes both sex-specific phenotypes and sport performances. The message he drove home was that there was a "lack of overlap" in females and males: in testosterone, in sport performances, and in "normal" phenotype. It was the lack of overlap in T, he said, that is "one of the main explanations" for the lack of overlap in "world best performances." This sounds simple, but dimorphism in athletes' T levels is contested, and relies on manipulating which women and men are included in analysis (Healy et al. 2014; Karkazis and Jordan-Young 2015).

From there, Bermon's presentation took an odd turn as he created potent associations between doping and naturally occurring high T. Implicitly referring to the hyper-distinct "male" and "female" phenotypes he had just shown, he said these phenotypes can be "modified" by "exogenous administration of androgen or anabolic hormones." In other words, doping. As he spoke, he showed a slide featuring the same photo of Flex Wheeler, but this time paired with a female bodybuilder with remarkably bulging and striated muscles under taut skin, her right arm curled for maximum definition of her biceps and upper pecs, her right leg extended to show off her magnificent quadriceps. Compared with *La Maja Desnuda*, this steroid-pumped woman bodybuilder, like Flex, may as well have been not only from a different century and context but of a different species. The visual argument this slide offered was that the normal dimorphism had been breached. Her slicked back, bleached blond hair and light eyes notwithstanding, the overall impression given by her physique and her deeply bronzed skin was not so different from that of Flex.

Bermon's only other comment on this slide was to say that the only time you see "overlap" in women's and men's T levels is in doping and in naturally

high T, calling both "hyperandrogenism (HA)." Calling doping "exogenous hyperandrogenism" (meaning high T from an external source) was idiosyncratic in the extreme; the term "hyperandrogenism" is never used for doping. Bermon immediately reiterated this opportunistic usage by heading another slide with the text "Exogenous HA: Doping."

The viewer not only compares the woman bodybuilder to her fellow bodybuilder, Flex, but also to *La Maja*, whose image she has replaced on one half of the slide. The bodybuilder is not only abnormally "masculinized"—pictured as both a hormonal and an aesthetic problem in contrast with *La Maja*—she is a cheat.

Beyond linking naturally high T and doping, Bermon's sequence of slides strategically triggered a series of associations that would resonate through the rest of the presentation. Combining cultural tropes of masculinity, femininity, power, fairness, and race, Bermon set up a link between feminine, natural/honest, weak, and pale, on the one hand, and masculine, unnatural/cheating, powerful, and dark, on the other. There are several senses in which the female bodybuilder is not, like *La Maja*, the "fair" member of the pair. She has "modified" her phenotype with banned substances (unfair), while *La Maja* is the stand-in for the universal, "natural" woman. Neither the body nor the pose of the bodybuilder channel any of the attributes of the "fair sex" that are evident in the feminine *La Maja* (delicacy, availability, softness, sensuality). Finally, the bodybuilder's skin is dark, like Flex, not light, like *La Maja*. The double comparison of the woman bodybuilder to Flex (alike) and to *La Maja* (different) makes an obvious argument about the breach of sexual dimorphism, but it also extends the association of masculinity with dark, muscular power that was invoked by Flex's image in the first place. These slides build up associations by using words and images that have powerful "offstage" meanings. Alone, the images of Flex, *La Maja Desnuda*, and the woman bodybuilder do not constitute an argument about race and hyperandrogenism. But they put in play elements that would be available to increase the resonance of other words and images that followed and that also have racial associations.

The Rebranding of "Sex Testing"

Bermon, the IAAF's point person on the regulation, was followed by Arne Ljungqvist, who has strong ties both to the IAAF and the IOC. He spoke that morning from his position as chair of the IOC Medical Commission, the body long charged with the creation and enforcement of "sex testing" of women Olympians.

Ljungqvist began by giving a brief, editorialized history of "gender verification" in sport. Before we turn to his narrative, it is helpful to know some history. Women's entry into elite sport nearly a century ago was accompanied by regulations variously called gender verification, "sex testing," and other terms,

all of which had the same goal: to verify that those in the female category are really women. An early iteration of these eligibility regulations involved physical exams, which garnered intense criticism. Starting in 1967, based on the assumption that chromosomes are adequate proxies for sex, the IOC and the IAAF embraced chromosomal testing as a less intrusive and scientifically objective method (de la Chapelle 1986). Struggles over whether and which chromosomal or genetic tests could distinguish men from women, however, caused decades of infighting among athletes, medical commission members, and even professional medical societies. The main problem with all "sex testing" is not with the tests per se, but with the assumption that any singular marker of sex is adequate to classify people into a two-sex system. Sex is complex, comprising at least five core elements (karyotype, genitals, gonads, hormones, and secondary sex characteristics). None of these are dimorphic; all of them can vary independently of the others. Nor is there an objective way to choose which criterion or criteria "determines" sex: the decisions are made differently in different contexts (e.g., medicine, law, and the social sciences).

The case of Olympian Maria José Martínez-Patiño is crucial to this history; at ICSEMIS, Ljungqvist rehashed the official claim that her story ushered in the end of "sex testing." In the mid-1980s, the IOC disqualified the Spanish hurdler from competitions and withdrew her medals and records because she was "chromosomally male" (Martínez-Patiño 2005). Martínez-Patiño has complete androgen insensitivity syndrome, which is characterized by a 46, XY karyotype and high levels of circulating T, but her tissues are unable to respond to T and other androgens. After "failing" the sex chromatin test owing to XY chromosomes, Martínez-Patiño challenged her exclusion and won (Martínez-Patiño 2005).

Martínez-Patiño's victory needs to be reread not for how it killed "sex testing," but for how it ushered in a focus on T. She and her advocates, including Ljungqvist, successfully argued that her *insensitivity* to T should be the deciding factor in the case. In 1992 and 2000, both the IAAF and the IOC, respectively, cited her challenge as a key rationale in their choice to "abandon" sex testing.

The IAAF and IOC have repeatedly insisted that "sex testing" is over, to the extent that we initially repeated their claim as fact (Karkazis et al. 2012). Ljungqvist's talk at ICESMIS, though, gave the lie to their abandonment narrative. Sport governing bodies, he said, always retained the authority to take "proper measures for the determination of the gender of the competitor" through ad hoc investigations of targeted athletes. "Sex testing" never stopped; it just was not mandatory for all women. And then he went one important step further: the T regulation "is a still existing regulation to which has now been added some further elements." Female athletes have long been subject to T testing. The central element of the "new" regulation is to make the focus on T transparent. A second element has to do with providing legal cover. Earlier regulations aimed at actually determining athletes' sex, potentially going against athletes' social

and legal documents, and left the sports organizations open to legal challenge for exceeding their authority.

Ljungqvist revealed that underneath the T talk, sport regulators are still interested in sex determination. He bemoaned "cases that were doubtful in terms of whether particular athletes were actually men or women." The concern, he said, was "intersex people—of course most of them are women—but what to do with those cases." Toggling between confirmation that governing bodies still engage in "sex testing," and insistence that they do not, he explained that if an athlete's gender is questioned, "the relevant sporting body shall have the authority to take proper measures *for the determination of the gender of the competitor*" (emphasis added). Again, though, he insisted that this new elaboration of the ad hoc rule is "not a sex test or a gender test." The IOC policy likewise notes that "nothing in these Regulations is intended to make any determination of sex" (IOC 2012, 1), revealing the disavowal of "sex testing" to be a legal disclaimer intended to protect sport authorities from challenge rather than a meaningful description of the regulation.

T talk seems to make this disavowal appear more plausible, perhaps because the T criterion appears to be scientific, objective, and narrow. As a singular chemical, T is simpler than sex, and common wisdom holds that T is both sex dimorphic and the driver of athleticism. T talk thus offers scientized cover for a regulation that looks new, but continues many of the same problems as the earlier policies. For example, focusing on T deflects attention from the fact that the current regulation also entails intrusive physical exams such as those that Ljungqvist had just denounced.

T talk is fork tongued: not only does high T supposedly provide an "unfair advantage" to women athletes; it also makes them sick. After framing naturally high T in women as a health problem, Ljungqvist asserted that sport authorities have "a duty within the context of medical ethics" to identify women with high T and direct them into treatment "to protect the health of the athlete." The health justification is embedded in the regulation texts: the IAAF claims the regulation is for "the early prevention of problems associated with hyperandrogenism" (IAAF 2011, 1) and an IOC press release for the regulation reads, "In order to protect the health of the athlete, sport authorities should have the responsibility to make sure that any case of female hyperandrogenism that arises under their jurisdiction receives adequate medical follow-up" (IOC 2011; cf. Karkazis et al. 2012; Karkazis and Jordan-Young 2013; Jordan-Young, Sönksen, and Karkazis 2014).

This appeal to medical ethics vacates the power, which is to say the politics, of the situation. Ticktin's critique of humanitarian "regimes of care" as "politics based on care and produced as a moral imperative" is instructive (2011, 16). Sport authorities appeal to the notion of a sick or "suffering" body, as do humanitarians seeking to provide some refuge within restrictive immigration laws, and in both cases, medical science is the arbiter of suffering. With the regulation, experts

operating in the name of medical science can designate bodies as "suffering" and in need of intervention even when this designation runs contrary to subjective experience and desires, and even as they acknowledge that this intervention is medically unnecessary (e.g., Fénichel et al. 2013, E1057).

The idea that high T is dangerous to women is one of the oldest staples of sex hormone ideology (Oudshoorn 1994), a kind of T talk that appears self-evident. But high T in and of itself is not a health problem (Jordan-Young, Sönksen, and Karkazis 2014). Moreover, when Ljungqvist and other proponents of the regulation argue that concerns about the risks of high T are behind their efforts to identify women athletes "affected" by hyperandrogenism, they are inverting the story. Health worries about high T are a post hoc justification for continuing concerns about how to "deal" with "ambiguous gender cases." In 2010, just months after targeting Semenya, the IOC organized a medical conference in Miami "to look at the state-of-the-art science and see what we should recommend to sport" for "ambiguous gender cases" (Foxsports 2009). At the time, Ljungqvist said, "The general recommendation is obvious: they should be treated as medical cases in compliance with up-to-date procedures. But we have to be more specific in telling the sports people what that actually means and what they should do" (Wells 2010, 303). While health was supposedly the core focus, the IOC also sought advice on which sex variations among women ostensibly confer athletic advantage. But panelists observed that extensive research on intersex variations would be necessary to map any ostensible "advantages" they might confer, "a complex and perhaps impossible task" (Wells 2010, 306).

T talk offered a bridge between the considerable complexity acknowledged at the Miami meeting and the confident and streamlined assertions that emerged in the regulation itself. In Miami, "None of the presenters attempted to link athleticism with particular disorders or conditions studied, nor did they relate their research directly or indirectly to the issues of athletic advantage of intersex athletes, gender verification policy," or particular athletes (Wells 2010, 305). Later, when the regulation was announced with a narrow focus on T levels, it was taken as obvious that high T provides an athletic advantage to women. Bermon even closed his ICSEMIS presentation by showing a table purporting to parse the clinical conditions associated with high T that do and do not provide athletic "advantage."

In the rebranding of sex testing, high T was doubly framed as both an advantage and a health problem, giving a new health-based rationale for intervention and transforming an issue that had previously caused public relations problems for sport authorities into an unequivocal good. Think back to Prelude 2, in which we describe the four young athletes who were intervened upon in the "specialist reference center" in France. None of those interventions were medically necessary. But as the athletes were told, "gonadectomy would most likely decrease their performance level but allow them to continue elite sport in the female category" (Fénichel et al. 2013, E1057). In Glasgow, Ljungqvist even

suggested that the new regulation benefits women who are specifically disadvantaged: "These cases . . . are pretty rare. The competence is not found all over the world." With this sentence, Ljungqvist revealed the geographical focus of his concerns: the Global South. Humanitarian "regimes of care" have routinely figured women and children of the Global South as the prototypical "suffering body," which entails a coupling of bodily pathology with cultural pathology (Ticktin 2011). In the domain we analyze, the cultural pathology implicitly entails incompetent or uncivilized "neglect" of bodies figured as damaged or ill. "The competence is not there," Ljungqvist stated in Glasgow, thereby invoking a progress narrative that links the West with science, modernity, a privileged insight into biological "truth," and the obligation to "perfect" bodies that do not fit aesthetic and cultural norms.[11] This narrative mandates intervention from a supposedly beneficent position, erasing power differentials and echoing colonial rationales for bringing less "developed" people under control.

Breaking the Code of Hyperandrogenism

To understand who the regulation affects, it is crucial to take apart the coded work that is accomplished by the idiosyncratic and strategic way that sport authorities use the word "hyperandrogenism." Hyperandrogenism, defined generally as "excess androgen in women," is a medical concept with no analogue in men. In practice, it nearly always refers to polycystic ovary syndrome (PCOS). PCOS affects up to 20 percent of women worldwide, and "ethnic and racial variation is remarkably low" (Azziz et al. 2016, 16057), so regulation of hyperandrogenism-qua-PCOS should be largely race and region neutral.

Sport authorities have introduced an entirely new usage for the term hyperandrogenism, giving a new twist to T talk. The 2012 Olympic regulation reads, "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.'" Thus, the IOC is concerned specifically with high T in the context of intersex variations. With the latest iteration of the regulation, released in 2018, this was made explicit when the IAAF dropped the language of hyperandrogenism and directly named that their concern is women with intersex variations, what they refer to as "differences of sex development" or DSD. This does not mean that all the women surveilled or investigated under this regulation have intersex variations, especially given the IOC's chillingly broad mandate to surveil gender nonconformity, directing National Olympic Committees to "actively investigate any perceived deviation in sex characteristics" (IOC 2012, 2).

Bermon opportunistically departed from conventional usage of the terms hyperandrogenism and DSD in two ways. First, Bermon paired the image of the woman bodybuilder with a neologism for doping, "exogenous hyperandrogenism," aligning hyperandrogenism with cheating. He immediately followed with

a reference to "endogenous hyperandrogenism, what we call DSD." DSD, a medicalized term for intersex, and hyperandrogenism are medically distinct.[12] None of the medical descriptions of hyperandrogenism that we have found mentions DSD/intersex, nor did the hyperandrogenism clinical guidelines Bermon mentioned (Goodman et al. 2001). Hyperandrogenism typically refers to PCOS, but the regulation has been crafted specifically to *exclude* women with PCOS. Bermon explained that they set the eligibility threshold for naturally occurring T much higher than levels observed in women with PCOS. If any more confirmation were needed indicating that for sport regulators hyperandrogenism is code for intersex, there is the report of the four athletes "treated" at the IAAF reference center describing the focus of the T regulation as "detecting those athletes who are competing unknowingly with a disorder of sex differentiation (DSD)" (Fénichel et al., 2013, E1056).

Three linked claims apparent in the Glasgow presentations collectively explain the racial and geographic effects of the regulation, that is, why it overwhelmingly if not exclusively targets black and brown women from the Global South. First, Bermon claimed there is "huge ethnic and area variation" in prevalence of intersex, with the suggestion that there is higher prevalence in the Global South. Second, he showed a slide claiming to sort intersex variations according to whether they provide "athletic advantage," which he implicitly linked to ethnic and area variation by repeatedly discussing the two points in direct succession, without transition. This created the impression that the people with the most advantage are clustered in the Global South. Third, he repeated Ljungqvist's point that "local expertise" to diagnose and treat intersex variations is not common outside of Western industrialized states:

> [A]s I told you before, a lot of these cases arise in poor countries or developing countries where diagnosis is not done at birth like is the case in Western countries at least. Diagnosis is not done and you realize that you have a 16 or 18 years old very well-performing athlete with an intersex condition who's going to enter into a major championship, and here probably [would be] stopped.

With the "here" in that last sentence, Bermon anchored himself and his listeners in the "rich" and "developed" countries of the Global North, referring in the same breath to both the literal space in which the talk was delivered, and the typical referential space of his audience who, though scant in number, were overwhelmingly from Western industrialized nations. In the context of repeated assertions that "cases" have typically surfaced in poor, developing nations, the vague statement about "ethnic and area variation" is automatically interpreted as meaning that intersex variations are themselves more common in poor regions (Magubane 2014). There is no evidence that this is so. The major point of geographic variation is not in the *prevalence* of intersex, but in medical *responses* to intersex. Specifically, the standard protocol in the Global North has, for more than five decades, been characterized by an urgency to identify

and "normalize" people with intersex variations at the earliest possible stage of life, which includes modifying atypical genitals and controlling hormone levels by surgery or pharmacological intervention (Karkazis 2008; Davis 2015). For a variety of reasons that might include cultural differences, general infrastructure, medical resources, and others, early medical intervention has never been routinized outside the Global North.

The point is not to argue whether women targeted by the regulation "really" have intersex variations or whether there are "really" more women with such variations in the Global South, and it is certainly not an argument about whether anyone "should" identify as intersex. The point is instead to attend to the politics of race and nation that shape the search for and perception of sexual difference. Magubane has demonstrated that the relevant histories go well beyond the racist display of Saartjie Baartman and the pathologization of black women's bodies more generally, and has suggested that we must ask "what role race and imperial history have played in rendering intersex visible or invisible" (2014, 768).

This helps us to decode Bermon's claim in Glasgow that there is "huge ethnic and area variation" in the incidence of intersex. Bermon padded this idea with references to "poor countries or developing countries" and to Africa, Asia, and South America. In the context of Western racial ideology, these ideas in close proximity fill in the mental blank of "ethnic" with brown/black and with race. It is accurate to say that there is ethnic variation in specific kinds of intersex variations, but the ethnic variations in prevalence do not map onto racial categories (e.g., Boudon et al. 1995; Maimoun et al. 2011). Nonetheless, a regulation that is about atypically high T in women, through a variety of *conceptual* associations with race and the explicit *material* focus on regions where women with intersex variations are not routinely subject to early intervention, manifests in targeted concern about black and brown women from the Global South.

Emergence and Emergencies: "A Lot of People Coming from Africa, Asia"

For all the talk of a duty to treat athletes, and concerns about where there is "competence" to do so, the overall framing of the regulation indicates that health talk is highly strategic. T talk does a lot of things, but one of the most important is to keep certain kernels of received wisdom readily available to make the regulation seem rational. These self-evident claims, sometimes implicit but often explicit, include the idea that T is male, and renders women with high T masculine; that women with high T have an "advantage" in sport; and that T is a foreign substance to women, its presence akin to doping and therefore unfair. It's important to read all the different threads concurrently to see how the issue becomes racial and regional. Who has high T? Untreated intersex women. And where are they found? In the Global South. The regulation was released within this assemblage of claims, revealing seemingly abstract, neutral concerns about

women with "masculine traits" and "uncommon athletic capacity" to be far from abstract or neutral. This provides an important backdrop for understanding the regulation itself, and who it targets: "Despite the rarity of such cases, their emergence from time to time at the highest level of women's competition in Athletics has proved to be controversial since the individuals concerned often display masculine traits and have an uncommon athletic capacity in relation to their fellow female competitors" (IAAF 2011, 1).

This brings us to one of the most direct articulations of how concerns about race and region drive this regulation, again from Bermon's talk:

> First, HA, especially DSD, is not so rare in female sports, at least athletics. I say "at least athletics" because as you probably know athletics is a whole world sports, it's not purely the Caucasian sports. We have a lot of people coming from Africa, Asia and we have a lot of these cases coming from these countries. So, of course, there is a kind of recruitment bias, a double one. One because they have an unfair advantage, some of them, so of course they compete better and they reach more easily the higher level. And the other one is I would say an ethnic or local area recruitment bias, because they are undiagnosed at birth, so they are raised with this condition, and they arrive at the highest level with this condition, which is quite seldom in rich countries where they are treated just after birth.[13]

According to Bermon, women from Africa and Asia are "arriving" at the highest level because of unfair advantage owing to not having been "treated." The repetition of the word "bias" and the explicit reference to cheating indicates that their very presence in competition is unfair. The idea that these women "reach more easily the higher level" signals that they have not worked hard, that they have just magically jumped the line. Likewise, Bermon's explanation of "biases" that enable the success of some women is a breathtaking inversion of the biases that work *against* any athlete from the Global South, including challenges of inadequate nutrition, lack of access to specialized equipment and excellent training facilities, and the enormous risk of pouring time and energy into sport instead of more secure income generation. This claim of "unfair advantage" forcefully reverberates with the "racialist logic that presents the black body especially as vitality, as raw force, as athleticism itself" (Doyle 2013, 420).

World-record-holding marathoner Paula Radcliffe, a white runner from the UK, demonstrated the interlocking assumptions driving the targeting of women from the Global South in a recent interview (5 Live Sport 2016). In a quote that resonates with our opening image of the disappointed white runners at the Rio Olympics, Radcliffe said that when "we fully expect no other result than Caster Semenya" winning at the Olympics, "then it's no longer sport." Blind to her own privilege and dominance and the politics that shape them, she said she feared that people would go to "certain villages in South Africa" where she claimed hyperandrogenism is more prevalent and "seek out girls who look like they're

going to be able to go out and perform and to run fast." Bavington (2016) drew attention to earlier organizing among white athletes that frame white athletes as deserving of fairness and "protection" from global south athletes who simply "arrive" on the scene with all the goods, and are therefore "advantaged."

In a 2013 defense of the regulation, Bermon and colleagues explained the regulation as grounded in "concerns for fairness for women athletes," and referred to "concerns among women athletes that they should not be compelled to compete against other athletes who may have a massive androgenic advantage" (Bermon et al. 2013, 63). This supposedly universalizing statement about "women athletes" explicitly excludes women with high T from this category and favors a construction of fairness that benefits both women with "typical" T levels and women from the Global North (Jordan-Young and Karkazis 2012; Bavington 2016). T talk obfuscates this bias, but reading the narratives of health, of the lack of medical competence in the Global South, regional and ethnic variations, and advantage together makes this bias impossible to miss, as Bermon again illustrated in Glasgow: "And we have a lack of local suitable testing facilities . . . you can easily understand that when such cases arise in Africa, South America, Asia, it's very complicated to get local expertise there. And as they have a very clear advantage, they were pushed to compete at the highest level." He elaborated: "this is a way of cheating."

How, then, would this unfair emergence of women with an "advantage" from high T be prevented? In short, by pushing the investigations down to lower levels of competition. In the 2012 Olympic policy, the National Olympic Committees were mandated to look for "any perceived deviation in sex characteristics" (IOC 2012). The Olympic regulation was modified in 2014 to offload the obligation to investigate women to the specific international federations for individual sports (IOC 2014). The IAAF, in turn, has stipulated that the national athletics federations should enforce the regulations. This multipronged attempt to stop women from competing in international competitions involves a decentralization of tasks and diffusion of responsibility: scrutiny will not look the same in all contexts. For example, while race is a powerful presence in the designation of normative femininity, race might not be especially salient at every local or national level. But the discourses of "advantage" and "sex deviation" that circulate around this regulation make available an enormous array of signs and signals that can be attached to particular bodies in particular circumstances and used strategically.

How exactly is this mandate operationalized? To investigate any perceived deviation, you first have to understand the perceived norm.

Looking at the Clitoris, Seeing "Advantage"

Like his earlier presentation of *La Maja*, Bermon's description of the protocol for investigating suspected hyperandrogenism resonated with broad cultural

ideas about the aesthetics of T. Midway through his ICSEMIS presentation, he showed a spreadsheet with what he described as the most frequent types of intersex variations that IAAF sees in investigations, indicating which ones they believe convey advantage in sport, and notably, one they believe does not. Recalling Ljungqvist's discussion of Martínez-Patiño, Bermon said that complete androgen insensitivity syndrome (CAIS), in which women have high T but their bodies do not respond to it,

> is not a problem at all, because as Arne has told you before, there are females with a high level of testosterone but with perfect female, at least external perfect female phenotype. And they have no advantage at all, since they don't have any functional testosterone receptors. By the way, most of the time these are very beautiful females, and you can find them as models.

If the "perfect female phenotype" signals "no advantage at all" (think of Goya's prone and inert *La Maja*), how does a female body display an "advantage" stemming from T? It is difficult to measure androgen receptor function directly, so sport investigations draw on protocols developed by doctors specializing in intersex variations, who infer the function of androgen receptors from the body's surface. The IAAF regulation lists the following indicators of high functional T (2011, 20):

- Deep voice
- Breast atrophy
- Never menstruation (or loss of menses for several months)
- Increased muscle mass
- Body hair of male type (vertex alopecia, >17 years)
- Tanner score low (I / II) [see figure 3]
- F&G score (>6 / ! minimized by the beauty) [*sic*] [see figure 4]
- No uterus
- Clitoromegaly [larger than typical clitoris]

Many of these features are deeply subjective, drawing on aesthetic judgments about femininity and masculinity; several are also a common result of extreme athletic training in women. It is crucial here to understand that this list is not used alongside some objective medical test for a woman's physical sensitivity to T: it *is* the test.

At ICSEMIS, Bermon stressed one trait above all others as the most important for determining whether an athlete under investigation for high T has unfair advantage: the size of her clitoris. The IAAF investigations follow "three levels of medical assessment": an initial clinical examination, preliminary endocrine assessment, and a full examination and diagnosis. Bermon clarified that a gynecological exam should be included in the first level, emphasizing its importance by using bold font, all caps, and three plus signs. Bermon claimed that clitoral size "gives you very good information about the level of

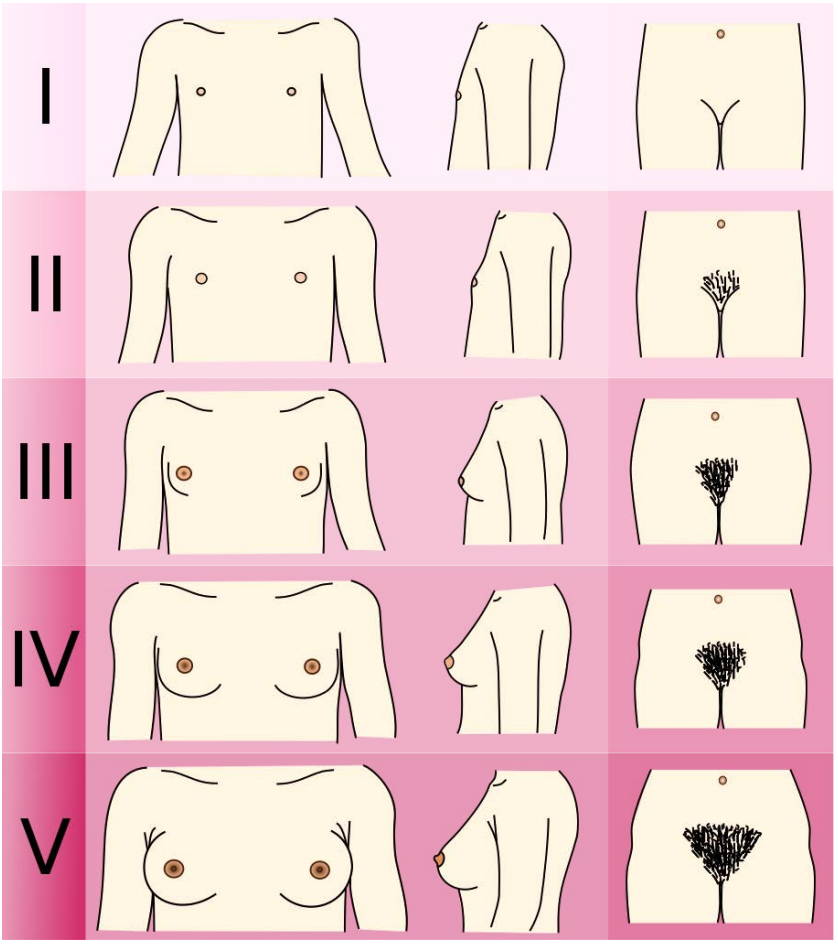

Figure 3. The Tanner Scale-Female (1969) schematic used to assess pubertal development. Image reproduced with permission from Michal Komorniczak (Poland) under creative commons license (CC BY-SA 3.0).

virilization"—that is, whether someone has been "masculinized" by T. The clitoris is the sine qua non for divining so-called advantage.[12]

Bermon made a series of inferences: a large clitoris indicates both high T and functional receptors; high T and functional receptors indicate athletic advantage. But these indicators have no predictive capabilities regarding athleticism. In his testimony during the CAS hearing, Ljungqvist acknowledged that "it [i]s not possible to quantify the magnitude of athletic advantage enjoyed by a particular athlete based on assessment of physical virilisation" (CAS 2015, 64).

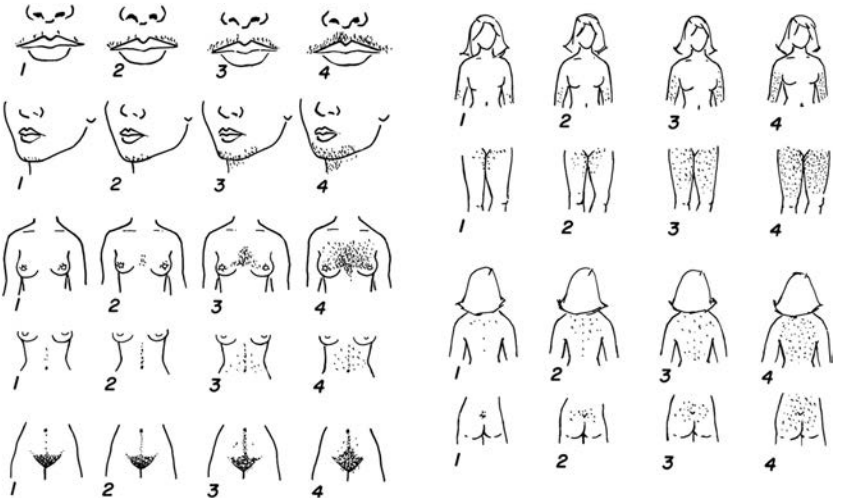

Figure 4. Ferriman-Gallwey Scale (1961). Reproduced with permission from Martin, Kathryn and Jeffrey Chang. 2008. "Evaluation and Treatment of Hirsutism in Premenopausal Women: An Endocrine Society Clinical Practice Guideline." The Journal of Clinical Endocrinology & Metabolism. © Oxford University Press

Beyond its use in investigations, the list plays a role in marking some women as suspicious, which brings all women athletes under scrutiny. The IAAF guideline is "scientific" insofar as these are the elements endocrinologists look for when assessing high T in women, but the logics and aesthetics of this list boil down to common ideas of what T does to women's bodies, and the idea that evidence of high T can be gleaned from the body's surface characteristics. But while this list is used clinically as if it were objective, judgments about masculinity in women vary by historical period, place, racial ideologies, and individual situation. How deep is too deep for a woman's voice, and in which contexts is it considered normal for a woman to speak "roughly" versus cultivating a soft and quiet voice? Is body hair feminine, or is it suspiciously masculine? Measures of the patterns and density of hair growth were developed in the context of racial science, and anthropologists used these as "a principal method of defining race" (Yildiz et al. 2010, 53). The Ferriman-Gallwey scale for assessing a so-called male pattern of body and facial hair (hirsutism) is profoundly subjective, and the literature on hirsutism reveals an ongoing obsession with racial and ethnic variations (see, e.g., Yildiz et al. 2010; Goodman et al. 2001). Several listed traits are also common results of intensive athletic training in women. How small must breasts be to show "atrophy"? Small breasts might be interpreted as the result of high T, rather than a result of the demands and effects of training in a specific sport. How much muscle mass indicates *increased* muscle mass in a woman? Muscle mass is a particularly fraught characteristic for elite women

athletes, because even in some sports where larger muscles could benefit performance, some elite women athletes (and notably their coaches) strive to avoid "bulking up" (Dworkin 2001; Krane et al. 2004; Rothenberg 2015). T talk erases the subjectivity from these judgments, certifying the list as scientifically valid, universal effects of high T on women, and thus signs of advantage.

Bermon ended his talk with a slide carrying five take-home messages, one of which was in all caps: "Importance of GYNAECOLOGICAL EXAMINATION: PPHE." In other words, not only is a genital exam the first step in investigating women under the T regulation, but he called for *all women athletes* to have one as part of a preparticipation health exam (PPHE). He called the PPHE "very, very, very important," but noted with regret that it "is not very much popular [*sic*] in poor countries, as you can imagine." With that reference to poor countries, he made the slip from supposedly looking for athletic advantage to claims that the process is in the service of women's health: "It's very easy to detect a labial fusion, clitoral enlargement, or very small vagina, or very short," he said. "Once you detect this, you can help the athlete for diagnosis and treatment." Not twenty minutes before Bermon described these assessments, Arne Ljungqvist had bemoaned the "humiliation" involved in the physical exams of "sex testing," and had assured the audience that "sex testing" was over.

Multiple analyses of the genital inspections associated with "sex testing" in sport have pointed out the resonance of these exams with the historical pathologization of black women's genitals (Nyong'o 2010; Munro 2010; Merck 2010; Jordan-Young and Karkazis 2012; Doyle 2013; Dworkin, Swarr, and Cooky 2013; Adjepong and Carrington 2014). Writing about how shifting racial and national contexts affect perceptions of sexual (a)typicality, Magubane has observed that "one thing that South African, US, and European medical texts from the seventeenth century through the twentieth seem to agree on was the fact that malformed or ambiguous genitalia, especially an enlarged clitoris or overdeveloped labia, were particularly common among women of African descent" (2014, 769). As Adjepong and Carrington note, "Colonial myths around black women's bodies are reproduced even after the formal dismantling of western colonial regimes" (2014, 173). Colonial myths concern "pathological cultures" as well as pathological bodies, recasting violent colonial interventions as "saving" women from their own (violent and misogynist) communities. We see here a double parallel to what Ticktin documents in her critique of humanitarianism, where "both NGOs and the French state give attention to women who are subject to exceptionally violent or exoticized practices, such as excision or modern slavery, but this renders them visible as victims of cultural pathologies and hence in need of help, rescue—not equal rights" (2011, 4–5). In the instance we examine, the exoticized practice is not excision, but *failure* to excise. The women targeted for the "help" of IAAF and IOC medical teams are not thereby included as equals among other women athletes, as the official aim of intervention is to reduce athleticism among the former for the benefit of the latter.

T as the Great Distraction

Returning to that striking image taken minutes after the 800–meter women's final ended, we can understand it within a more complex web of context. The image is more than a representation of multiple discourses circulating around the women on the podium and those at its periphery. It is also a snapshot of particular people with material lives and specific histories and locations in the intersecting orders of privilege and "rights" to winning, to privacy, to respect. In a context in which T alone is deemed to determine advantage and disadvantage, what makes sense and is valued as legitimate in this scene is the sense of injustice expressed acutely by the women who did not win the race. But women investigated for possible high T face harms that are nowhere in the picture: having their identity publicly questioned, their genitals scrutinized, the most private details of their lives subject to "assessment" for masculinity, their careers and livelihoods threatened, and being subject to pressure for medically unnecessary interventions with lifelong consequences. The narrative of harm is inverted: how does the putative advantage conferred by T matter more than concrete and demonstrable harms to people?

The stories emerging from development and implementation of this regulation are "predictable failures," which Holloway describes as "instances where medical issues and information that would usually be seen as intimate, private matters are forced into the public sphere" (2011, back cover). The intrusions are predictable precisely because hierarchies of race, gender, and nation place these women athletes far from power, and the policy-making process instrumentalizes these very hierarchies by constructing "fairness" as an objective phenomenon that could therefore be defined absent consideration of its meaning to women who would be excluded by the regulation. A regulation aimed at ensuring fairness "for all female athletes" fails to take into account the perspective of women directly affected: "None of the female athletes disqualified by prior policies were invited to attend the meetings that were held to formulate the new policies" (Viloria and Martínez-Patiño 2012, 17). Far from being objective or universal, this regulation mobilizes a version of "fairness" that is a privilege reserved for those with favored racial, gender, sexual, class, or national status. This exclusion from the purview of "fairness" is occluded by magnanimous claims of protecting health. Sport officials opportunistically move between two platforms of justification for the regulation: protecting health and protecting fairness. The women being "protected" in these two different justifications are mutually exclusive. Women with high T are not "visible" in the fairness portion of this regulation except as a threat; the "help" offered requires that they submit to the designation of "ill" despite having no health complaints (Jordan-Young, Sönksen, and Karkazis 2014). T talk thus obscures how the regulation benefits those with more power and privilege, making it look like defense against unfairness rather than the exercise of power.

T talk deflects attention from social structures and institutions, attributing the result of competitions completely to individual bodies, as though these bodies have developed, trained, and ultimately competed in some socially-neutral vacuum. At one level, the regulation harms all women athletes. It is built upon the premise that sport is a masculine domain and it is a distortion of nature for women to enter it in a serious, competitive way (Kahn 1998, Krane et al. 2004). "Sex testing" is the traditional way of policing this line, and reframing this as a rule about T obscures the fact that this regulation is still "sex testing." The regulation has even provided a fresh occasion for an IOC policymaker to argue with a straight face that barriers to equality in sport are gone (CAS 2015).

At another level, some women are harmed in a much more direct, material, and significant way. The premise that women are a vulnerable class that needs protection is readily endorsed in this domain even by some who are otherwise champions of gender equity (e.g., Dreger, quoted in Epstein 2014), but history is full of examples of how the "female vulnerability" argument has consistently valued more privileged women (whether by class, race, gender presentation, or region) over less privileged women, who are ironically but systematically seen as less vulnerable. T talk deflects attention from the racial and regional politics of intrasex competition in women's sport.

The IOC and IAAF frame interventions as an unmitigated good, especially because they target women from the Global South, coming from situations that Bermon and Ljungqvist have described as "lacking competence" for dealing with the conditions that are "revealed" through investigations. We must, however, attend to resonances, co-occurring narratives, and indirect logic. The designated "Centers of Excellence" are in Sweden, France, Australia, Japan, Brazil, and the United States; the athletes are repeatedly described as coming from "Africa, South America, Asia" and from "poor countries or developing countries" as opposed to the "western countries" where medical diagnosis and intervention for intersex happens at or near birth. A high-ranking IOC official told us in an interview that "these women have dangerous diseases," underscoring the way that sport authorities frame untreated intersex variations as a seriously harmful problem. Together with the refrain that outside the West there is not the "competence" to deal with such conditions, the picture that assembles is that of a missionary relationship, and certainly resonates with a long legacy of colonialist ideologies. Emphasizing the delivery of scientific and medical prowess to women in need obscures the extremely asymmetrical power relations involved.

The interventions on athletes are not directed by their goals and needs, but by the goals of sport organizations. Neither the regulations nor any sport officials' publications or presentations that we have encountered acknowledge the now decades-old controversies that have raged over genital surgeries and other medical interventions for intersex. The interventions performed on women in order to comply with the regulation are the same ones that adults

with intersex variations have argued against for decades, pointing out that they are driven by gender ideologies that pathologize sex atypical bodies and gender atypical behavior, and cause irreparable harm to sexual sensation and function (Karkazis 2008, Davis 2015). These complaints, delivered forcefully from individuals in countries around the world, have caught the attention of national legislative bodies and human rights organizations (Carpenter 2016, OII Australia n.d.). Moreover, high T may *signal* a medical problem but it does not *constitute* a medical problem (Karkazis et al. 2012, Jordan-Young, Sönksen, and Karkazis 2014). Physicians do not lower T in the absence of patient complaints or functional impairments. Lowering T can cause significant health problems, which can include depression, fatigue, osteoporosis, muscle weakness, low libido, and metabolic problems; these may be life-long problems, and may require hormone replacement treatments, which are both costly and often difficult to calibrate (Jordan-Young, Sönksen, and Karkazis 2014).

Beyond performing unnecessary medical interventions and violating IAAF rules, the report on the four women raises serious ethical concerns about coercion and violations of confidentiality and privacy (Jordan-Young, Sönksen, and Karkazis 2014; Sönksen et al. 2015). Implicitly addressing concerns about coercion, the IAAF regulation states that no woman is required to undergo medical intervention, but this claim is deeply misleading. The regulation applies to women in the category of elite athletes. If a woman with hyperandrogenism wishes to continue her career as an athlete, she is required to lower her T levels. If she does not, then she can no longer be in the category. Since sport authorities have no grounds to make rules about people who are not in that category, it is meaningless for them to say that women athletes do not need to have medical interventions.

Because the IOC and IAAF have delegated the obligation to investigate women to the lower-level sport authorities, when predictable failures occur, the IOC/IAAF frame these as "implementation problems" that happen under the aegis of the national federations or National Olympic Committees. For example, in Dutee Chand's successful challenge to the IAAF regulation, any problems Chand had encountered—medical harm, violations of privacy, discrimination, psychological distress, and wrongful suspension of her career—were not inherent to the regulation itself, but to how it was implemented. Any problems could be attributed to the ineptitude and bungling of the national officials, Athletics Federation of India (AFI), and the doctors that AFI chose to examine her. This is yet another resonance with colonial ideas of the backwardness of those in the Global South.

A month before the photo that opens this essay was taken, a debate erupted on Twitter about the T regulation. Shannon Rowbury, a middle-distance runner who was goaded into speaking about the issue immediately after a race commented that "it challenges and threatens the integrity of women's sports to have intersex athletes competing against . . . genetic women" (Rowbury 2016). Justifiably angry that Rowbury had excised women with intersex variations

from the category of women, several advocates asked her to apologize for her statement. The debate torqued and turned picking up more interlocutors until it included a sports scientist known for his spirited defenses of the regulation. One participant argued the regulation cannot be isolated from questions of race, "Even if it makes dialogue YOU want to have about it more difficult. I dont [*sic*] think it's good science to isolate physiology from history + politics and race plays direct role if it contributes to who does/doesn't get tested" (Eisenberg-Guyot 2016). The sport scientist rejected the idea and replied dismissively that race "is irrelevant to the science and so to me, the introduction of race is an intellectually lazy approach" (Tucker 2016).

No one had to introduce race; it was there all along. M'charek, Schramm, and Skinner (2014) argue that in contemporary European discourses race is an "absent presence" both normatively and methodologically. Normatively, race is "a tabooed object often removed and excluded from discourse and viewed as something that belongs to the problematic past." Methodologically, the obfuscation of race engenders a "slippery-ness"; race "come(s) in many different guises." The analyst's task, then, is "to attend to things that are othered (silenced and excluded): such things do not fully go away, but might give rise to things that are (made) present" (2014, 462). Similarly, sociologist Avery F. Gordon writes of being haunted by a photograph while immersed in a project as she kept "looking for the language that could render what wasn't easily or normally seen, what was in the blind field, what was in the shadows, what only crazy people or powerless people saw." She struggled "to conjure, to present, to bring back to a different life what was living and breathing in the place blinded from view" (2007, 9). We have aimed here to bring forth what others do not see, cannot see, refuse to see. Foregrounding the intertwined workings of colonialism, race, and modernity reveal race as central to, not apart from, this regulation. Exposing and centering these relationships, the regulation and its effects can only be understood as intentional and as a predictable outcome of legacies that not only continue to haunt, but to harm.

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Key

CAIS	Complete androgen insensitivity syndrome
CAS	Court of Arbitration for Sport
IAAF	International Association of Athletics Federations
ICSEMIS	International Convention on Science, Education and Medicine in Sport
IOC	International Olympic Committee
PCOS	Polycystic Ovarian Syndrome

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Notes

1. This prelude draws on the previously published article (Karkazis 2016).

2. Here, we focus on the IAAF and the IOC regulations issued prior to 2018. The analysis applies to the IAAF's revised regulation released in 2018, and we expect it will apply to any similar regulations targeting naturally high T in women. Likewise, because the IOC and IAAF developed their respective regulations together, are materially similar, and involve many of the same institutional actors, we use the singular noun "regulation" in this piece.

3. The T regulation concerns only higher natural levels of testosterone and not higher levels due to doping. With doping, which is regulated by the World Anti-Doping Agency, the hormones are external to the athlete's body. The women targeted by this regulation have not introduced testosterone into their bodies.

4. "Intersex" is a term long used to refer to individuals born with atypical sex traits. In 2006, participants at a medical conference updated treatment guidelines agreed to change the nomenclature from intersex to Disorder of Sex Development (DSD) (Lee et al. 2006). Others, including IAAF and IOC officials, have sometimes used the alternative phrase "disorders of sex differentiation" for the same DSD concept. DSD has been controversial among many intersex individuals, advocates, activists, and community organizations owing to its use of "disorders," which pathologizes atypically sexed bodies prompting imperatives for medical intervention. Many thus reject the term DSD, preferring instead intersex. In this paper, we use intersex except when quoting or referencing the regulations themselves or addressing policymakers' use of the term DSD.

5. We are grateful to Lisa Bavington for bringing the publication by de Visser to our attention.

6. This has been confirmed through several sources including a talk given in 2012 by Stéphane Bermon, a key IAAF policymaker, at the International Convention on Science, Education and Medicine in Sport (ICSEMIS) and interviews with other policymakers.

7. Sport policymakers have variably and interchangeably used the terms "sex testing" or "sex tests," and "gender tests" or "gender verification" to refer to the vetting of women athletes for eligibility in the female category. In this paper, unless we are directly quoting a source, we use "sex testing." One of the key points of this paper is to show how gender ideologies are embedded in assessments of sex, including those that are thought to be "purely" biological (Kessler and McKenna 1978). Drawing on Kessler and McKenna, Westbrook and Schilt use "'determining gender' as an umbrella term for these diverse practices of placing a person in a gender category" (2014, 34). We are sympathetic to that usage, which points to the social nature of these processes. We opt for different usage here to clearly spotlight the fact that official regulations have aimed to link eligibility to biological criteria, in this case testosterone, and at the same time to show in detail how the assessment of testosterone and testosterone function are social phenomena.

8. We have written extensively, both separately and together, about how scientific notions of "normal" and "atypical" sex are always deeply entangled with commitments to heteronormative relationships among sex, gender, and sexuality (e.g., Karkazis 2008; Jordan-Young 2010; Karkazis et al. 2012). In this piece, we do not deal in any detail with the operations of homophobia, primarily because the techniques for assessing sexuality among women who are identified as having high T via this regulation are the most opaque of the assessments. The IAAF regulation includes six mentions of "anamnestic" data as an important element of assessing the degree of virilization. Anamnesis typically means an interview on a "patient's" subjective medical and psychiatric history, but the term has a particularly strong history of use in sexology, where it specifically indicates an interview on the subjective experiences of gender and sexuality. The only direct indication of the content of anamnestic interviews or how they should be used to assess virilization is found in Fénichel et al., where the authors report that none of the four young women athletes "reported male sex behavior" (2013, E1056)—a confused and confusing locution that we presume means that the women did not have women sex partners. The lack of specific direction in terms of how to interpret anamnestic data is a signal that regulators believe "virilized" sexuality can simply be recognized by anyone who looks, an assumption that closely conforms to our prior observations of heteronormativity in medical science (Karkazis 2008; Jordan-Young 2010).

9. The IAAF and IOC regulation and much discussion about it use the terminology "female athletes" or "female hyperandrogenism." The term "female" has strong biological connotations, and this may indeed be the reason that the term is preferred by sport regulators. We understand that many women athletes also refer to themselves and their competitive category as comprising "females" rather than women. Nonetheless, in this paper, we have opted to use the words "woman" or "women" rather than "female(s)" in order to highlight the fact that we are interested in social operations of gender.

10. Goya also painted a nearly identical work titled *La Maja Vestida*—the clothed maja—which portrays the same woman draped over a green divan and propped up by pillows, but this time clad in a clinging, transparent white dress. Bermon not only chose one of Goya's *La Maja* paintings for his presentation; he chose the naked one.

11. Showing that similar progress narratives operate across political lines and domains of discourse, Magubane has offered a sustained analysis of feminist scholarship on Caster Semenya, showing that feminist and queer scholars have often perpetuated the association of modernity, knowledge, and the West.

12. Here's a sleight of hand that we do not have room to address fully in this paper: the regulation and official statements related to it not only merge high T with intersex, but flatten intersex into a singular thing. This flattening obscures a great deal of empirical and logical slippage in their rationale for the regulation.

13. Bavington notes that the IAAF regulation specifically stipulates that the "burden of proof" for partial androgen insensitivity is "put on the athlete precisely because it is so difficult to prove" (2016, 124).

References

5 Live Sport. 2016. "Radcliffe: Caster Semenya Rio Gold 'Won't Be Sport.'" July 21. http://www.bbc.co.uk/programmes/p0425m52.

Adjepong, L. Anima, and Ben Carrington. 2014. "Black Female Athletes as Space Invaders." In *Routledge Handbook of Sport, Gender and Sexuality*, edited by Jennifer Hargreaves and Eric Anderson, 169–78. London: Routledge.

Amandla Awethu. 2016. "Stop the Bullying of Caster Semenya." https://awethu.amandla.mobi/petitions/stop-the-bullying-of-caster-semenya.

Associated Press. 2010. "Caster Semenya's Comeback Statement in Full." *Guardian*, March 30. http://www.theguardian.com/sport/2010/mar/30/caster-semenya-comeback-statement.

Azziz, Ricardo, Enrico Carmina, ZiJiang Chen, Andrea Dunaif, Joop S. E. Laven, Richard S. Legro, Daria Lizneva, Barbara Natterson-Horowtiz, Helena J. Teede, and Bulent O. Yildiz. 2016. "Polycystic Ovary Syndrome." *Nature Reviews. Disease Primers* 2: 16057.

Bavington, L. Dawn. 2016. "Regulating Hyperandrogenism in Female Athletes: The History and Current Politics of Sex-Control in Women's Sport." PhD diss., University of Otago.

Bermon, Stéphane. 2012. "New Eligibility Rules for Female Competitions." Paper presented at the ICSEMIS, Glasgow, Scotland, July 21.

Bermon, Stéphane, Martin Ritzen, Angelica Hirschberg, and Thomas Murray. 2013. "Are the New Policies on Hyperandrogenism in Elite Female Athletes Really Out of Bounds? Response to 'Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes.'" *American Journal of Bioethics* 13 (5): 63–65.

Boudon, Corinne, Serge Lumbroso, Jean-Marc Lobaccaro, Maria Szarras-Czapnik, Thomas E. Romer, Patrick Garandeau, Pedro Montoya, and Charles Sultan. 1995. "Molecular Study of the 5 Alpha-Reductase Type 2 Gene in Three European Families with 5 Alpha-Reductase Deficiency." *The Journal of Clinical Endocrinology and Metabolism* 80 (7): 2149–53.

Brook, Benedict. 2016. "South African Athlete Caster Semenya Reportedly under Armed Guard at Rio Olympics Following Safety Fears." *NewsComAu*, August 17. http://www.news.com.au/sport/olympics/south-african-athlete-caster-semenya-reportedly-under-armed-guard-at-rio-olympics-following-safety-fears/news-story/d0fd6608d4d2aff4ba98cf9a2c6d0664.

Browning, Ella. 2016. "Rupturing the World of Elite Athletics: A Feminist Critical Discourse Analysis of the Suspension of the 2011 IAAF Regulations on Hyperandrogenism." PhD diss., University of South Florida.

Carpenter, Morgan. 2016. "The Human Rights of Intersex People: Addressing Harmful Practices and Rhetoric of Change." *Reproductive Health Matters* 24 (47): 74–84.

Cahn, Susan. 1998. *Coming on Strong: Gender and Sexuality in Twentieth-Century Women's Sports*. Cambridge, MA: Harvard University Press.

CAS. 2015. "CAS2014/A/3759 Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)." Lausanne, Switzerland: Court of Arbitration for Sport. http://www.tas-cas.org/fileadmin/user_upload/AWARD_3759__FINAL___REDACTED_FOR_PUBLICATION_.pdf

Collins, Patricia Hill. 1990. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*. Boston, MA: Unwin Hyman.

Cooky, Cheryl, and Shari L. Dworkin. 2013. "Policing the Boundaries of Sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy." *Journal of Sex Research* 50 (2): 103–11.

Cooky, Cheryl, Ranissa Dycus, and Shari L. Dworkin. 2013. "'What Makes a Woman a Woman?' Versus 'Our First Lady of Sport': A Comparative Analysis of the United States and the South African Media Coverage of Caster Semenya." *Journal of Sport and Social Issues* 37 (1): 37–56.

Davis, Georgiann. 2011. "'DSD Is a Perfectly Fine Term': Reasserting Medical Authority through a Shift in Intersex Terminology." *Advances in Medical Sociology* 12: 155–82

———. 2015. *Contesting Intersex: The Dubious Diagnosis*. New York: New York University Press.

De la Chapelle, Albert. 1986. "The Use and Misuse of Sex Chromatin Screening for 'Gender Identification' of Female Athletes." *Journal of the American Medical Association* 256 (14): 1920–23.

De Visser, Ellen. 2013. "Topatletes Laten Teelballen Verwijderen Op Last van IAAF." *De Volkskrant*, May 25. http://www.volkskrant.nl/wetenschap/topatletes-laten-teelballen-verwijderen-op-last-van-iaaf~a3446744/.

Doyle, Jennifer. 2013. "Dirt off Her Shoulders." *GLQ: A Journal of Lesbian and Gay Studies* 19 (4): 419–33.

Dworkin, Shari L. 2001. "'Holding Back': Negotiating a Glass Ceiling on Women's Muscular Strength." *Sociological Perspectives* 44 (3): 333–50.

Dworkin, Shari L., Amanda Lock Swarr, and Cheryl Cooky. 2013. "(In) Justice in Sport: The Treatment of South African Track Star Caster Semenya." *Feminist Studies* 39 (1): 40–69.

Epstein, David. 2014. *The Sports Gene: Inside the Science of Extraordinary Athletic Performance*. London: Yellow Jersey Press.

Eisenberg-Guyot, Jerzy. 2016. Twitter posts. July 13, 9:30 a.m. https://twitter.com/JerzyEisenGuyot/.

Fausto-Sterling, Anne. 2000. *Sexing the Body: Gender Politics and the Construction of Sexuality*. New York, NY: Basic Books.

Fénichel, Patrick, Françoise Paris, Pascal Philibert, Sylvie Hieronimus, Laura Gaspari, Jean-Yves Kurzenne, Patrick Chevallier, Stéphane Bermon, Nicolas Chevalier, and Charles Sultan. 2013. "Molecular Diagnosis of 5 Alpha-Reductase Deficiency in 4

Elite Young Female Athletes through Hormonal Screening for Hyperandrogenism." *Journal of Clinical Endocrinology & Metabolism* 98 (6): E1055–59.

Foxsports. 2009. "AP NewsBreak: IOC to Hold Meeting on Gender." October 27. http://www.foxsports.com/olympics/story/ap-newsbreak-ioc-to-hold-meeting-on-gender-cases2-102709.

Gordon, Avery F. 2007. "'Who's There?': Some Answers to Questions about Ghostly Matters." Talk presented at UnitedNationsPlaza (Berlin), October 22–26. http://www.averygordon.net/writing-haunting/whos-there/.

Goodman, Neil, Maya Bledsoe, Rhoda Cobin, Walter Futterweit, Joseph Goldzieher, Steven Petak, Keith Smith, Emil Steinberger, and American Association of Clinical Endocrinologists Hyperandrogenic Disorders Task Force. 2001. "American Association of Clinical Endocrinologists Medical Guidelines for Clinical Practice for the Diagnosis and Treatment of Hyperandrogenic Disorders." *Endocrine Practice* 7 (2): 120–34.

Guardian Sport. 2016. "Sebastian Coe Indicates IAAF Will Challenge Female Testosterone Ruling." *Guardian*, August 11. https://www.theguardian.com/sport/2016/aug/11/caster-semenya-sebastian-coe-iaaf-cas-testosterone-olympics.

Healy, Marie-Louise, James Gibney, Claire Pentecost, Mike J. Wheeler, and Peter H. Sönksen. 2014. "Endocrine Profiles in 693 Elite Athletes in the Post-Competition Setting." *Clinical Endocrinology* 81 (2): 294–305.

Henne, Kathryn. 2015. *Testing for Athlete Citizenship: Regulating Doping and Sex in Sport*. New Brunswick, NJ: Rutgers University Press.

Hoad, Neville. 2010. "'Run, Caster Semenya, Run!' Nativism and the Translations of Gender Variance." *Safundi* 11 (4): 397–405.

Holloway, Karla FC. 2011. *Private Bodies, Public Texts: Race, Gender, and a Cultural Bioethics*. Durham, NC: Duke University Press.

IAAF. 2011. "IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competitions." https://www.dropbox.com/s/tjc172qod6b9zf2/IAAF%20Hyperandrogenism%20Policy%202011.pdf?dl=0.

ICSEMIS. 2016. "Introduction to ICSEMIS." http://www.icsemis2016.org/.

IOC. 2011. "IOC Addresses Eligibility of Female Athletes with Hyperandrogenism." April. http://www.olympic.org/content/press-release/ioc-addresses-eligibility-of-female-athletes-with-hyperandrogenism/.

———. 2012. "IOC Regulations on Female Hyperandrogenism." Lausanne, Switzerland: International Olympic Committee. https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf.

———. 2014. "IOC Regulations on Female Hyperandrogenism." Lausanne, Switzerland: International Olympic Committee. https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/IOC-Regulations-on-Female-Hyperandrogenism.pdf.

Jordan-Young, Rebecca M. 2010. *Brain Storm: The Flaws in the Science of Sex Differences*. Cambridge, MA: Harvard University Press.

Jordan-Young, Rebecca M., and Katrina Karkazis. 2012. "Some of Their Parts." *Anthropology News*, 53 (6): S12–S14.

Jordan-Young, Rebecca M., and Katrina Karkazis. 2017. "The Powers of Testosterone:

Race, Nation, and the Regulation of Women Athlete." Annual Meeting of the Society for Social Studies of Science, Boston, MA, August 30.

Jordan-Young, Rebecca M., Peter Sönksen, and Katrina Karkazis. 2014. "Sex, Health, and Athletes." *British Medical Journal* 348 (May): 20–21.

Karkazis, Katrina. 2008. *Fixing Sex: Intersex, Medical Authority, and Lived Experience*. Durham, NC: Duke University Press.

———. 2016. "The Ignorance Aimed at Caster Semenya Flies in the Face of the Olympic Spirit." *Guardian*, August 23. https://www.theguardian.com/commentisfree/2016/aug/23/caster-semenya-olympic-spirit-iaaf-athletes-women.

Karkazis, Katrina, and Rebecca Jordan-Young. 2013. "The Harrison Bergeron Olympics." *American Journal of Bioethics* 13 (5): 66–69.

Karkazis, Katrina, and Rebecca M. Jordan-Young. 2015. "Debating a Testosterone 'Sex Gap.'" *Science* 348 (6237): 858–60.

Karkazis, Katrina, Rebecca M. Jordan-Young, Georgiann Davis, and Silvia Camporesi. 2012. "Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes." *The American Journal of Bioethics* 12 (7): 3–16.

Kessler, Suzanne, and Wendy McKenna. 1978. *Gender: An Ethnomethodological Approach*. New York: John Wiley and Sons.

Krane, Vikki, Precilla Yee L. Choi, Shannon M. Baird, Christine M. Aimar, and Kerrie J. Kauer. 2004. "Living the Paradox: Female Athletes Negotiate Femininity and Muscularity." *Sex Roles* 50 (5–6): 315–29.

Lee, Peter A., Christopher P. Houk, Syed F. Ahmed, and Ieuan A. Hughes. 2006. "Consensus Statement on Management of Intersex Disorders." *Pediatrics* 118 (2): e488–500.

Ljungqvist, Arne. 2012. "New Eligibility Rules for Female Competitions." Paper presented at the ICSEMIS, Glasgow, Scotland, July 21.

Macharia. 2009. "On Caster Semenya." *Gukira*. September 20. https://gukira.wordpress.com/2009/09/20/on-caster-semenya/.

Magubane, Zine. 2014. "Spectacles and Scholarship: Caster Semenya, Intersex Studies, and the Problem of Race in Feminist Theory." *Signs: Journal of Women in Culture and Society* 39 (3): 761–85.

Maimoun, Laurent, Pascal Philibert, Benoit Cammas, Françoise Audran, Philippe Bouchard, Patrick Fénichel, Maryse Cartigny, Catherine Pienkowski, Michel Polak, Nicos Skordis, et al. 2011. "Phenotypical, Biological, and Molecular Heterogeneity of 5α-Reductase Deficiency: An Extensive International Experience of 55 Patients." *The Journal of Clinical Endocrinology and Metabolism* 96 (2): 296–307.

Marshall, W. A. and James M. Tanner. 1969. "Variations in Pattern of Pubertal Changes in Girls." *Archives of Disease in Childhood* 44 (235): 291–303.

Martínez-Patiño, Maria. 2005. "Personal Account: A Woman Tried and Tested." *Lancet* 366 Suppl. 1 (December): S38.

M'charek, Amade, Katharina Schramm, and David Skinner. 2014. "Technologies of Belonging: The Absent Presence of Race in Europe." *Science, Technology, & Human Values* 39 (4) 459–67.

McRae, Donald. 2016. "The Return of Caster Semenya: Olympic Favourite and Ticking Timebomb." *Guardian*, July 29. https://www.theguardian.com/sport/2016/jul/29/the-return-of-caster-semenya-olympic-favourite-and-ticking-timebomb.

Merck, Mandy. 2010. "The Question of Caster Semenya." *Radical Philosophy* 160 (March/April). https://www.radicalphilosophy.com/commentary/the-question-of-caster-semenya.

Munro, Brenna. 2010. "Caster Semenya: Gods and Monsters." *Safundi: The Journal of South African and American Studies* 11 (4): 383–96.

Nehm, Ross, and Rebecca M. Jordan-Young. 2008. "Sex Hormones in Secondary School Biology Textbooks." *Science & Education* 17 (10): 1175–90.

Nyong'o, Tavia. 2010. "The Unforgivable Transgression of Being Caster Semenya." *Women & Performance: A Journal of Feminist Theory* 20 (1): 95–100.

OII Australia. n.d. "Frequently Asked Questions (FAQs): Human Rights Reports." *OII Australia—Intersex Australia*. https://oii.org.au/faq/.

O'Sullivan, Sonia. 2016. "Sonia O'Sullivan: Intersex Athletes and the Problem of Testosterone." *Irish Times*, June 9. http://www.irishtimes.com/sport/sonia-o-sullivan-intersex-athletes-and-the-problem-of-testosterone-1.2677419.

Oudshoorn, Nelly. 1994. *Beyond the Natural Body: An Archeology of Sex Hormones*. London: Routledge.

Pieper, Lindsay Parks. 2014. "Sex Testing and the Maintenance of Western Femininity in International Sport." *The International Journal of the History of Sport* 31 (13): 1557–76.

———. 2016. *Sex Testing: Gender Policing in Women's Sports*. Champaign: University of Illinois Press.

Rothenberg, Ben. 2015. "Tennis's Top Women Balance Body Image with Ambition." *New York Times*, July 10. https://www.nytimes.com/2015/07/11/sports/tennis/tenniss-top-women-balance-body-image-with-quest-for-success.html.

Rowbottom, Mike. 2016. "Coe Admits IAAF and IOC 'Surprised' by CAS Ruling That Allows Semenya to Compete at Rio 2016." *Inside the Games*, August 11, http://www.insidethegames.biz/articles/1040505/coe-admits-iaaf-and-ioc-surprised-by-cas-ruling-that-allows-semenya-to-compete-at-rio-2016.

Rowbury, Shannon. 2016. "Shannon Rowbury Speaks Out . . ." YouTube video, 2:44, Posted July 7. https://www.youtube.com/watch?v=qMQJeL302Qs.

SAHO (South African History Online). 2017. "Sara 'Saartjie' Baartman." Last updated August 3. http://www.sahistory.org.za/people/sara-saartjie-baartman.

Schuhmann, Antje. 2010. "Taming Transgressions: South African Nation Building and 'Body Politics.'" *Agenda* 24 (83): 95–106.

Schultz, Jaime. 2011. "Caster Semenya and the 'Question of Too': Sex Testing in Elite Women's Sport and the Issue of Advantage." *Quest* 63 (2): 228–43.

Sönksen, Peter, Malcolm A. Ferguson-Smith, L. Dawn Bavington, Richard I. G. Holt, David A. Cowan, Don H. Catlin, Bruce Kidd, Georgiann Davis, Paul Davis, Lisa Edwards, et al. 2015. "Medical and Ethical Concerns Regarding Women with Hyperandrogenism and Elite Sport." *The Journal of Clinical Endocrinology and Metabolism* 100 (3): 825–27.

Ticktin, Miriam I. 2011. *Casualties of Care: Immigration and the Politics of Humanitarianism in France*. Berkeley: University of California Press.

Tucker, Ross. 2016. Twitter post. July 13, 10:07 a.m. https://twitter.com/Scienceofsport/.

Van Den Wijngaard, Marianne. 1997. *Reinventing the Sexes: The Biomedical Construction of Femininity and Masculinity*. Bloomington, IL: Indiana University Press.

Viloria, Hilda, and Maria Martínez-Patiño. 2012. "Reexamining Rationales of 'Fairness': An Athlete and Insider's Perspective on the New Policies on Hyperandrogenism in Elite Female Athletes." *The American Journal of Bioethics* 12 (7): 17–19.

Wells, Cassandra. 2010. "Diagnosing Sex–Gender Verification and the IOC." *Proceedings: International Symposium for Olympic Research*, 301–11. London, Ontario, Canada. http://library.la84.org/SportsLibrary/ISOR/isor2010zg.pdf.

Westbrook, Laurel, and Kristen Schilt. 2014. "Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System." *Gender & Society* 28 (1): 32–57.

Yildiz, Bulent O., Sheila Bolour, Keslie Woods, April Moore, and Ricardo Azziz. 2010. "Visually Scoring Hirsutism." *Human Reproduction Update* 16 (1): 51–64.