# Gender Justice GU4506 Spring 2020 Professor Katherine Franke William & June Warren Hall, Room 417

# Course Reader – Volume 1

# **Course Introduction**

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# February 3th: Early Framing

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

# February 10<sup>th</sup>: Paradigms of Gender Equality

 Nancy Levit and Robert R.M. Verchick, <u>Feminist Legal Theories</u>, in <u>Feminist Legal</u> <u>Theory</u>, 11 (New York University Press, 2016).

# The Body As A Gender Justice Project

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- Richards v. USTA
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- Bauer v. Holder
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# Women

# **A Feminist Perspective**

Fifth Edition

Edited by Jo Freeman



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# The Revolution for Women in Law and Public Policy

INSTITUTIONS OF SOCIAL CONTROL

### 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.<sup>1</sup>

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

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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."<sup>2</sup> The consequences were described by Edward Mansfield when he wrote the first major American analysis of *The Legal Rights, Liabilities and Duties of Women* in 1845.

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

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

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

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

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

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

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

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

Institutions of Social Control 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.<sup>10</sup> And in the 1960s a married Texas woman successfully defended against the United States government's efforts to collect a judgment against her for an unpaid Small Business Administration loan on the grounds that her disability to bind her separate estate by contract had not been removed by court decree as required by Texas law.<sup>11</sup>

#### PROTECTIVE LABOR LEGISLATION

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

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

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

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

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

#### CIVIL AND POLITICAL RIGHTS

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

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

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

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

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

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

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

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

# Sex and the Supreme Court

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

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

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

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

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

the right to an impartially selected jury... does not entitle one... to a jury tailored to the circumstances of the particular case, ... It requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, 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.<sup>23</sup>

#### THE FOURTEENTH AMENDMENT

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

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

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

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

This umbrella did not protect everyone or every right. Instead, in the post-New Deal era, two tiers of equal protection analysis emerged.<sup>29</sup> Not all legal discrimination was prohibited, only *invidious* discrimination. If a *compell-ing* 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

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

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

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

#### THE TURNING POINT: REED AND FRONTIERO

It was not until 1971 that the Court demonstrated displeasure at a State's "drawing a sharp line between the sexes,"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.<sup>32</sup> Although unexpected, this development was not unforeseeable. During the previous few years the Court had been adding a bit of bite to the rational basis test by looking more closely at state rationalizations as they applied to some statuses or some interests that did not trigger strict scrutiny.<sup>33</sup> In the previous two years the emerging women's movement had become publicly prominent, and the Equal Rights Amendment had been battling its way through Congress.<sup>34</sup> Despite the Court's assertion that "the Constitution does not require legislatures to reflect sociological insight, or shifting social standards,"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.<sup>36</sup>

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

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

#### INTERMEDIATE SCRUTINY

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

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

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

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

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

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

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

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

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

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

#### JURY SERVICE

Even though intermediate scrutiny was not in place until 1976, by 1975 the Supreme Court was ready to take a new look at some state laws it had previously upheld. One of these concerned jury service. In the years since Hoyt more women had been added to the jury roles, and no state excluded them totally, but they did not serve equally everywhere.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".<sup>51</sup>

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

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

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

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

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

#### **EDUCATION**

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

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

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

students, but they could not matriculate. A male registered nurse who lived in the same town as MUW wanted a B.A. degree in nursing but didn't want to move to attend one of the other two schools in Mississippi that offered that degree coeducationally. In a five to four decision written by the newest member of the Court, Justice Sandra Day O'Connor, the Court held that "MUW's policy of excluding males from admission . . . tends to perpetuate the stereotyped view of nursing as an exclusively woman's job" and thus is not consistent with the State's claimed justification that the single-sex admissions policy "compensates for discrimination against women and, therefore, constitutes educational affirmative action." Instead the Court found that the "policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men."<sup>37</sup>

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

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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.<sup>61</sup>

#### NEW PROTECTIONS

The Constitution protects individuals only from action by the state, not from action by private parties. Thus private parties can discriminate on any basis they choose unless the state says otherwise. Many statutes have been passed prohibiting discrimination; sometimes those statutes are challenged as themselves violative of a Constitutional provision. The Supreme Court has heard three cases brought by private associations challenging restrictions on their membership policies as interfering with their First Amendment right of free association. California, Minnesota, and New York City all passed ordinances prohibiting sex (and some other) discriminations by some types of clubs often thought of as private. Their rationale was that many of these clubs were in fact arenas for the conduct of business or the exchange of information important to people's careers, and that therefore discrimination was "invidious." The Court has unanimously upheld all of these statutes, ruling that any "slight infringement on . . . members' rights of expressive association . . . is justified because it serves the State's compelling interest in eliminating discrimination against women."<sup>62</sup>

# CURRENT RATIONALES FOR SEX-DISCRIMINATORY LAWS

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

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

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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 twelveyear 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, not for men over women."<sup>69</sup>

# PREGNANCY AND PARENTHOOD

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

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

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

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

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

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

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

#### ABORTION

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

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

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

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

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

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.<sup>85</sup>

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

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

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

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

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

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# Lower Federal and State Cases

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

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

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

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

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

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

# Legislative Gains

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

#### EQUAL PAY

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

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

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

#### TITLE VII AND THE EEOC

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

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

Even with protective laws out of the way, there were many long-standing practices that treated women differently than men. The initial court decisions were not as consistently in women's favor. For example, Martin-Marietta Corporation would not employ the mothers of preschool children on its assembly lines, even though it would hire the fathers of those children. Since the company did in fact hire lots of women, the lower federal courts ruled that it did not discriminate. Although the Supreme Court rejected this "sexplus" theory, it did not do so unequivocally. Instead it remanded the case to a lower court to ascertain whether having preschool children actually interfered with a woman's job performance.<sup>107</sup> Despite this ambiguity, the Court's rejection of "sex-plus" was used by lower courts to relieve women of burdens not imposed on male employees even when the job was restricted to women. Flight attendants, for example, had to be not only female but also unmarried and under thirty-two, and they could not wear glasses or be even slightly overweight. Several federal courts ended these restrictions as well as the prohibition on men.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.<sup>109</sup>

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

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

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

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

These job evaluation systems generally showed that male-dominated jobs paid 20 to 40 percent more than female-dominated jobs of equal point values. Since jobs were often segregated by sex, some plants even had separate pay scales that deliberately set the rate for women's jobs below men's jobs with equal points. During the 1970s labor unions began to argue that pay rates should be equalized. They did this because their usual demands for higher wages through collective bargaining were stymied by the poor economic climate. Demands for pay equity, with the possibility of a lawsuit lurking in the background, were one of the few ways available to improve at least some of their members' compensation without a strike. The leaders in making comparable worth claims and filing suits have been the unions of government employees, particularly the American Federation of State, County and Municipal Employees. This is partially because government jobs are heavily female and partially because political pressure could be put on governors and state legislatures to do the job evaluation studies necessary to illuminate wage disparities by sex. During the more affluent 1980s most states commissioned studies, and many raised wages as a result. There were some strikes and some litigation. When it looked like these cases might succeed in incorporating pay equity claims into Title VII law, the Reagan administration threw the weight of the Justice Department behind the opposition, with both the EEOC and the Civil Rights Commission joining the chorus. The ironic outcome was that pay equity was stopped at the national level even while it was succeeding at the state and local levels.<sup>114</sup>

The Revolution for Women in Law and Public Policy

#### THE EQUAL RIGHTS AMENDMENT

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

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

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

#### OTHER LEGISLATION

Although the ERA was not ratified, the two-year battle had some very beneficial side effects. It created a climate in Congress that there was a serious constituent interest in women's rights and established liaisons between feminist organizations and Congressional staff. With this impetus the 92nd Congress, which sent the ERA to the states, passed a bumper crop of women's rights legislation in 1971–72. In addition to the ERA there were laws that (1) expanded the coverage of Title VII and the enforcement powers of the EEOC; (2) prohibited sex discrimination in all federally aided education programs (Title IX); (3) added sex discrimination to the jurisdiction of the U.S. Commission on Civil Rights; (4) prohibited sex discrimination in state programs funded by federal revenue sharing; (5) provided free day care for children of poor families and a sliding fee scale for higher income families (which was vetoed by President Nixon); (6) provided for a child care tax deduction for some parents; (7) added prohibitions against sex discrimination to a plethora of federally funded programs, including health training, Appalachian redevelopment, and water pollution.

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

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

#### THE FAMILY—AGAIN

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

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

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

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

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

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

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

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

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

<sup>1</sup> During the 1980s courts and legislatures continued to alter the common law rules on the marital relationship. Economic obligations have become more equal. Some make both spouses equally liable for each other's debts. Some make the contracting spouse primarily liable and the other secondarily liable. Some have retained the common law rule with exceptions for specific circumstances.<sup>124</sup> Others found that "neither husband nor wife is liable for necessaries supplied to the other."<sup>125</sup> Most states now allow the criminal prosecution of a husband for raping his wife. Interspousal immunity for conspiracy and from lawsuits has been largely abolished. Immunity from testifying against a spouse is now at the option of the witness, except for "privately disclosed [information] in the confidence of the marital relationship."<sup>126</sup> Virtually all states permit both husband and wife to sue third parties for loss of consortium.

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

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

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

# The Challenges Ahead

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

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

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

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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 WomenWorkers* 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

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Institutions of Social Control 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 twentyfive 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).

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

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Institutions of Social Control 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).

The Revolution for Women in Law and Public Policy Institutions of Social Control 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



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

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

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

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

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

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

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

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

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

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

Such conditions made it obvious to women within the Black Panther Party that liberation was not something we could obtain separately, nor would consciousnessraising 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"

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

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

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

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

In a society defined by its creation of a class of human property, gender has maintained the demarcation that race historically imposed between those who owned that property and those who became property. The alleged benefits of the cult of femininity did not accrue to the black woman, who was neither protected within the white patriarchal structure nor excluded from the market.<sup>15</sup> When the slave woman's children, her labor, and her person legally became a commodity, white women were both protected and subordinated by the authority, autonomy, and property of their fathers or husbands. An irony of the system that extracted the greatest labor benefits conceivable from its workers was that it released enslaved women from the conventions evoked by gender among the dominant group. But, as Angela Davis has cautioned, the onerous nature of this brutal equality with black men should never be overlooked.<sup>16</sup>

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

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

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

The social isolation, economic deprivation, and blatant terrorism meted out to blacks make it difficult for many to appreciate the subtler subordination and intimidation that women within the dominant community endure. Lacking an appreciation of these women's realities, many black people fail to recognize that women whom they perceive as privileged may in fact feel weak, and therefore they discredit the validity of the feminist movement. Further, the sexist attitudes that belittle and exclude women's contributions from major black institutions, including churches, colleges, and reform organizations, is rarely given the public acknowledgment and condemnation it deserves. The presence of a significant underclass, masses of solid working people, and an affluent middle class among blacks shows that we are neither liberated nor integrated, but have become a fragmented population, scattered through all levels of society from the Pentagon to the prison yard. To elevate awareness of feminist concerns within black communities requires facing hostile opposition and uncomprehending denial. Yet this work may become a new focus for black women's activism. Concern for gender equity knows no color line, and women of every community desperately need more respect.

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

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

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

### NOTES

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

2. Title VII of the Civil Rights Act of 1964 prohibited discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-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

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

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

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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<sup>21.</sup> 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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- 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<sup>1</sup>

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

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

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

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

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

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

The Supreme Court began to whittle down both federal and state Comstock laws during the 1950s. By 1975, the prohibition of materials used for, and information about, contraception and abortion had been ruled unconstitutional. However, although the obscenity provisions have been modified, their fundamental constitutionality has been upheld. Thus it remains a crime to make, sell, mail, or import material which has no purpose other than sexual arousal.  $^{\rm 5}$ 

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."<sup>6</sup> However, public furor over this ostensible problem

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

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

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

homosexuals and other sexual "deviants."

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

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

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

The current period bears some uncomfortable similarities to the 1880s and the 1950s. The 1977 campaign to repeal the Dade County, Florida, gay rights ordinance inaugurated a new wave of violence, state persecution, and legal initiatives directed against minority sexual populations and the commercial sex industry. For the last six years, the United States and Canada have undergone an extensive sexual repression in the political, not the psychological, sense. In the spring of 1977, a few weeks before the Dade County vote, the news media were suddenly full of reports of raids on gay cruising areas, arrests for prostitution, and investigations into the manufacture and distribution of pornographic materials. Since then, police activity against the gay 271

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 threeinch headlines, which claimed to expose a national vice ring organized to lure young boys into prostitution and pornography.<sup>16</sup> Newspapers across the country ran similar stories, most of them worthy of the National Enquirer. By the end of May, a congressional investigation was underway. Within weeks, the federal government had enacted a sweeping bill against "child pornography" and many of the states followed with bills of their own. These laws have reestablished restrictions on sexual materials that had been relaxed by some of the important

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

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

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

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.<sup>19</sup>

It is easy to see someone like Livingston as a victim of the child porn wars. It is harder for most people to sympathize with actual boy-lovers. Like communists and homosexuals in the 1950s, boylovers 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 witchhunt. 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 longsimmering passions of the American right, and sparked an extensive movement to compress the boundaries of acceptable sexual behavior.

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

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

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

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

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

The most ambitious right-wing legislative initiative has been the Family Protection Act (FPA), introduced in Congress in 1979. The Family Protection Act is a broad assault on feminism, homosexuals, non-traditional families, and teenage sexual privacy.<sup>26</sup> The Family Protection Act has not and probably will not pass, but conservative members of Congress continue to pursue its agenda in a more piecemeal fashion. Perhaps the most glaring sign of the times is the Adolescent Family Life Program. Also known as the Teen Chastity Program, it gets some 15 million federal dollars to encourage teenagers to refrain from sexual intercourse, and to discourage them from using contraceptives if they do have sex. and from having abortions if they get pregnant. In the last few years, there have been countless local confrontations over gav 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.<sup>27</sup>

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

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

One such axiom is sexual essentialism – the idea that sex is a natural force that exists prior to social life and shapes institutions. Sexual essentialism is embedded in the folk wisdoms of Western societies, which consider sex to be eternally unchanging, 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.<sup>28</sup> Many historians have come to see the contemporary institutional forms of heterosexuality as an even more recent development.<sup>29</sup> An important contributor to the new scholarship is Judith Walkowitz, whose research has demonstrated the extent to which prostitution was transformed around the turn of the century. She provides meticulous descriptions of how the interplay of social forces such as ideology, fear, political agitation, legal reform, and medical practice can change the structure of sexual behavior and alter its consequences.<sup>30</sup>

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

The new scholarship on sexual behavior has given sex a history and created a constructivist alternative to sexual essentialism. Underlying this body of work is an assumption that sexuality is constituted in society and history, not biologically ordained.<sup>32</sup> This does not mean the biological capacities are not prerequisites for human sexuality. It does mean that human sexuality is not comprehensible in purely biological terms. Human organisms with human brains are necessary for human cultures, but no examination of the body or its parts can explain the nature and variety of human social systems. The belly's hunger gives no clues as to the complexities of cuisine. The body, the brain, the genitalia, and the capacity for language are all necessary for human sexuality. But they do not determine its content, its experiences, or its institutional forms. Moreover, we never encounter the body unmediated by the meanings that cultures give to it. To paraphrase Lévi-Strauss, my position on the relationship between biology and sexuality is a "Kantianism without a transcendental libido."<sup>33</sup>

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

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

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

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

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

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

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

What I call the fallacy of misplaced scale is a corollary of sex negativity. Susan Sontag once commented that since Christianity focused "on sexual behavior as the root of virtue, everything pertaining to sex has been a 'special case' in our culture."<sup>38</sup> Sex law has incorporated the religious attitude that heretical sex is an especially heinous sin that deserves the harshest punishments. Throughout much of European and American history, a single act of consensual anal penetration was grounds for execution. In some states, sodomy still carries twenty-year prison sentences. 279

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 irferior substitute for partnered encounters. Stable, long-term lesbian and gay male couples are verging on respectability, but bar dykes and promiscuous gay men are hovering just above the groups at the very bottom of the pyramid. The most despised sexual castes currently include transsexuals, transvestites, fetishists, sadomasochists, sex workers such as prostitutes and porn models, and the lowliest of all, those whose eroticism transgresses generational boundaries.

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

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

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

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

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

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

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

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

Figure 1 diagrams a general version of the sexual value system. According to this system, sexuality that is "good," "normal" and "natural" should ideally be heterosexual, marital, monogamous, reproductive, and non-commercial. It should be coupled, relational, within the same generation, and occur at home. It should 281

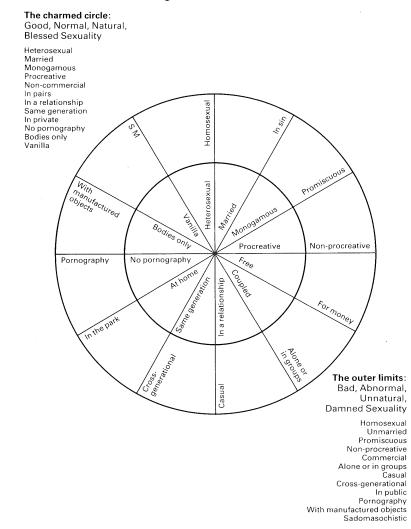


Figure 1 The sex hierarchy: the charmed circle vs the outer limits

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).

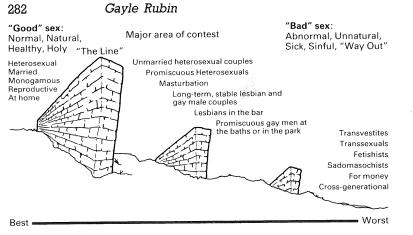




Figure 2 diagrams another aspect of the sexual hierarchy: the need to draw and maintain an imaginary line between good and bad sex. Most of the discourses on sex, be they religious, psychiatric, popular, or political, delimit a very small portion of human sexual capacity as sanctifiable, safe, healthy, 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

### Thinking Sex

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, nonmonogamous, or kinky, as to believe that everyone should be heterosexual, married, or vanilla – though the latter set of opinions are backed by considerably more coercive power than the former.

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

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

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

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

### **III** Sexual transformation

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

#### Michel Foucault<sup>44</sup>

In spite of many continuities with ancestral forms, modern sexual arrangements have a distinctive character which sets them apart from preexisting systems. In Western Europe and the United States, industrialization and urbanization reshaped the traditional rural and peasant populations into a new urban industrial and service workforce. It generated new forms of state apparatus, reorganized family relations, altered gender roles, made possible new forms of identity, produced new varieties of social inequality, and created new formats for political and ideological conflict. It also gave rise to a new sexual system characterized by distinct types of sexual persons, populations, stratification, and political conflict.

The writings of nineteenth-century sexology suggest the appearance of a kind of erotic 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.<sup>45</sup> Although these men engage in extensive homosexual and pedophile behavior, they are neither homosexuals nor pederasts.

Nor was the sixteenth-century sodomite a homosexual. In 1631, Mervyn Touchet, Earl of Castlehaven, was tried and executed for sodomy. It is clear from the proceedings that the earl was not understood by himself or anyone else to be a particular kind of sexual individual. "While from the twentieth-century viewpoint Lord Castlehaven obviously suffered from psychosexual problems requiring the services of an analyst, from the seventeenth century viewpoint he had deliberately broken the Law of God and the Laws of England, and required the simpler services of an executioner."<sup>46</sup> The earl did not slip into his tightest doublet and waltz down to the nearest gay tavern to mingle with his fellow sodomists. He stayed in his manor house and 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.<sup>47</sup>

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

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

Prostitution has undergone a similar metamorphosis. Prostitution began to change from a temporary job to a more permanent occupation as a result of nineteenth-century agitation, legal reform, and police persecution. Prostitutes, who had been part of the general working-class population, became increasingly isolated as members of an outcast group.<sup>49</sup> Prostitutes and other sex workers differ from homosexuals and other sexual minorities. Sex work is an occupation, while sexual deviation is an erotic preference. Nevertheless, they share some common features of social organization. Like homosexuals, prostitutes are a criminal sexual population stigmatized on the basis of sexual activity. Prostitutes and male homosexuals are the primary prey of vice police everywhere.<sup>50</sup> Like gay men, prostitutes occupy well demarcated urban territories and battle with police to defend and maintain those territories. The legal persecution of both populations is justified by an elaborate ideology which classifies them as dangerous and inferior undesirables who are not entitled to be left in peace.

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

### **IV** Sexual stratification

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

Michel Foucault<sup>51</sup>

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

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

Sex law is the most 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 gualified 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 dislodae.

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."<sup>52</sup> Keeping sex from realizing the positive effects of the market economy hardly makes it socialist.

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

The primary mechanism for insuring the separation of sexual generations is age of consent laws. These laws make no distinction between the most brutal rape and the most gentle romance. A 20-year-old convicted of sexual contact with a 17-year-old will face a severe sentence in virtually every state, regardless of the nature of the relationship.<sup>53</sup> Nor are minors permitted access to "adult" sexuality in other forms. They are forbidden to see books, movies, or television in which sexuality is "too" graphically portrayed. It is legal for young people to see hideous depictions of violence, but not to see explicit pictures of genitalia. Sexually active young people are frequently incarcerated in juvenile homes, or otherwise punished for their "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.<sup>54</sup> The more influence one has over the next generation, the less latitude one is permitted in behavior and opinion. The coercive power of the law ensures the transmission of conservative sexual values with these kinds of controls over parenting and teaching.

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

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

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

Although the legal apparatus of sex is staggering, most

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

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

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

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

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

Families play a crucial role in enforcing sexual conformity. Much social pressure is brought to bear to deny erotic dissidents the comforts and resources that families provide. Popular ideology holds that families are not supposed to produce or harbor erotic non-conformity. Many families respond by trying to reform, punish, or exile sexually offending members. Many sexual migrants have been thrown out by their families, and many others are fleeing from the threat of institutionalization. Any random collection of homosexuals, sex workers, or miscellaneous perverts can provide heart-stopping stories of rejection and mistreatment by horrified families. Christmas is the great family holiday in the United States and consequently it is a time of considerable tension in the gay community. Half the inhabitants go off to their families of origin; many of those who remain in the gay 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 nonconformity 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 selfsatisfaction for thousands of vice police, prison officials, psychiatrists, and social workers.<sup>57</sup>

### **V** Sexual conflicts

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

Jeffrey Weeks<sup>58</sup>

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

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

The legal regulation of sexual conduct is another battleground. Lysander Spooner dissected the system of state sanctioned moral coercion over a century ago in a text inspired primarily by the temperance campaigns. In Vices Are Not Crimes: A Vindication of Moral Liberty, Spooner argued that government should protect its citizens against crime, but that it is foolish, unjust, and tyrannical to legislate against vice. He discusses rationalizations still heard today in defense of legalized moralism - that "vices" (Spooner is referring to drink, but homosexuality, prostitution, or recreational drug use may be substituted) lead to crimes, and should therefore be prevented; that those who practice "vice" are non compos mentis and should therefore be protected from their self-destruction by state-accomplished ruin; and that children must be protected from supposedly harmful knowledge.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

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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

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occupy some regular, visible territory. Churches and other antivice 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 lowincome 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.<sup>60</sup> The white slavery hysteria of the 1880s, the anti-homosexual campaigns of the 1950s, and the child pornography panic of the late 1970s were typical moral panics.

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

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

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

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

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

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

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

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

The right wing opposes pornography and has already adopted elements of feminist anti-porn rhetoric. The anti-S/M discourse 299

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.<sup>63</sup>

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

AIDS is both a personal tragedy for those who contract the syndrome and a calamity for the gay community. Homophobes have gleefully hastened to turn this tragedy against its victims. One columnist has suggested that AIDS has always existed, that the Biblical prohibitions on sodomy were designed to protect people from AIDS, and that AIDS is therefore an appropriate punishment for violating the Levitical codes. Using fear of infection as a rationale, local right-wingers attempted to ban the gay rodeo from Reno, Nevada. A recent issue of the *Moral*  *Majority Report* featured a picture of a "typical" white family of four wearing surgical masks. The headline read: "AIDS: HOMO-SEXUAL DISEASES THREATEN AMERICAN FAMILIES."<sup>64</sup> Phyllis Schlafly has recently issued a pamphlet arguing that passage of the Equal Rights Amendment would make it impossible to "legally protect ourselves against AIDS and other diseases carried by homosexuals."<sup>65</sup> Current right-wing literature calls for shutting down the gay baths, for a legal ban on homosexual employment in food-handling occupations, and for statemandated 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<sup>66</sup>

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

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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 antipornography movement, it achieved temporary hegemony over feminist analysis.

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

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

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

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

Similarly, erotic minorities such as sadomasochists and transsexuals are as likely to exhibit sexist attitudes or behavior as any other politically random social grouping. But to claim that they are inherently anti-feminist is sheer fantasy. A good deal of current feminist literature attributes the oppression of women to graphic representations of sex, prostitution, sex education, sadomasochism, male homosexuality, and transsexualism. 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 antivice 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.<sup>72</sup> 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.<sup>73</sup>

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

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

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

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

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

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

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

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.<sup>80</sup>

Adult incest statutes operate in a similar fashion. Contrary to popular mythology, the incest statutes have little to do with protecting children from rape by close relatives. The incest statutes themselves prohibit marriage or sexual intercourse between adults who are closely related. Prosecutions are rare, but two were reported recently. In 1979, a 19-year-old Marine met his 42-year-old mother, from whom he had been separated at birth. The two fell in love and got married. They were charged and found guilty of incest, which under Virginia law carries a maximum ten-year sentence. During their trial, the Marine testified. "I love her very much. I feel that two people who love each other should be able to live together."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.<sup>82</sup>

In a famous S/M case, a man was convicted of aggravated assault for a whipping administered in an S/M scene. There was no complaining victim. The session had been filmed and he was prosecuted on the basis of the film. The man appealed his conviction by arguing that he had been involved in a consensual sexual encounter and had assaulted no one. In rejecting his appeal, the court ruled that one may not consent to an assault or battery "except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing, or wrestling."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.<sup>85</sup> This is yet another version of the notion that sexual dissidents are victims of the subtle machinations of the social system. Weeks and Foucault would not accept such an interpretation, since they consider all sexuality to be constructed, the conventional no less than the deviant.

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

The position which defends the political rights of perverts but which seeks to understand their "alienated" sexuality is certainly preferable to the WAP-style bloodbaths. But for the most part, the sexual moderates have not confronted their discomfort with erotic choices that differ from their own. Erotic chauvinism cannot be redeemed by 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."<sup>88</sup> I went on to argue that "Sex as we know it – gender identity, sexual desire and fantasy, concepts of childhood – is itself a social product."<sup>89</sup> In that essay, I did not distinguish between lust and gender, treating both as modalities of the same underlying social process.

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

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

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

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

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

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

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

In the early days of the contemporary women's movement, a theoretical conflict took place over the applicability of Marxism to gender stratification. Since Marxist theory is relatively powerful, it does in fact detect important and interesting aspects of gender oppression. It works best for those issues of gender most closely related to issues of class and the organization of labor. The issues more specific to the social structure of gender were not amenable to Marxist analysis.

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

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

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

## VII Conclusion

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

#### Colette<sup>93</sup>

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

The legislative restructuring that took place at the end of the nineteenth century and in the early decades of the twentieth was a refracted response to the emergence of the modern erotic system. During that period, new erotic communities formed. It became possible to be a male homosexual or a lesbian in a way it had not been previously. Mass-produced erotica became available, and the possibilities for sexual commerce expanded. The first homosexual rights organizations were formed, and the first analyses of sexual oppression were articulated.<sup>94</sup>

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

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

In Western culture, sex is taken all too seriously. A person is not considered immoral, is not sent to prison, and is not expelled from her or his family, for enjoying spicy cuisine. But an individual may go through all this and more for enjoying shoe leather. Ultimately, of what possible social significance is it if a person likes to masturbate over a shoe? It may even be nonconsensual, 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.

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an excellent discussion of gay oppression in the 1950s which covers many of the areas I have mentioned. The dynamics he describes, however, are operative in modified forms for other erotic populations, and in other periods. The specific model of gay oppression needs to be generalized to apply, with appropriate modifications, to other sexual groups.

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# 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.

# 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—

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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.<sup>1</sup> 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.<sup>2</sup> Two years later, in Frontiero v. Richardson,<sup>3</sup> the WRP argued in an amicus brief<sup>4</sup> 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

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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.<sup>7</sup> 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.<sup>8</sup> Nursing schools could not reject potential students because they were male; attorneys could not reject potential jurors because they were female.<sup>9</sup> In some cases, though, the Court permitted women to recoup such benefits as extra Social Security allotments as compensation for market disadvantages they experience.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

Cultural feminist theory in law drew on the "different voice" scholarship of educational psychologist Carol Gilligan.<sup>13</sup> 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 employmentdiscrimination 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> 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."<sup>17</sup> 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 genderneutral 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."<sup>18</sup>

The question of which model-formal equality or celebration of difference-leads to more fairness is known as the "equal treatmentspecial 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"), <sup>19</sup> 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."<sup>20</sup>

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."<sup>21</sup>

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."<sup>22</sup> 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.<sup>23</sup> 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."<sup>24</sup> 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?"<sup>25</sup>

## 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."<sup>26</sup> 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.<sup>27</sup> 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 grass-roots protest rallies called SlutWalk that took place in Canada, India, Singapore, Mexico, Finland, Germany, South Africa, and numerous cities in the United States.<sup>28</sup> 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."<sup>29</sup> 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."<sup>30</sup> 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.<sup>31</sup>

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."<sup>32</sup> 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.<sup>33</sup>

One method of promoting the traditional patriarchal structure is to discourage same-sex relationships and compel heterosexuality. "Compulsory heterosexuality"<sup>34</sup> 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."<sup>35</sup>

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."<sup>36</sup> 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 "consciousnessraising"—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.<sup>37</sup> 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.<sup>38</sup> 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."<sup>39</sup>

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, middleclass, 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.<sup>40</sup>

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.<sup>41</sup> 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."<sup>42</sup>

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.<sup>43</sup> 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 wellknown essay, Professor Williams later used this experience to explore the social connections among race, sex, crime, and commerce.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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."<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup>

Critical race feminists believe that a jurisprudential method recognizing "that differences are always relational rather than inherent" can lead to liberation.<sup>51</sup> 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.<sup>52</sup>

## 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.<sup>53</sup>

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.<sup>54</sup>

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."<sup>55</sup> 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).<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup> 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."<sup>59</sup> 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,<sup>60</sup> 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.<sup>61</sup> 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<sup>62</sup>—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.<sup>63</sup> 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."<sup>64</sup>

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 humancentered 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.<sup>65</sup>

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.<sup>66</sup> 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,<sup>67</sup> 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,<sup>68</sup> 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."<sup>69</sup> 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."<sup>70</sup> 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."<sup>71</sup>

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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.<sup>72</sup>

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.<sup>73</sup>

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."<sup>74</sup> 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."<sup>76</sup> 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."<sup>77</sup>

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."<sup>78</sup>

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.<sup>79</sup>

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,"<sup>80</sup> 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."<sup>81</sup> 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?

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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).

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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

 See Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 836-37 (1990).
 CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 34 (1987).

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

Richards v. United States Tennis Ass'n, 93 Misc. 2d 713

RENEE RICHARDS, Plaintiff, v UNITED STATES TENNIS ASSOCIA-TION et al., Defendants.

Supreme Court, Special Term, New York County, August 16, 1977

## APPEARANCES OF COUNSEL

Saxe, Bacon & Bolan, P. C. (Michael Rosen and Edward H. Heller of counsel), for plaintiff. Curtis, Mallet, Prevost, Colt & Mosle (Peter K. Leisure of counsel), for United States Tennis Association and another, defendants. Ware, Fletcher & Friedenrich (Laurence Aufmutn of counsel), for Women's Tennis Association, Inc., defendant.

## **OPINION OF THE COURT**

Alfred M. Ascione, J.

Plaintiff, Dr. Renee Richards, *nee* Richard H. Raskind, an ophthalmologist licensed to practice in the State of New York, underwent a sex reassignment operation about two years ago, at the age of 41, "at which time", Dr. Richards avers, "for all

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intents and purposes, I became a female, psychologically, socially and physically, as has been attested to by my doctors." Dr. Richards says that, "I underwent this operation after many years of being a transsexual, a woman trapped inside the body of a man."

As Dr. Richard H. Raskind, plaintiff was an accomplished male tennis player, and in 1974 ranked 3rd in the east and 13th nationally in the men's 35-and-over tennis. Since the sex reassignment operation in 1975, plaintiff has entered nine women's tennis tournaments and has won two tournaments and finished as runner-up in three. Most recently, Dr. Richards, now 43 years of age, reached the finals of the women's singles at the Mutual Benefit Life Open played on August 7, 1977 at the Orange Town Tennis Club in South Orange, New Jersey.

Claiming a violation of the New York State Human Rights Law (Executive Law, § 297, subd 9) and the Fourteenth Amendment to the United States Constitution, plaintiff now seeks a preliminary injunction against the defendants, the United States Tennis Association (USTA), United States Open Committee (USOC) and the Women's Tennis Association (WTA) "so that I shall be allowed to qualify and/or participate in the United States Open Tennis Tournament, as a woman in the Women's Division." The United States Open, the USTA's national championships, is to begin on August 25, 1977, at the West Side Tennis Club, Forest Hills, New York.

Dr. Richards says that she is prevented from qualifying and/or participating in the United States Open as a woman in the women's division since defendants require that she take a sex-chromatin test (also known as the Barr body test) to determine whether she is a female, "which test," she says, "is recognized to be insufficient, grossly unfair, inaccurate, faulty and inequitable by the medical community in the United States for purposes of excluding individuals from sports events on the basis of gender." Plaintiff argues that the criteria for such a test is arbitrary and capricious and does not have a rational basis.

Furthermore, plaintiff claims that she is prevented from qualifying and/or participating in the United States Open due to defendant Women's Tennis Association's failure to rank plaintiff as a woman tennis professional, a necessary prerequisite for qualification and participation in the United States Open. The Barr body test or sex-chromatin test, determines the presence of a second "x" chromosome in the normal female; a male has a "y" chromosome instead, as set forth in detail below.

The sex-chromatin test was first employed by the International Olympic Committee in connection with the 1968 Olympics. The USTA first required a sex determination test for women in connection with the 1976 United States Open, after plaintiff applied to play in women's singles in the Open in July, 1976. Plaintiff demanded that USTA waive the test requirement, which request was rejected by the USTA. However, apparently, plaintiff failed to appear at a qualifying site and, in effect, withdrew her application, rendering academic the question of the test for 1976.

The record is clear that USTA's and USOC's decision to require a sex determination test for the 1976 United States Open, the national championships, was a direct result of plaintiff's application to the 1976 United States Open, and plaintiff's frank presentation of her medical situation in a personal letter to the chairman of the United States Open, Mike Blanchard.

Apparently, until August, 1976, there had been no sex determination test in the 95-year history of the USTA national championships, other than a simple phenotype test (observation of primary and secondary sexual characteristics). It also seems that the USTA has not required the sex-chromatin test for sanctioned tournaments other than the United States Open. The USTA permits each tournament committee to make its own determination as to whether to use the chromatin test.

Eugene Scott, tournament chairman of the Mutual Benefit Life Open held in South Orange, New Jersey, in which Dr. Richards played and reached the finals, avers in an affidavit submitted in support of plaintiff's application:

"I have invited Dr. Renee Richards to play in my tournament and, in fact, she has done so. I extended the invitation to Dr. Richards as a woman because as a tennis tournament chairman based on the information afforded to me, I recognize her as a woman.

"I rejected reliance solely on the Barr body test and instead chose to rely on the Phenotype test which concerns itself with

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the observation of primary and secondary sexual characteristics".

According to defendants, their primary concern in instituting the chromatin test is that of insuring fairness. They claim that there is a competitive advantage for a male who has undergone "sex change" surgery as a result of physical training and development as a male. As stated by George W. Gowen for defendant USTA: "We have reason to believe that there are as many as 10,000 transsexuals in the United States and many more female inpersonators or imposters. The total number of such persons throughout the world is not known. Because of the millions of dollars of prize money available to competitors, because of nationalistic desires to excell in athletics, and because of world-wide experiments, especially in the iron curtain countries, to produce athletic stars by means undreamed of a few years ago, the USTA has been especially sensitive to its obligation to assure fairness of competition among the athletes competing in the U.S. Open, the leading international tennis tournament in the United States. The USTA believes that the Olympic type sex determination procedures, are a reasonable way to assure fairness and equality of competition when dealing with numerous competitors from around the world. The USTA believes the question at issue transcends the factual background or medical history of one applicant."

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What is a transsexual? A transsexual is an individual anatomically of one sex who firmly believes he belongs to the other sex. This belief is so strong that the transsexual is obsessed with the desire to have his body, appearance and

social status altered to conform to that of his "rightful" gender. They are not homosexual. They consider themselves to be members of the opposite sex cursed with the wrong sexual apparatus. They desire the removal of this apparatus and further surgical assistance in order that they may enter into normal heterosexual relationships. On the contrary, a homosexual enjoys and uses his genitalia with members of his own anatomical sex. Medical science has not found any organic cause or cure (other than sex reassignment surgery and hormone therapy) for transsexualism, nor has psychotherapy been successful in altering the transsexuals identification with the other sex or his desire for surgical change. (Transsexualism, Sex Reassignment Surgery and the Law, 56 Cornell L Rev 963; also, see, Transsexuals in Limbo: The Search for a LegaL Definition of Sex, 31 Maryland L Rev 236 and The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma, 7 Conn L Rev 288.)

Finally, plaintiff submits the affidavit of women's tennis professional star Billie Jean King, holder of hundreds of titles including Wimbledon and the United States Open, and who defeated male tennis professional Bobby Riggs on national television, in support of plaintiff's application. Billie Jean King states that she and Dr. Richards were doubles teammates in one tournament and that she participated in two tournaments in which Dr. Richards played. It is Billie Jean King's judgment that, "she [plaintiff] does not enjoy physical superiority or strength so as to have an advantage over women competitors in the sport of tennis."

In this court's view, the requirement of defendants that this plaintiff pass the Barr body test in order to be eligible to participate in the women's singles of the United States Open is grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of this State (Executive Law, § 290 *et seq.*). It seems clear that defendants knowingly instituted this test for the sole purpose of preventing plaintiff from participating in the tournament. The only justification for using a sex determination test in athletic 722

competition is to prevent fraud, i.e., men masquerading as women, competing against women.

This court rejects any such suggestion as applied to plaintiff. This court is totally convinced that there are very few biological males, who are accomplished tennis players, who are also either preoperative or postoperative transsexuals.

When an individual such as plaintiff, a successful physician, a husband and father, finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female.

As indicated, this court finds defendants and each of them in violation of plaintiff's rights under the Human Rights Law and, accordingly, pursuant to subdivision 9 of section 297 thereof, plaintiff's application for a preliminary injunction is granted in all respects.

### 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-tofemale transsexual is not a woman within the meaning of the statutes recognizing marriage, and (2) a marriage between a postoperative male-to-female transsexual and a man is void as against public policy.

Affirmed in part, and reversed in part.

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#### IN RE ESTATE OF GARDINER Cite as 42 P.3d 120 (Kan. 2002)

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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

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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.

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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.' 140N.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."

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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. 132 Kan.

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.

#### IN RE ESTATE OF GARDINER Cite as 42 P.3d 120 (Kan. 2002)

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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.

# 136 Kan.

"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.





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THE PAGEANT					

UNITED STATES of *America* PAGEANTS are designed to encourage women to strive to ACHIEVE their hopes, dreams, goals, and aspirations, while making them feel CONFIDENT and BEAUTIFUL inside and out! We believe the true definition of beauty is *"The unique set of combinations that make you, You*." Our motto is to EMPOWER Women, INSPIRE others, & UPLIFT everyone! We focus on women empowerment, promoting positive self-image and advocating a platform of community service, which allows our contestants to rise by lifting others. But more importantly we are an elite sisterhood that gives support and encouragement to inspire each delegate to be the best version of herself!

"There is no tool for development, more effective than the empowerment of women". $_{ ext{Kofi Annan}}$ 

# **ELIGIBILITY REQUIREMENTS & AREAS OF COMPETITION**

As of January 1, 2019

# UNITED STATES OF AMERICA'S TEEN

### **ELIGIBILITY REQUIREMENTS**

- 1. Is between 13-17 years of age
- 2. Is a U.S. citizen or has been granted Permanent Residency by the United States
- 3. Is a resident, works, or goes to school in the state they are competing.
- 4. Is a natural born female.
- 5. Has never posed nude in film or print media.
- 6. Is single, not married, has never been married & has never given birth.

### AREAS OF COMPETITION

PRELIMINARY COMPETITION SCORING Personal Interview- 50% Eitness wear Competition, 25%

#### FINAL COMPETITION SCORING

Fitness wear Competition- 25% Evening Gown Competition- 25% Onstage Question- 50%

# **UNITED STATES OF AMERICA'S MISS**

#### **ELIGIBILITY REQUIREMENTS**

Is between 18-28 years of age
 Is a U.S. citizen or has been granted Permanent Residency by the United States
 Is a resident, works, or goes to school in the state they are competing.
 Is a natural born female.
 Has never posed nude in film or print media.
 Is single, not married, & has never given birth.

#### PRELIMINARY COMPETITION SCORING

Personal Interview- 50% Swim wear Competition- 25% Evening Gown Competition- 25%

#### FINAL COMPETITION SCORING

Swim wear Competition- 25% Evening Gown Competition- 25% Onstage Question- 50%

# **UNITED STATES OF AMERICA'S MS.**

#### **ELIGIBILITY REQUIREMENTS**

1. Is at least 29+ years of age or older

2. Is a U.S. citizen or has been granted Permanent Residency by the United States

3. Is a resident, works, or goes to school in the state they are competing.

4. Is a natural born female.

5. Has never posed nude in film or print media.

6. Is single, divorced, widowed, with or without children

### PRELIMINARY COMPETITION SCORING

Personal Interview- 50% Swim wear Competition- 25% Evening Gown Competition- 25%

#### FINAL COMPETITION SCORING

Swim wear Competition- 25% Evening Gown Competition- 25% Onstage Question- 50%

# **UNITED STATES OF AMERICA'S MRS.**

#### **ELIGIBILITY REQUIREMENTS**

 Is at least 18 years of age or older
 Is a U.S. citizen, married to a U.S. citizen or has been granted Permanent Residency by the United States
 Is a resident, works, or goes to school in the state they are competing.
 Is a natural born female.
 Has never posed nude in film or print media.
 Is legally married and living with with her spouse for at least 6 months.

#### PRELIMINARY COMPETITION SCORING

Personal Interview- 50% Swim wear Competition- 25% Evening Gown Competition- 25%

#### FINAL COMPETITION SCORING

Swim wear Competition- 25% Evening Gown Competition- 25%

Onstage Question- 50%

Shenoa L. Payne, OSB No. 084392 SHENOA PAYNE ATTORNEY AT LAW PC 805 SW Broadway, Ste 407 Portland, Oregon 97205 Phone: (503) 517-8203 spayne@paynelawpdx.com

Attorney for Plaintiff

# IN THE UNITED STATES DISTRICT COURT

# DISTRICT OF OREGON

# PORTLAND DIVISION

ANITA NOELLE GREEN, an individual,

Plaintiff,

v.

MISS UNITED STATES OF AMERICA, LLC, a Nevada limited liability corporation, d.b.a. United States of America Pageants;

Defendants.

Case No.: 3:19-cv-02048

COMPLAINT

Gender-Identity Discrimination (ORS 659A.403)

DEMAND FOR JURY TRIAL

Plaintiff alleges as follows:

# INTRODUCTION

1. Beauty pageants provide females opportunities for academic and professional

success locally, nationally, and internationally. Although criticized historically for objectifying

women, pageants have developed over history to primarily empower women. Although

comparisons of beauty and femininity remain central to the theme of pageants, pageants offer the

women who participate in them significant benefits, such as confidence building, team-building,

public-speaking skills, community service, and scholarship and professional opportunities. It is

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### Case 3:19-cv-02048-MO Document 1 Filed 12/17/19 Page 2 of 10

for these reasons that plaintiff began participating in pageant life in 2017, when she became the first transgender contestant in the Miss Montana USA pageant, and the third transgender contestant in the Miss Universe pageant program. Plaintiff has continued participating in pageants, earning the title of 2019 Miss Earth Elite Oregon and participating in the Miss Earth Elite National pageant.

2. Unfortunately, however, plaintiff was excluded from participating in defendant's pageant program due to an express discriminatory eligibility policy requiring contestants to be "natural born female." This policy, intentionally designed to exclude the specific class to which plaintiff belongs – transgender females – is discriminatory because it denied plaintiff the full and equal advantages and privileges of defendant's services in violation of Oregon's public accommodations law, ORS 659A.403.

### DEFINITIONS

3. **Transgender female**. A person whose gender identity as female differs from the assignment of gender at birth.

4. **Cisgender female**. A person whose gender identity as female correspondents with their assigned gender at birth.

### PARTIES

5. Plaintiff Anita Noelle Green is an openly transgender female and, absent defendant's discriminatory policies, at all relevant times qualified, and still qualifies, as a pageant contestant for defendant's pageant program. Ms. Green was and is at all relevant times a resident of Clackamas, Oregon.

:::

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6. Defendant Miss United States of America, LLC is a Nevada Limited Liability corporation, doing business as "United States of America Pageants." Defendant operates or manages beauty pageants for females throughout the United States, including in Oregon. Defendant is incorporated in Nevada and its principle place of business is in Las Vegas, Nevada.

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### FACTUAL ALLEGATIONS

### **Defendant's Pageant Program**

15. Defendant's pageants are designed to "encourage women to strive to achieve their hopes, dreams, goals, and aspirations, while making them feel confident and beautiful inside and out." Defendant strives to empower women, inspire others, and uplift everyone. Defendant's pageants focus on female empowerment, promoting positive self-image and advocating a platform of community service. Defendant's pageants also promote community and "sisterhood" among pageant participants.

16. Defendant offers a prize package for the winner of the Oregon pageant in each division, including but not limited to entry into the national pageant (valued at over \$2000), along with gear, equipment, and other prizes.

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17. Defendant's pageant program offers women the opportunity to boost their confidence, improve their public speaking skills, have a voice in a public forum, gain public and media exposure, engage in social and civic benefits, build their resume, earn scholarships, and travel.

# Defendant is a Place of Public Accommodation Under Oregon Law

18. Defendant is a business or commercial enterprise. Defendant is in the business of advertising and charging contestants to participate in pageants.

19. Defendant is a place or service that offers privileges or advantages to the female public by providing opportunities for exposure to the public, civic and social benefits, speaking platforms, personal achievement, confidence building, resume fodder, scholarships, media exposure, and travel.

20. Defendant is not in its nature distinctly private. Other than defendant's discriminatory policy excluding transgender females, all United States citizens and residents who are females over the age of 13 and who have never posed nude may compete in a pageant division. Defendant's pageants in Oregon are open to all women who live, work, or learn in Oregon. This is such a large segment of the female population that defendant's rules and qualifications are so unselective that defendant can fairly be said to offer its services to the public and is *de facto* open to the public.

### **Defendant's Discriminatory Policy**

21. Defendant's express eligibility qualifications require that participants must be a "natural born female" to compete in defendant's pageants. Defendant's discriminatory policy

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applies to all divisions – Teen, Miss, Ms., and Mrs.

22. Defendant intentionally enacted this policy to exclude and prevent transgender females from participating in defendant's pageants and receiving the full and equal privileges and advantages of defendant's services.

23. Defendant's policy has no legitimate purpose other than to exclude and discriminate against transgender females. Transgender females gain no physical or other advantage in beauty pageants, including defendant's pageant program.

24. In fact, even though other pageant programs include transgender females, transgender females competing in such pageants have continued to struggle to gain achievements and equality, and to be viewed as equally feminine and as beautiful as their cisgender peers. For example, the Miss Universe pageant franchise ended its ban on transgender contestants in 2012; however, there has been only one transgender titleholder in the entire world – Miss Universe Spain.

25. Despite defendant's stated policy that its pageants are "natural," defendant does not strictly enforce this policy and has no rules against contestants altering their physical bodies in any manner. Thus, the "natural born female" rule is not targeted at preventing surgical enhancements. Rather, it is intended only to exclude, and is enforced only against, a specific class of individuals – transgender females.

26. Defendant's policy on its face is impossible to actually enforce, as it ignores that biological sex is not binary (only male or female), and sex assignment at birth is not conclusive evidence of the sex of a child because components of biological sex are more complex than external genitals and includes chromosomes, genes, hormones, internal genitalia, gender identity,

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and secondary sex characteristics.

# **Plaintiff's Participation in Pageants**

27. On or about September 2017, plaintiff was the first openly transgender contestant in the Miss Montana USA pageant and the third openly transgender contestant ever to compete in a Miss Universe pageant program. Plaintiff's experience in the Miss Montana USA pageant was positive, and she participated in the pageant again in 2018.

28. Plaintiff is the 2019 Oregon Miss Earth Elite titleholder and in June 2019, competed in the 2019 National Miss Earth Elite pageant in Las Vegas, Nevada.

29. For plaintiff, participating in beauty pageants affirms her identity as a woman. Plaintiff participates in pageants because they contribute to her sense of femininity and beauty. However, pageants are much more than just competing on a stage with other women. Plaintiff participates in pageants because they play a vital role in boosting her confidence, improving her public speaking skills, making her feel heard, giving her a public platform in which to discuss important social issues, and allowing her to be a positive and inspiring example to all women.

### **Defendant's Discrimination Against Plaintiff**

30. On or about December 2018, defendant, by and through its National Director,Tanice Smith, sent a friend request to plaintiff on Facebook. Plaintiff accepted.

31. On or about December 20, 2018, plaintiff contacted Ms. Smith via Facebook Messenger and inquired about participating in defendant's pageants. Ms. Smith acknowledged that plaintiff was an Oregon resident and invited plaintiff to participate in the 2019 Oregon pageant.

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32. Plaintiff then asked for a link to the pageant's rules. After viewing the rules, which expressly require contestants to be "natural born females," plaintiff disclosed to Ms. Smith that plaintiff is transgender.

33. At that point, Ms. Smith informed plaintiff that defendant's pageant is a "natural" pageant and that she would be happy to help plaintiff find another pageant program for which she qualified. Plaintiff asked if defendant would be willing to change their policy, and Ms. Smith represented that defendant would not.

34. On or about January 19, 2019, plaintiff submitted an entry fee and application for the "Miss" Division of defendant's pageants. Defendant immediately rejected plaintiff's application and refunded plaintiff's entry fee.

### Injury

35. Defendant's unlawful conduct injured plaintiff and denied her full and equal advantages and privileges in defendant's pageant program. Defendant's unlawful acts have caused plaintiff significant noneconomic damages in the form of mental and emotional distress.

36. Unless enjoined, defendant will continue to engage in the unlawful acts of discrimination described above. Plaintiff has no adequate remedy at law. Therefore, plaintiff is entitled to injunctive relief.

### CLAIM FOR RELIEF Gender-Identity Discrimination ORS 659A.403

37. Plaintiff realleges each and every paragraph above and incorporates them herein.
38. Defendant is a place of public accommodation, as that term is defined in ORS
659A.400.

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SHENOA PAYNE ATTORNEY AT LAW 805 SW BROADWAY, SUITE 407 PORTLAND, OR 97205 (503) 517-8203/ (503) 296-2296 www.paynelawpdx.com 39. Defendant unlawfully discriminated against plaintiff on the basis of plaintiff's gender identity by denying plaintiff the full and equal advantages and privileges of defendant's services.

40. Plaintiff's gender identity was the sole or motivating factor of defendant's unlawful conduct.

41. Defendant's conduct has caused plaintiff noneconomic damages pursuant to ORS659A.885.

42. Plaintiff remains qualified and, absent the discriminatory policy, intends to participate in defendant's pageant program. Plaintiff therefore is entitled to injunctive relief.

43. Pursuant to ORS 659A.885 and ORS 20.107, plaintiff is entitled to her reasonable attorney fees, costs, expert witness fees, and disbursements incurred in prosecuting this claim.

# **PRAYER FOR RELIEF**

WHEREFORE, plaintiff prays that this Court provide trial by jury on all claims triable by jury and a judgment providing the following relief:

- 1. Declaring defendant's policy unlawful and in violation of ORS 659A.403;
- Awarding plaintiff her noneconomic damages in an amount to be determined at trial;
- Awarding plaintiff her reasonable attorney's fees, costs, expert witness fees, and disbursements;
- 4. An order that:
  - Requires defendant to removes its discriminatory eligibility policy regarding "natural born females";

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- b. Requires defendant to cease discrimination and exclusion of transgender females; and
- c. Requires training of all employees and/or agents on compliance with Oregon public accommodations law.
- 5. Awarding plaintiff pre-judgment interest on all damages at the highest rate allowed by law; and
- 6. Granting such other and further relief as the Court deems just and equitable.

# **DEMAND FOR JURY TRIAL**

Pursuant to Fed. R. Civ. P. 38, plaintiff demands trial by jury in this action on all issues triable by a jury.

DATED this 17th day of December, 2019.

SHENOA PAYNE ATTORNEY AT LAW, P.C.

By: *s/ Shenoa L. Payne* Shenoa L. Payne, OSB No. 084392 805 SW Broadway, Ste 470 Portland, Oregon 97205 (503) 517-8205 spayne@paynelawpdx.com

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# An Oregon Woman Is Suing a Beauty Pageant that Excludes Transgender Contestants

wweek.com/news/2019/12/18/an-oregon-woman-is-suing-a-beauty-pageant-that-excludes-transgender-

By Elise Herron, Elise Herron



Last January, Anita Green signed up to compete in a Miss Oregon beauty pageant.

Green, 29, is a trailblazer on the pageant circuit. When she competed in her first pageant, <u>the 2017 Miss Montana USA contest</u>, she was only the third openly transgender contestant in the history of the Miss Universe program.

"This is about giving minorities a voice," Green says. "I believe I'm beautiful, and I want to set an example for all women—cisgender and transgender—that beauty doesn't have to fit into specific molds."

United States of America's Miss Oregon pageant organizers didn't agree. (United States of America Pageants is a different organization from the one that operates Miss Montana USA, even though both pageants bear patriotic initials.) They rejected Green's entry the same

month she applied, returning her \$195 entry fee after the state pageant's director told her it was a "natural" pageant.

Now she's suing in federal court, asking a judge to compel the pageant to allow her to compete, as well as for unspecified monetary damages.

"I felt as though I was being invalidated," Green says. "I felt as though the organization was saying I am not a woman and I'm not woman enough."

United States of America Pageants and its Miss Oregon director, Tanice Smith, declined to comment on the lawsuit.

Green's case appears to be the first of its kind in Oregon. If she wins, it could establish a legal precedent for Oregon and 20 other states with similar nondiscrimination laws, requiring pageant organizers to allow transgender people to compete.

The lawsuit is part of a continued push for equality in the state, says Mikki Gillette, an executive at <u>Basic Rights Oregon</u>, the state's leading LGBTQ advocacy group.

"The last decade or so has seen a real broadening of visibility for transgender people," says Gillette, who is also a transgender woman. "But this kind of message that 'you're not really a woman' is so harmful—for the person it's said to and for young people growing up, trying to understand their place in the world."



"This is about having my voice heard," Green says. "That, to me, is what pageantry is about." (Eva Flis)

United States of America's Miss Oregon pageant, which takes place annually in Corvallis, <u>says on its website</u> it is "designed to encourage women to strive to achieve their hopes, dreams, goals and aspirations, while making them feel confident and beautiful inside and out." State winners qualify to enter the national United States of America Miss pageant and win a prize package valued at more than \$2,000.

Green moved to Oregon from Montana in 2018, and in 2019 won Miss Earth USA's Elite Miss Oregon contest. One year ago, she began corresponding on Facebook with United States of America's Oregon pageant director.

According to Facebook messages acquired by *WW*, Green—who works for a video game company—reached out to Smith, asking for more information about the pageant. Smith sent a link with the pageant rules, and after reading them, Green responded, "You know I'm transgender, right?"

"I did not," Smith wrote back. "Our rules and regulations allow same-sex marriage, however this is a natural pageant."

Smith then offered to help Green find another pageant. Green asked if Smith would "be willing to change the rules to allow transgender women to compete."

"Again," Smith wrote, "we would be happy to help you find a pageant that you qualify for, however at this time we do not anticipate the rules changing."

"Well," Green responded, "I'll talk to my attorney about this then because discrimination is unacceptable. This is clearly discrimination."

"I am sorry that you feel that way," Smith replied and ended the conversation. Smith declined WW's request for comment on the exchange.

On Dec. 16, Green sued in U.S. District Court. Her lawsuit, filed by Portland lawyer Shenoa Payne, argues United States of America Pageants, which hosts pageants across the nation and is headquartered in Nevada, unlawfully discriminated against Green by excluding her from its Miss Oregon pageant because of her gender identity. It seeks to require the pageant to change its rules; to cease the exclusion of transgender women; to require training of pageant staff on Oregon's public accommodation law; and to award Green damages "in an amount to be determined at trial."

According to United States of America Pageants' rules, which are listed on its website, entrants—in addition to being single and never having "posed nude in film or print media"—are required to be "natural born female."

"This policy" the lawsuit reads, "intentionally designed to exclude the specific class to which the plaintiff [Green] belongs—transgender females—is discriminatory because it denied the plaintiff the full and equal advantages and privileges of the defendant's [United States of America Pageants] services in violation of Oregon's public accommodation law."

The suit argues that because the pageant is open to the public, barring Green from entering is legally the same as a hotel denying her a room or a restaurant refusing to serve her.

It also argues that although the pageant requires entrants to be "natural," it does not exclude women who have undergone plastic surgery.

"Rather," the lawsuit reads, "it is intended only to exclude, and is enforced only against, a specific class of individuals—transgender females."

It's only in the past decade that openly transgender beauty pageant contestants have begun to gain footing among their cisgender peers. In 2012, the Miss Universe program ended its ban on transgender entrants after the threat of a lawsuit. Since then, there has been only one transgender titleholder, Miss Universe Spain in 2015.

Green's desired outcome? She still hopes to compete in United States of America's Miss Oregon pageant.

"This is about justice and it's about righting a wrong," Green says. "No matter what anyone thinks about pageants, trans women should have the choice to compete just like anyone else."

# Darlene JESPERSEN, Plaintiff-Appellant,

#### v.

### HARRAH'S OPERATING COMPANY, INC., Defendant-Appellee.

### No. 03-15045.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 3, 2003.

#### Filed Dec. 28, 2004.

**Background:** Female bartender at casino terminated for refusing to wear makeup sued employer for sex discrimination under Title VII, alleging both disparate treatment and disparate impact, and asserted claims under state law. On employer's motion for summary judgment, the United States District Court for the District of Nevada, Edward C. Reed, Jr., J., 280 F.Supp.2d 1189, granted motion in part. Employee appealed.

**Holding:** The Court of Appeals, Tashima, Circuit Judge, held that bartender failed to establish that grooming policy imposed greater burden on female bartenders than on male bartenders.

Affirmed.

Thomas, Circuit Judge, dissented and filed opinion.

### 2. Civil Rights @ 1177

Female bartender at casino who was terminated for refusing to wear makeup, Before: TASHIMA, THOMAS, and SILVERMAN, Circuit Judges.

TASHIMA, Circuit Judge:

Plaintiff Darlene Jespersen, a bartender at Harrah's Casino in Reno, Nevada, brought this Title VII action alleging that her employer's policy requiring that certain female employees wear makeup discriminates against her on the basis of sex. The district court granted summary judgment for Harrah's, holding that its policy did not constitute sex discrimination because it imposed equal burdens on both sexes. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

#### I.

The following facts are undisputed. Darlene Jespersen was a bartender at the sports bar in Harrah's Casino in Reno, Nevada, for nearly 20 years. She was an outstanding employee. Over the years, Jespersen's supervisors commented that she was "highly effective," that her attitude was "very positive," and that she made a "positive impression" on Harrah's Harrah's customers repeatedly guests. praised Jespersen on employee feedback forms, writing that Jespersen's excellent service and good attitude enhanced their experience at the sports bar and encouraged them to come back.

Throughout the 1980s and '90s Harrah's encouraged its female beverage servers to wear makeup, but wearing makeup was not a formal requirement. Although Jespersen never cared for makeup, she tried wearing it for a short period of time in the 1980s. But she found that wearing makeup made her feel sick, degraded, exposed, and violated. Jespersen felt that wearing makeup "forced her to be feminine" and to become "dolled up" like a sexual object,

**1.** The text of the appearance standards provides, in relevant part, as follows:

All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must posand that wearing makeup actually interfered with her ability to be an effective bartender (which sometimes required her to deal with unruly, intoxicated guests) because it "took away [her] credibility as an individual and as a person." After a few weeks, Jespersen stopped wearing makeup because it was so harmful to her dignity and her effectiveness behind the bar that she could no longer do her job. Harrah's did not object to Jespersen's choice not to wear makeup and Jespersen continued to work at the sports bar and receive positive performance reviews for over a decade.

In February 2000, Harrah's implemented its "Beverage Department Image Transformation" program at 20 Harrah's locations, including its casino in Reno. The goal of the program was to create a "brand standard of excellence" throughout Harrah's operations, with an emphasis on guest service positions. The program imposed specific "appearance standards" on each of its employees in guest services, including heightened requirements for beverage servers. All beverage servers were required to be "well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform." In addition to these general appearance standards applicable to both sexes, there were gender-specific standards for male and female beverage servers. Female beverage servers were required to wear stockings and colored nail polish, and they were required to wear their hair "teased, curled, or styled." Male beverage servers were prohibited from wearing makeup or colored nail polish, and they were required to maintain short haircuts and neatly trimmed fingernails.<sup>1</sup>

sess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with

Harrah's called its new appearance standards the "Personal Best" program. In order to enforce the "Personal Best" standards, Harrah's required each beverage service employee to attend "Personal Best Image Training" prior to his or her final uniform fitting. At the training, "Personal Best Image Facilitators" instructed Harrah's employees on how to adhere to the standards of the program and tested their proficiency. At the conclusion of the training, two photographs (one portrait and one full body) were taken of the employee looking his or her "Personal Best." Each employee's "Personal Best" photographs were placed in his or her file and distributed to his or her supervisor. The supervisors used the "Personal Best" photographs as an "appearance measurement" tool, holding each employee accountable to look his or her "Personal Best" on a daily basis. Jespersen acknowledged receipt of the policy and committed to adhere to the appearance standards for her position as a beverage bartender in March 2000.

maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

Overall Guidelines (applied equally to male/female):

- Appearance: Must maintain Personal Best Image portrayed at time
- Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.
- No faddish hairstyles or unnatural colors are permitted.

Males:

- Hair must not extend below top of shirt collar. Ponytails are prohibited.
- Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.

Shortly thereafter, however, the "Personal Best" standards were amended such that in addition to the existing appearance standards, all female beverage servers (including beverage bartenders) were required to wear makeup.<sup>2</sup> As before, male beverage servers were prohibited from wearing makeup. Because of her objection to wearing makeup, Jespersen refused to comply with the new policy. In July 2000, Harrah's told Jespersen that the makeup requirement was mandatory for female beverage service employees and gave her 30 days to apply for a position that did not require makeup to be worn. At the expiration of the 30-day period, Jespersen had not applied for another job, and she was terminated.

After exhausting her administrative remedies with the Equal Employment Opportunity Commission, Jespersen brought this action alleging that Harrah's makeup requirement for female beverage servers constituted disparate treatment sex discrimination in violation of 42 U.S.C. § 2000e–2(a) ("Title VII"). The district

- Eye and facial makeup is not permitted.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.

Females:

- Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
- Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
- Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.
- 2. The amended policy required that "[m]ake up (foundation/concealer and/or face powder, as well as blush and mascara) must be worn and applied neatly in complimentary colors," and that "[1]ip color must be worn at all times."

court granted Harrah's motion for summary judgment, holding that the "Personal Best" policy did not run afoul of Title VII because (1) it did not discriminate against Jespersen on the basis of "immutable characteristics" associated with her sex, and (2) it imposed equal burdens on both sexes. Jespersen timely appealed from the judgment.

#### III.

[1] Title VII prohibits employers from discriminating against "any individual with respect to ... compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1). In order to prevail on a Title VII disparate treatment sex discrimination claim, an employee need only establish that, but for his or her sex, he or she would have been treated differently. UAW v. Johnson Controls, Inc., 499 U.S. 187, 200, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) (citing Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)). Although the employee must prove that the employer acted intentionally, the intent need not have been malevolent. Id. at 199, 111 S.Ct. 1196 ("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.").<sup>3</sup>

[2] Pursuant to the "Personal Best" program, women are required to wear makeup, while men are prohibited from doing so. Women are required to wear their hair "teased, curled, or styled" each day, whereas men are only required to maintain short haircuts. We must decide whether these standards are discriminatory; whether they are "based on a policy

**<sup>3.</sup>** Even if intentional discrimination is shown, an employer can escape liability if sex "is a bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal

operation of that particular business or enterprise." 42 U.S.C. § 2000e–2(e)(1). There is no BFOQ issue on this appeal.

which on its face applies less favorably to one gender ....." Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 608 (9th Cir. 1982). If so, then Harrah's would have discriminated against Jespersen "because of ... sex." 42 U.S.C. § 2000e-2(a)(1); see id.

We have previously held that grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex. In Baker v. Cal. Land Title Co., 507 F.2d 895 (9th Cir.1974), employees challenged their employer's rule banning men, but not women, from having long hair. Id. at 896. We concluded that grooming and dress standards were entirely outside the purview of Title VII because Congress intended that Title VII only prohibit discrimination based on "immutable characteristics" associated with a worker's sex. Id. at 897 ("Since race, national origin and color represent immutable characteristics, logic dictates that sex is used in the same sense rather than to indicate personal modes of dress or cosmetic effects."); see also Fountain v. Safeway Stores Inc., 555 F.2d 753, 755 (9th Cir.1977) ("It is clear that regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII."). Because grooming and dress standards regulated "mutable" characteristics such as hair length, we reasoned, employers that made compliance with such standards a condition of employment discriminated on the basis of their employees' appearance, not their sex.

Our later cases recognized, however, that an employer's imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination even where the appearance standards regulate only "mutable" characteristics such as weight. *Gerdom*, 692 F.2d at 605–

06. In Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir.2000) (en banc), a class of female flight attendants challenged their employer's weight restrictions as a violation of Title VII because women were held to more strict weight limitations than were men. The employer insisted that all emplovees maintain a weight that corresponded to the "desirable" weight for their height as determined by an insurance company table, but women were required to maintain the weight corresponding to women of "medium" build, whereas men were permitted to maintain the weight corresponding to men of "large" build. Id. at 848. Citing Fountain, the employer argued that because the weight restrictions were mere "appearance" standards, they were not subject to Title VII. Id. at 854. We rejected the employer's argument, holding that "[a] sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a BFOQ." Id. at 855; see also Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1032 (7th Cir.1979) (holding that employer's policy requiring female employees to wear uniforms but permitting male employees to wear "appropriate business attire" of their choosing was sex discrimination in violation of Title VII). Although employers are free to adopt *different* appearance standards for each sex, they may not adopt standards that impose a greater burden on one sex than the other. Frank, 216 F.3d at 855.

Although in *Frank* we characterized the weight standards at issue as "appearance standards," *id.*, we have, as yet, had no occasion to apply the "unequal burdens" test to gender-differentiated dress and grooming requirements. In *Frank* and *Gerdom*, we were called upon only to compare the relative burdens of different weight limitations imposed on male and female employees. In those cases our task

#### JESPERSEN v. HARRAH'S OPERATING CO., INC. Cite as 392 F.3d 1076 (9th Cir. 2004)

was simple because it was apparent from the face of the policies at issue that female flight attendants were subject to a more onerous standard than were males. *See Frank*, 216 F.3d at 854; *Gerdom*, 692 F.2d at 608.

In order to evaluate the relative burdens the "Personal Best" policy imposes, we must assess the actual impact that it has on both male and female employees. In doing so we must weigh the cost and time necessary for employees of each sex to comply with the policy. Harrah's contends that the burden of the makeup requirement must be evaluated with reference to all of the requirements of the policy, including those that burden men only, such as the requirement that men maintain short haircuts and neatly trimmed nails. Jespersen contends that the only meaningful appearance standard against which the makeup requirement can be measured is the corresponding "no makeup" requirement for men. We agree with Harrah's approach. Because employers are permitted to apply different appearance standards to each sex so long as those standards are equal, our task in applying the "unequal burdens" test to grooming and dress requirements must sometimes involve weighing the relative burdens that particular requirements impose on workers of one sex against the distinct requirements imposed on workers of the other  $sex.^4$ 

Jespersen contends that the makeup requirement imposes "innumerable" tangible burdens on women that men do not share because cosmetics can cost hundreds of dollars per year and putting on makeup requires a significant investment in time. There is, however, no evidence in the record in support of this contention. Jespersen cites to academic literature discussing the cost and time burdens of cosmetics generally, but she presents no evidence as to the cost or time burdens that must be borne by female bartenders in order to comply with the makeup requirement. Even if we were to take judicial notice of the fact that the application of makeup requires some expenditure of time and money, Jespersen would still have the burden of producing some evidence that the burdens associated with the makeup requirement are greater than the burdens the "Personal Best" policy imposes on male bartenders, and exceed whatever "burden" is associated with ordinary goodgrooming standards. Because there is no evidence in the record from which we can assess the burdens that the "Personal Best" policy imposes on male bartenders either, Jespersen's claim fails for that reason alone.

Jespersen cites United States v. Seschillie, 310 F.3d 1208, 1212 (9th Cir.2002), for the proposition that "a jury can make determinations requiring simple common sense without specific supporting evidence." But Seschillie involved the entirely different question of whether jurors in a criminal case could draw common-sense inferences from the evidence without the aid of expert testimony. Id. It cannot be construed as relieving Jespersen of her burden of production at the summary judgment stage in a civil case. As the non-moving party that bore the ultimate burden of proof at trial, Jespersen had the burden of producing admissible evidence that the "Personal Best" appearance stan-

**<sup>4.</sup>** Because the question is not presented on this record, we do not need to define the exact parameters of the "unequal burdens" test, as applied to personal appearance and grooming. We do note, however, that this is not an exact science yielding results with

mathematical certainty. We further note that any "burden" to be measured under the "unequal burdens" test is only that burden which is imposed beyond the requirements of generally accepted good grooming standards.

dard imposes a greater burden on female beverage servers than it does on male beverage servers. *See Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. She has not met that burden.

Jespersen also contends that even if Harrah's makeup requirement survives the "unequal burdens" test, that test should be invalidated in light of the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In Price Waterhouse, the Supreme Court held that an employer may not force its employees to conform to the sex stereotype associated with their gender as a condition of employment. Id. at 250-51, 109 S.Ct. 1775. When evaluating a female associate's candidacy for partnership in an accounting firm, decision makers referred to her as "macho" and suggested that she "overcompensated for being a woman" by behaving aggressively in the workplace. Id. at 235, 109 S.Ct. 1775. The associate was advised that her partnership chances would be improved if she learned to behave more femininely, wear makeup, have her hair styled, and wear jewelry. Id. Noting that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group," the Court held that the employer's discrimination against the associate because of her failure to conform to a traditional, feminine gender stereotype was sex discrimination in violation of Title VII. Id. at 251, 109 S.Ct. 1775.

Following *Price Waterhouse*, we have held that sexual harassment of an employee because of that employee's failure to conform to commonly-accepted gender stereotypes is sex discrimination in violation of Title VII. In *Nichols v. Azteca Restaurant Enter., Inc.,* 256 F.3d 864 (9th Cir.2001), a male waiter at a restaurant sued his employer under Title VII for sexual harassment. The waiter contended that he was harassed because he failed to conform his behavior to a traditionally male stereotype. Id. at 874. Noting that Price Waterhouse "sets a rule that bars discrimination on the basis of sex stereotypes," we concluded that the harassment and abuse was actionable under Title VII because the waiter was systematically abused for failing to act "as a man should act" and for walking and carrying his tray "like a woman." Id. at 874–75. Similarly, in Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir.2002) (en banc), we held that a man stated a claim for sexual harassment under Title VII where he alleged that he was the victim of assaults "of a sexual nature" by his co-workers because of stereotypical assumptions. Id. at 1068.

Although Price Waterhouse held that Title VII bans discrimination against an employee on the basis of that employee's failure to dress and behave according to the stereotype corresponding with her gender, it did not address the specific question of whether an employer can impose sex-differentiated appearance and grooming standards on its male and female employees. Nor have our subsequent cases invalidated the "unequal burdens" test as a means of assessing whether sexdifferentiated appearance standards discriminate on the basis of sex. Although the precise issue was not before us, we declined to apply Price Waterhouse to grooming and appearance standards cases when we rendered our decision in Nichols, 256 F.3d at 875 n. 7 ("Our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards."). And while a plurality of judges in Rene endorsed an independent claim for gender-stereotyping sexual harassment, such a claim is distinct from the claim Jespersen advances here. She has presented no evidence that she or any other employee has been sexually harassed as a result of the "Personal Best" policy. In short, although we have applied the reasoning of *Price Waterhouse* to sexual harassment cases, we have not done so in the context of appearance and grooming standards cases, and we decline to do so here. We thus disagree with the dissent's assertion that "Jespersen has articulated a classic case of *Price Waterhouse* discrimination...." Dissent at 1084.

Finally, we note that we are, in any event, bound to follow our en banc decision in *Frank*, in which we adopted the unequal burdens test. Price Waterhouse predates Frank by more than a decade and, presumably, the Frank en banc court was aware of it when it adopted the unequal burdens test. Thus, Price Waterhouse does not qualify as an "intervening decision" which could serve as a basis for overruling Frank. See EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 744 n. 1 (9th Cir.2003) (en banc) (explaining that "[a] three-judge panel can overrule a prior decision of this court [only] when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point") (internal quotation marks and citations omitted).

#### IV.

We hold that under the "unequal burdens" test, which is this Circuit's test for evaluating whether an employer's sex-differentiated appearance standards constitute sex discrimination in violation of Title VII, Jespersen failed to introduce evidence raising a triable issue of fact as to whether Harrah's "Personal Best" policy imposes unequal burdens on male and female employees.

The judgment of the district court is **AFFIRMED.** 

1083

Ayiana Davis Beatrice Eliska Peacock Fatimah Samaria Short Jill Christine Marhone Rosalie Ngatchou Nasirah Fair Samantha O'Sullivan Phina Walker Essence Kendall Kristine Furner Nadiyah W Kamaya Gabby Angel Chrissy Catharine G Ceon DuBose Sage Grace Dolan-Sandrino





Black girls, bodies, and bias in D.C. schools



BAR



**Black girls** in District of Columbia schools, like girls across the country, miss out on crucial class time simply because of the clothes they wear or the style of their hair or makeup. Again and again, they are suspended for tight pants, sent to the office for shoes that aren't quite the right color, and told they must "cover up" before they can learn. Strict dress, uniform, and grooming codes do nothing to protect girls or their classmates' learning. Rather, these codes needlessly interrupt their educations.

## **Summary** of Findings

While all students disciplined for dress code violations face these interruptions, Black girls face unique dress and hair code burdens. For example, some schools ban styles associated with Black girls and women, like hair wraps. Black girls also face adults' stereotyped perceptions that they are more sexually provocative because of their race, and thus more deserving

of punishment for a low-cut shirt or short skirt. Girls who are more physically developed or curvier than their peers also may be viewed as more promiscuous by adults, which can lead to them being punished more often for tight or revealing clothing.

Dress codes also communicate to students that girls are to be blamed for "distracting" boys, instead of teaching boys to respect girls, correct their behavior and be more responsible. This dangerous message promotes sexual harassment in schools.

The costs of dress codes are known all too well by students, but are rarely considered a matter of important education policy. In order to demonstrate the impact of dress codes, the National Women's Law Center undertook a city-wide exploration into young people's real experiences alongside 21 Black girls who attend or recently attended schools in D.C. These girls represent 12 different public schools, including charter schools and traditional public schools (known as "District of Columbia Public Schools," or DCPS).

Our findings are cause for grave concern. Plain and simple, D.C. dress codes promote race and sex discrimination and pull students out of the classroom for no good reason—often through illegal suspensions. As a result, Black girls fall behind in school, which threatens their long-term earning potential while also exacerbating longstanding and widespread racial and gender inequalities.

In this report, we present some common problems with D.C. schools' dress codes, how these rules affect Black girls, and ideas for how schools and lawmakers can do better by all girls—but especially the Black girls who make up the majority of female students in D.C. schools. We hope that our findings will serve as a call to action for D.C. educators and policymakers to support Black girls in school.

**WLC** Every interviews ession was recorded and then transcribed. Not all interviews In addition to the interviews

# Methodology

were given the opportunity to provide written accounts of their experiences. Each girl was given the chance to confirm or edit her transcribed account. Co-authors determined how they

would be identified, including what names they preferred and whether they wanted their ages and schools listed. This report only includes accounts confirmed by the co-authors. All coauthors were given a small stipend for their time and thoughtful engagement in this report. One middle school student co-author's confirmation was delayed because she was sent home for wearing a dirty uniform the day of a scheduled meeting.

The girls range in age from 12 to 18. Some students self-identified as lesbian or queer, some self-identified as straight, and some did not disclose their sexual orientation. Per recommendations from partners, NWLC did not ask students whether they were transgender or cisgender but one participant self-identified as transgender during her interview.

Additionally, NWLC conducted a qualitative and quantitative analysis of D.C.'s public high schools' written dress code policies. This analysis was of the most recent dress code policies posted on the school's website. Three high schools did not have student or family handbooks posted online. As a result, this analysis does not include information on McKinley Technology High School, Benjamin Banneker Academic High School, or Anacostia High School beyond information provided directly by students in confirmed accounts.

The photographs in this report are pictures of six co-authors in the clothing they get in trouble for wearing at school.

### Common Problems with D.C. School Dress Codes

Dress and grooming codes in D.C. schools, as well as their enforcement patterns, share a number of common problems. These include:

### **Problems with Rules**

- Rules that are overly strict
- Rules that require expensive purchases
- Rules that punish kids for dressing for the weather
- Rules based in racial stereotypes
- Rules based in sex stereotypes
- Unclear rules

### **Problems with Enforcement**

- Discriminatory enforcement
- Enforcement that promotes rape culture
- Enforcement through physical touching by adults, including school police
- Shame-based punishments
- Overly harsh and illegal punishments

# **Problems** with Rules

### **Overly Strict Rules**

Many D.C. public schools have detailed dress codes that ban forms of student expression that pose no threat to classmates' safety or ability to learn. Many of these rules target "revealing" or "tight" clothing most often worn by girls, like halter tops and miniskirts. Of D.C. high schools with publicly accessible dress codes:

- 81 percent require a uniform
- 65 percent regulate the length of skirts
- 58 percent prohibit tank tops
- 42 percent ban tights and/or leggings
- 45 percent require students to wear belts (and many specify the belts must be black)

**\*\*** In middle school, I had a dress code and they always dress coded people. Sometimes, they made you miss class because you didn't have the right shoes or right sweater. That's the downside to school dress codes." — Beatrice "One time, I came into school with jeans that had holes in them, and as soon as I walked in at the metal detector they told me to go to the principal's office. I was like, they're just holes. You can't see anything." — Kristine Turner, 16

"A teacher made a girl put on her jacket because her school jersey was a tank top." — Eliska, 15

- Students must wear appropriately sized tan or khaki pants, shorts,or skirts.
- Skirts and shorts must be worn no more than two (2) inches above the knee.
- Belts must be worn if there are belt loops on the student's pants, shorts, or skirts...

### **The Following Are Prohibited:**

- Pants, shorts, or skirts that have patterns, lace, polka dots, stripes, holes, or words.
- Brightly colored tights, leg-warmers, knee-high socks or fishnet stockings . . .
- Undershirts that have patterns, lace, polka dots, stripes, holes, or words.
- Sleeveless or cut-off shirts, blouses, dresses, or tank tops.

Kipp DC College Preparatory Dress Code Policy



# Expensive Rules

**Some supporters of dress codes** claim that uniforms hide students' financial differences. Some even argue that uniforms are less expensive for families. However, D.C. public schools' policies often require kids and their parents to purchase expensive clothing that puts a strain on families already struggling to make ends meet.

At my middle school, we had to go to Campus Outfitters to buy the required uniform. I thought the uniforms were horrible. It consisted of an ugly plaid skirt and these dreadful red sweaters. Campus Outfitters sold many different school uniforms and I thought their prices were expensive. Altogether, my family paid approximately \$300 for the entire uniform." — Catherine G., 16, Phelps A.C.E. High School

"I got to pay \$25 dollars for a sweater, \$20 dollars for each shirt I get, that's like \$100 dollars for four shirts." — Phina Walker, 17, Thurgood Marshall Academy

"The school dress codes are unfair because people can't afford to keep buying expensive special shirts and khaki pants. They could just let us wear a regular t-shirt and some red pants. My mom was mad because it's too much money. My brother goes to Sousa Middle School, too. And each shirt costs \$15 online. That's too much. And you have to pay to 'dress down' on Fridays—to not wear the uniform. You have to pay \$2 for one dress down pass. One day. One day. The school should let us wear regular clothes throughout the school. Why do you have to pay someone to actually wear clothes that we want to?" — Kamaya, 12, Sousa Middle School

## Weather-Defiant Rules

Many dress codes do not account for the weather. Students are required to "cover up" during hot summer months and are prohibited from wearing coats or outof-uniform sweaters during the winter—even when the school building is inadequately heated. Forty-two percent of D.C. public high schools with publicly accessible dress code policies ban outerwear, like jackets and sweaters, in school. Others place restrictions on the kinds of outerwear students may wear.

During
During
the summer,
they always
harass girls
and make us
change."
Nasirah Fair,
17, Wilson
High
School

"We were not permitted to wear outerwear like jackets or coats inside the school. When we went through the metal detectors all outerwear had to be removed. The principal expelled one boy for having a coat on. It was considered a security violation."
— Catherine G., 16, Phelps A.C.E. High School

66 We can't wear ... any outside coats [inside] but the school is freezing." - Ceon DuBose, Phelps A.C.E. High School\*

"Outerwear cannot be worn during school hours. Administration discretion can waive this rule based on extenuating circumstances." — Cardozo Education Campus Dress Code

\*Phelps' formal dress code indicates students can wear a uniform school jacket with the Phelps logo, available for purchase at additional cost, indoors.

### **66** You should be able to show your shoulders when it's hot. What's so attractive about shoulders?"

- Rosalie Ngatchou, 15, D.C. International School

Last year, when we were in a temporary building, we had to transfer from academic to arts block, so we had to wait for buses. It was really hot that day and I took off my jean jacket because since we were outside; inside, I was wearing a jacket. Since the shirt I had on underneath was strapless, I got dress coded and I was told that I couldn't wear that. But I was outside and it was really hot. What do you expect?"
— Ayiana Davis, 16, Duke Ellington School of the Arts

"OVERSIZED COATS, JACKETS, AND OTHER OUTER-WEAR /GARMENTS ARE NOT ALLOWED TO BE WORN IN THE CLASSROOM. NO EXCEPTIONS!" — Cardozo Education Campus flyer on school dress code

## Rules Based in Racial Stereotypes

### **Black people face**

assumptions about who they are and what they are like based on racial stereotypes. For example, traditionally Black hairstyles and head coverings, which often have specific cultural or religious meaning, are sometimess viewed as "unprofessional." These stereotypes can influence dress code policies, many of which target students of color. For instance, 68 percent of D.C. public high schools that publish their dress codes online ban hair wraps or head scarves.

<sup>66</sup>At my sister's school, black girls are told that they shouldn't wear headwraps." - Nasirah Fair, 17, Wilson High School

"The following clothing and/or personal items are not permitted in Ellington's professional educational environment: ... No do-rags or baseball caps in the building at any time for males or females. No combs in hair." — Duke Ellington School of the Arts Dress Code Policy

### HIGH SCHOOLS THAT BAN BANDANAS INCLUDE:

- School Without Walls
- E.L. Haynes Public **Charter School**
- LAYC YouthBuild Public Charter School
- Next Step Public **Charter School**
- Paul Public Charter School

**Solution** wear headwraps unless it's for religious purposes.\* Because all my friends who are Muslims are allowed to wear their hijabs but because it's a cultural [rather than religious] thing we're not allowed to do that. And so a lot of students are upset because they said that's being culturally insensitive. I agree." — Fatimah, 17, **School Without Walls High School** 

While School Without Walls' formal dress code does ban bandanas, the policy does not include an explicit ban on headwraps. Many schools enforce rules that are not memorialized in official policies.

## Rules Based in Sex Stereotypes

Many Schools across the country have different dress codes for girls and boys based on sex stereotypes (i.e., notions about how people "should" act based on their gender). For example, such stereotypes may presume that girls should wear feminine skirts, while boys should be active and athletic in pants. These rules also can present obstacles for transgender students whose schools do not respect their gender identity, as well as nonbinary and gender fluid students.\* While DCPS formally prohibits sex-specific rules, 35 percent of D.C. public high schools with publicly accessible policies—including some DCPS schools—have specific dress code requirements for students based on their gender.

 horre –
 boys are not allowed to wear earrings to school. Gentlemen with earrings will be asked to remove their earring(s) prior to entering the building.
 NO EXCEPTIONS" – Achievement Prep Wahler Middle School Dress Code Policy

must wear belts. Pants may never sag." — KIPP D.C. College Preparatory School Dress Code Policy

\*A non-binary person is someone who does not identify as a man or a woman. A genderfluid person's gender identity varies over time. Even dress codes that are the same for boys and girls may nonetheless rely on and reinforce—sex stereotypes. Often dress codes enforce backward ideas about what makes a girl feminine or "ladylike."

"The dress code is targeted towards girls, such as [rules requiring] fingertip-length bottoms and no shoulders showing. However, boys are allowed to wear whatever they please." — Fatimah, 17, School Without Walls

### \*\* We're not allowed

to wear shorts, but we're allowed to wear skirts." — Phina Walker, 17, Thurgood Marshall Academy

> School rules that ban "revealing" or tight clothing are also based in sex stereotypes that girls should be modest. Often, these rules are unclear, allowing administrators to enforce their own ideas about how much skin girls should show. Rules prohibiting makeup and nail polish are also based in a narrow vision of how a "good" girl presents herself.

66 For trans students and non-binary students, dress codes are just another form of restriction. They also normalize cisgender and traditional roles and views. It's traumatizing to be forced into clothes that don't match your identity." — Sage Grace Dolan-Sandrino, 17

•• They told us

at the beginning of the year that we need to wear bras, which was gross." — Nasirah Fair, 17, Wilson High School\*

> "NOT permitted: make-up, lipstick, colored-gloss, etc." — Jefferson Middle School Academy Uniform Policy

Ten percent of D.C. public high schools that publish their dress code policies ban students from wearing makeup.

"No face makeup . . . allowed." — Friendship Collegiate Academy Charter School Dress Code Policy

You can't have a certain length of fingernails. This girl would come in with long cat nails and our dean would say, 'You gotta take the nails off.' She would come through and at the end her nails would be gone. The middle school tutor used to tell us we couldn't wear lipstick, I guess because we were in middle school. We were kinda young, you know, trying weird lipstick and stuff, but it's not that serious. You can't tell us what lipstick we can and cannot wear. She tried to say we couldn't wear no lipstick at all. Administrators try to be like your parent or something, but I don't go home with you at the end of the day. They said the lipstick was distracting. The nails were just considered too grown. And they'd say really short skirts were distracting. You get in trouble for that." — Kristine Turner, 16

# **Unclear Rules**

Unclear rules promote discrimination. Because they are open to interpretation, they create too much room for unfair enforcement. They are also hard for students to follow.

<sup>66</sup> Dyed hair or a hairstyle that serves as a distraction—as determined in the sole

that serves as a distraction—as determined in the sole discretion of the school—is not permitted.... Clothing must be sized appropriately to fit the Scholar. Clothes may not be too big or too small. What is too big or small is determined in the sole discretion of Achievement Prep administration." — Achievement Prep Dress Code Policy

Clothes that are inappropriate in size (too tight) or see-through or expose undergarments may not be worn. Other inappropriate items determined by a Thurgood Marshall Academy administrator will not be allowed. Staff members will determine whether a student's attire complies with the dress code and will report any violations to the Dean of Students. The Dean's decision regarding dress code is final."
— Thurgood Marshall Academy Dress Code Policy

## Problems with Enforcement Discriminatory Enforcement

**Back girls** are 20.8 times more likely to be suspended from D.C. schools than white girls. One reason for this disproportionate punishment is that adults often see Black girls as older and more sexual than their white peers, and so in need of greater correction for minor misbehaviors like "talking back" or wearing a skirt shorter than permitted.<sup>1</sup> Race- and sex-based stereotypes result in unequal enforcement of rules.

"At my school the dress code is more enforced on the girls than boys. The girls get in trouble more often for ripped jeans and tank tops but the boys usually don't." — Christine Marhone, 16, D.C. International School

> Yes, they really enforce their dress code especially towards the girls. You never hear a boy [say], 'Oh, y'all got dress coded today, bro.' I mean at Banneker, no, it's not about race, but it is by body type. Like the little skinny girls can just wear what they want. I'm just being honest. And then the girls with curves, like really curvy, they just [say], 'Oh, you're showing too much, you're revealing so much.' I have this friend she has no breasts, no butt. She wears crop tops, mini skirts. It doesn't matter. They don't care." — Essence Kendall, 18, Charles Herbert Flowers High School, previously attended Banneker High School

#### Three words to describe your school's dress code:

0

"Unequally enforced, bothersome, eh" — Eliska, 15

> "Strict, ugly, extra" — Kristine Turner, 16

"Racist, sexist, unfair" — Samantha O'Sullivan, 17

"Silly, uncomfortable, expensive" — Samaria Short, 13, Sousa Middle School 66 We have a dress code but it's more of a casual [thing]. Basically you're not supposed to wear anything shorter than like your fingertip, so you can wear shorts and skirts, but they have to be longer than your fingertips and you're not supposed to wear crop tops or spaghetti straps. People wear it all the time and the biggest problem is that they enforce it based on your body type basically. So what, two people be wearing the same thing and then like if you, if you're like curvier then they'll tell you to change because it looks inappropriate." — Samantha

O'Sullivan, 17

I feel like when it comes to girls they're like, 'Oh, where's your belt, where's your belt, where's your belt?' I've seen boys that were in front of me they didn't even ask where his belt was. It was just let him go through." — Phina Walker, 17, Thurgood Marshall

I don't get why no one says

anything to the boys when the boys come to school without their uniforms. But when the girls do it, they say something. They let the boys slide and it's not fair." — Kamaya, 12, Sousa Middle School

"Boys can walk around shirtless outside during lunch, sag their pants, wear shirts objectifying women and aren't reprimanded at all." — Nasirah Fair, 17, Wilson High School

I think the rules are usually enforced depending on your body type a lot. That's often how it's enforced. I don't know, like I'm pretty skinny and small so people usually don't notice when I break the rules. But when people who are curvier wear short shorts or a skirt then I see them get dress coded. Race has to do with it sometimes. Often times I see a lot of white females wearing stuff that is just, like, I don't follow the dress code but my mother would never let me walk to school like that. Just like, backs out, really short crop tops or like really short shorts. Nobody ever says anything to them, but my friends will wear something the same or not even as bad and they'll get dress coded or have to change clothes."

"I've noticed how my friends have gotten dress coded on stuff because they have bigger hips, bigger breasts, or bigger butts, yet I have worn similar things but I did not get dressed coded because I'm skinnier and it is less noticeable on me. That kind of thing teaches girls to be ashamed of their bodies." — Ayiana Davis, 16, Duke Ellington School of the Arts

<sup>66</sup>Many of the Caucasian

girls wear things against the dress code without getting into trouble, while girls of color would get into trouble."

— Eliska, 15

## Enforcement That Promotes Rape Culture

The adults at this school say that if girls wear tight stuff, the boys think that it's okay to touch them. I think everyone should keep their hands to themselves, no matter what anybody is wearing." — Samaria Short, 13, Sousa Middle school

#### **Too many schools**

make clear that girls need to cover up their bodies so as not to "distract" or "tempt" boys. That enforcement sends the clear message that boys are not responsible for their bad behavior. By blaming boys' misconduct on girls' choices, schools promote an environment where sexual harassment is excused. Students may think it is appropriate to comment on girls' bodies because they see their teachers do it, too, when they enforce the dress code.

"One teacher at Banneker did not like the girls for some reason. One day she told me that I had on ripped jeans, but I had gym shorts to cover it. She was like, 'You know why I don't like holes above the knee? Because a boy can put [his] finger up there.' And I'm just like, 'Wait, what?' Why would you even say something like that to a student? And she said, 'So, your mom let you walk from the station to your to school like that?' I'm like, 'Yeah, sure.' She wanted you to be covered." — Essence Kendall, 18, Charles Herbert Flowers High School, previously attended Banneker High School

## Enforcement Through Physical Touching

Teachers.

administrators, and even security guards and school police unnecessarily touch girls without their consent when enforcing a dress code. In doing so, these adults send the message to girls (and their classmates) that their bodies are not their own.

Well, today, so this girl she had on some brown Uggs. And she didn't have no other shoes at home because some people cannot afford all black shoes... [The teacher] grabbed her shirt. She told her to come, come on. And so the girl had to get up and the girl had to change her shoes to these orthopedic shoes." — Phina Walker, 17, Thurgood Marshall Academy

## Shame-Based Punishments

**Too many schools** punish students who break the dress code, or even other rules, by shaming them with attention-grabbing clothing "fixes." In doing so, the schools distract and upset students and undermine young people's trust in educators.

"[If you break dress code] you get sent home.
 Or they give you like a big shirt, or big pairs of pants or like big shoes on purpose."
 Phina Walker, 17, Thurgood Marshall Academy

"I've heard about other girls having to wear jerseys and gym clothes from the school after being dress coded."— Eliska, 15

(especially if you're a girl) then they put duct tape on the holes. So if you

(especially if you're a girl) then they put duct tape on the holes. So if you arrive to Banneker and have rips above the knee, they'll put duct tape on the rips to cover it up or you'll have wear gym shorts over top of your pants. They will also give you a big t-shirt that says 'help the homeless' if you have on a crop top or something and they'll call your parent as well."
— Essence Kendall, 18, Charles Herbert Flowers High School, previously attended Banneker High School





## **Overly Harsh and Illegal Punishments**

74 percent of D.C. public high school dress codes authorize disciplinary action that can lead to missed class or school.

### As the Washington

Post exposed in 2017, D.C. public schools have a problem with illegal "send homes," where students are excluded from school without formal suspensions, allowing schools to artificially reduce their suspension rates.<sup>2</sup> While DCPS policy forbids out of school suspensions for dress code violations, many students report they are nonetheless sent home for violations. These suspensions do not follow required procedures and are likely not recorded.

"[If you break the dress code], they either send you home or make you sit in the office." — Ceon DuBose, 16, Phelps ACE High School

If you break the dress code, the school will say 'You gotta go to the office,' or, 'Oh, you gotta go home.' Last time I got dress coded, I almost had to go all the way home. I live far. I have to catch two buses and get up at 6:00 in the morning just to get to school on time. They almost made me go all the way back home, just to change my uniform pants, because my uniform pants were dirty. I said, 'I can't go home, 'cause there's no one there and it takes a long time for me to get home and get back here.' So, they made me come try on all these different pants they had. Some of them were small, and some were too big. They told me to go home because none of the pants fit me. That wasn't right. Not everybody is the same size. Some people are big, some people are skinny. . . . [Once] they sent me to ISS—in school suspension. They give you work. They tell you to get work from your teachers but sometimes that's hard because you don't know what to do. So you end up doing the wrong thing and you have to do it over again."

"To enforce the uniform policy, scholars would have to sit in the office all day if you wore the wrong shoes. Or they'll send you home to strongly emphasize the importance of obeying the school uniform dress code." — Catherine G., 16, Phelps A.C.E. High School

"Students who report to school not in uniform will either:

• Return home to change

• Receive loaner clothes if available

Remain in ISS until parent brings clothes to school

\*Students who routinely report to school out of uniform are subject to school disciplinary action"— Dunbar High School Dress Code

While charter schools are not, at the time of publication, subject to the same regulations as DCPS, many of their punishments for dress code violations also exclude students from the classroom in ways that are educationally harmful.

## <sup>66</sup> They make you go through the metal detector. And the security

guards have little wands. Once I got in trouble for a belt I wasn't wearing. The Administration called my mother and said I had detention and I said 'Mama, I ain't going to no detention over some belt that I'm not wearing."— Chrissy, 15, IDEA Public Charter School

"We got to wear uniform. And if we don't wear the right uniform, they send us home." — Angel, 15, Friendship Collegiate Academy Public Charter School Across the city, Black girls are missing out on class time because of dress and grooming codes. Some are suspended, while others are pulled out of the classroom informally. Both formal and informal classroom removals cause these girls to lose out on the opportunity to learn. Harsh and discriminatory school discipline leads to pushout, lost future

## Impact of Dress Codes on Black Girls

earnings, poorer health outcomes and increased likelihood of living in poverty.<sup>3</sup> For example, a girl who misses three or more days of school in a month can fall a vear behind her peers.<sup>4</sup> And even short, informal removals—like when a student is sent to the front office to "cover up" with a sweatshirt from the lost and found boxcan add up to hours of lost instruction.

Suspensions put students at risk for not graduating and going to

college. This exclusionary discipline threatens girls' long-term earning potential. Black women without a high school degree made \$7,631 less annually than Black women who graduated from high school, and \$25,117 less each year than Black women with a college degree.<sup>5</sup>

Even apart from lost class time, discriminatory dress codes and unfair enforcement change how Black girls see themselves and how their classmates see them, too. Studies show school practices that draw distinctions between students cause young people to form biases based on how different groups of students are treated.<sup>6</sup> Dress codes create distinctions both through different rules for girls and boys and through different enforcement based on race, sex, and body type. In these ways, dress codes are not only rooted in stereotypes, but also reinforce them.

These biases have negative academic, social, and emotional effects on students. And Black girls, of course, live at the intersection of damaging race- and sex-based stereotypes.

When you are made to feel uncomfortable in your clothes and with your body, it's hard to focus on learning and expanding your mind. Or even just getting good grades." — Sage Grace Dolan-Sandrino, 17 Research shows that Black students' performance and well-being are undermined by race-based stereotypes. Racial bias undermines Black students self-confidence.<sup>7</sup> Many studies confirm that Black students who are reminded of racist stereotypes—even in very subtle ways—perform worse on academic exams, often because they are afraid of conforming to a negative stereotype about Black people.<sup>8</sup> This phenomenon, known as "stereotype threat," drives racial disparities in school performance.<sup>9</sup>

Girls who believe gender stereotypes are more likely to have low self-esteem, including negative feelings about their bodies.<sup>10</sup> This trend is reinforced by adults' comments that girls wearing tight or revealing clothing are "asking for it." Stereotype threat also leads to disparities between boys and girls. Studies even show that girls who wear gender-specific clothing perform worse in math and science.<sup>11</sup> Practices that put pressure on students to conform to sex stereotypes are especially damaging for girls who prefer

wearing traditionally masculine clothes,<sup>12</sup> as well as transgender students of all genders and students who are genderfluid or nonbinary.

Dress codes also can encourage sexual harassment. Boys who believe in sex stereotypes like those promoted by many school rules fruggling with grades at school right now, and people not attending school. So if you all want kids at school, why would you all put them out of school? And if you all want us to have good grades, why would you all not allow us in school?" — Ceon DuBose, 16, Phelps A.C.E. High School

are more likely to harass girls.<sup>13</sup> Adults also promote harassment when they focus on girls' bodies over their minds. When students see girls sent out of the classroom because they are out of dress code, they learn that how a girl looks is more important than her thoughts and actions. When students see educators talking about girls' bodies, they learn to "sexualize" young women and view them as objects meant for others' pleasure rather than full human beings. Plus, when educators say girls are "distracting" boys or "asking for it," students get the message that boys are not responsible for how they behave, and girls who wear certain clothes or makeup deserve harassment and violence. Such viewpoints underlie a 2017 NWLC study that found that 1 in 5 girls ages 14-18 has been kissed or touched without her consent.<sup>14</sup> In addition to perpetuating harassment, adults who exclude girls from class to avoid "distracting" their male classmates prioritize boys' educations over girls'.

66 When it comes

between an item of clothing and a child's education, the child's education should always reign supreme."

— Beatrice

For all these reasons, discriminatory dress codes not only interrupt individual students' education but can compound race and gender inequalities. Every time a school sends a Black girl home because of what she is wearing, it risks exacerbating sharp race- and sex-based disparities in graduation rates, college enrollment rates, employment rates, and future wages.

- In D.C., white students are 1.3 times more likely to graduate from high school than Black students.<sup>15</sup>
- Nationally, white girls are 1.2 times more likely to be enrolled in a postsecondary program than Black girls.<sup>16</sup>
- Nationally, Black women who do not graduate from high school are 2.2 times more likely to be unemployed than white, non-Hispanic women.<sup>17</sup>
- Black women in D.C. who do find employment and who work full time, year round, are paid 52 cents for every dollar paid to white, non-Hispanic men.<sup>18</sup> This amounts to more than \$1.8 million dollars in lifetime losses.

"In high school, you're taught that you need to hide everything.
Deciding that some people can't wear certain shirts because their breasts are too big, it's not really doing anything, and it just causes insecurities. It teaches you to hide your body."
— Ayiana Davis, 16, Duke Ellington School of the Arts

# Girls Have Inswers

**66** If the purpose of a dress code is to teach professionalism, I feel like there should be like business week or one Friday out of the month, you have business casual attire. Then, the teachers and staff can give feedback on how to dress in a more professional way." – Ayiana Davis, 16, **Duke Ellington High School** of the Arts

66 They're just clothes. They should never result in a student being removed from the classroom or losing out on learning time, or starting a big issue. A classmate's absence is more of a distraction to the classroom than a piece of clothing." - Sage Grace Dolan-Sandrino, 17

"Boys need to be taught respect. Security guards shouldn't be able to touch you... Admin can't make remarks about students' bodies. Teach girls how to love their bodies and boys how to respect it." — Nasirah Fair, 17, Wilson High School

"If I were in charge of the dress code.

I would loosen it up or at least equally enforce it. Definitely allow religious things, code enforcers should not touch any students or their belongings without consent, don't publicly embarrass anyone, let students contribute to the dress code." — Eliska, 15

**66** I don't think that any school should have a dress code, whether it was uniform or regular clothes because what does wearing ripped jeans have to do with others' learning? Like I don't see the correlation between a dress code and education. I'm here for education. I'm not here to get teased because I don't wear Jordans. I'm not here to get duct tape on my rips because it's on my thigh. It's just no correlation. I just don't understand it. I don't. Come as you please because your clothes shouldn't define you or your learning. There is no correlation between the way you look and your education. What I wear shouldn't bother anybody." - Essence Kendall, 18, Charles Herbert Flowers High School, previously attended Banneker **High School** 

" Dress codes shouldn't matter.

Education does." — Chrissy, 15, IDEA Public Charter School

66 We actually have a dress code committee at our school because a lot of people were complaining about the dress code. And so, at the beginning of the year, the Principal is like, 'Okay you guys don't think the dress code is fair. I want to hear what your thoughts are.' And so we had meetings. They met, and they came up with new rules that were more fair towards girls. Allow off-the-shoulder tops, allow shorts that don't go all the way down to knees —because I don't know who buys shorts that go up to their knees anymore. And then, I think the Principal looked at them and then just, like disregarded the whole thing. They had several meetings about it and then nothing ever happened. He made an announcement one time. He said, 'The dress code will remain the same." - Fatimah, 17, School Without Walls

66 Schools should have a dress code committee. I would change the dress code by making the rules broader, and not primarily targeted at one gender. One thing that I know I would definitely change is the 'no off the shoulder shirts or tank tops' rule. Sheer clothing should be permitted, as long as there is solid clothing underneath. You should be able to wear crop tops with high-waisted jeans. The school can't touch you. And they can't put clothes on you. I don't like that. You can wear ripped jeans but they can't be ripped beneath your butt." — Jill, 17

# A Better Way

**Resperied and Stories** from students show that most school dress code policies hurt students, and specifically hurt Black girls. Dress codes often create an educational environment where the focus is on appearance rather than learning. When students are punished for violating dress code rules and are asked to leave the classroom, they are missing valuable class time and are prevented from having a school experience like their peers'. Plenty of schools (including high schools and colleges in D.C.) do not have dress codes and are able to educate students without distraction. For these reasons, NWLC and many student partners believe schools should not have dress code policies at all.

However, if a school insists on maintaining dress code policies, the policies should follow these guidelines:

## **Policies**

) All schools should begin their dress codes with an equity policy.

"Evanston Township High School's student dress code supports equitable educational access and is written in a manner that does not reinforce stereotypes and that does not reinforce or increase marginalization or oppression of any group based on race, sex, gender identity, gender expression, sexual orientation, ethnicity, religion, cultural observance, household income or body type/size." — Excerpt from student dress code at Evanston Township High School, Evanston, IL

Schools should celebrate expressions of diverse cultures. For example, schools should permit students to wear any religiously, ethnically, or culturally specific head coverings or hairstyles, such as hijabs, yarmulkes, headwraps, braids, dreadlocks, and cornrows.

Schools should also celebrate body diversity. Students of different sizes and abilities should all feel equally welcome in school. The same shirt style might look very different on students with different bodies, and that's great.

- Dress code policies should maintain gender neutrality. Students of all genders should be subject to the same rules. For example, if a school allows boys to wear pants, all students should be allowed to wear pants. If a school allows girls to wear skirts, all students should be allowed to wear skirts.
- Students should have the freedom to express themselves! Any rules should give students the space to be creative and show off what makes them unique.
  - ) School rules should be clear and specific, avoiding subjective terms like "distracting," "provocative," or "inappropriate."

### **Fair Consequences**

- Students should never be forced to leave school or the classroom for violating the dress code.
- Parents and students should know what the consequences for not following the dress code will be. Consequences should never exceed those guidelines.
- Schools should require all members of the school community who have the power to enforce the dress code to participate in bias and anti-harassment training at least once a year.
- ) School police should not be allowed to enforce the dress code.
- Adults should not touch students or their clothing to correct dress code violations, and should not require students to undress in public spaces.

## **Community Engagement**

Schools should maintain data transparency when it comes to dress code enforcements. In annual reports, schools should publish statistics on how often students are punished for dress code violations and for what specific violation. Schools should disaggregate and cross-tabulate those statistics by race and ethnicity, sex, disability, English language learner status, and sexual orientation to the extent possible while respecting student privacy.

Schools should also conduct annual anonymous climate surveys to hear directly from students about how school policies like dress code affect them.

Based on data and climate surveys, schools should facilitate self-audits to assess whether or not their policies are disproportionately impacting specific student populations.

Students should be integral to the process of writing the dress code. Schools should convene dress code committees to ensure students have the opportunity to shape these policies. A collaborative process will not only result in better but also stronger relationships and opportunities to model and build social-emotional skills.

# D.C. Can Lead the Way

**Here's the good News:** D.C. can do better. And students have the solutions. Here are some ways educators and policymakers should take action to ensure students do not miss out on the chance to learn because of dress codes:

#### School-level leaders, like principals, should:

- Revise their discipline codes to remove dress and grooming rules. If they will not do that, they should:
  - Reform their rules and practices in accordance with the checklist above—and avoid the common problems listed in this report.
  - Take affirmative steps to make sure they and their staff are following the law.
  - Monitor how the dress code affects school climate.
  - Provide washing machines in school, dry cleaning vouchers, and free uniforms multiple times per year to ensure dress codes do not pose an obstacle to families struggling to make ends meet.

#### **District-level administrators should:**

- Create policies that ensure no student misses class time because of a dress or grooming code.
- Enforce existing rules about when and how schools discipline students.
- Check in with parents and students to learn what's happening in school.

The Office of the State Superintendent of Education should provide guidance to schools about avoiding the risks dress and grooming codes pose to student learning and self-esteem.

**D.C. Councilmembers** should pass a new law to ban schools from removing students from the classroom due to a dress or grooming code violation.

Schools should teach girls how to love their bodies.

Vice versa. Boys how to love their bodies. And how to respect each other because you should feel confident. 'Cause my objective is to learn." — Nasirah Fair, 17, Wilson High School

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## Acknowledgments

**ABOUT THE NATIONAL WOMEN'S LAW CENTER** The National Women's Law Center is a non-profit organization that has worked for more than 45 years to expand opportunities for women and girls, focusing on on education and workplace justice, reproductive rights and health, and income security for families, with particular attention to the needs of women and girls of color and low-income women.

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# LET HER LEARN

BOR



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gation (FBI) Special Agent brought action alleging that gender-normed physical fitness test (PFT) constituted gender-based disparate treatment under Title VII. Parties cross-moved for summary judgment.

Holdings: The District Court, T.S. Ellis, III, J., held that:

- (1) plaintiff's resignation qualified as an adverse action under Title VII;
- (2) PFT violated Title VII provision making it an unlawful employment practice to use different cutoff scores for employment related tests on basis of sex.

Judgment for plaintiff.

Jay J. BAUER, Plaintiff,

#### v.

#### Eric H. HOLDER Jr., Attorney General, Department of Justice, Defendant.

Case No. 1:13-cv-93.

United States District Court, E.D. Virginia, Alexandria Division.

#### Signed June 10, 2014.

**Background:** Former candidate for appointment as a Federal Bureau of Investi-

#### **MEMORANDUM OPINION**

#### T.S. ELLIS, III, District Judge.

At issue on cross-motions for summary judgment in this Title VII<sup>1</sup> case is whether the Federal Bureau of Investigation's ("FBI") gender-normed physical fitness test ("PFT") that all FBI New Agent Trainees ("NATs") must pass constitutes impermissible disparate treatment under Title VII. As a NAT, plaintiff failed to perform the 30 push-ups required for male NATs, and argues that this requirement, given that female NATs are required to perform only 14 push-ups, discriminates against him on the basis of sex and thus violates Title VII. Defendant argues that the PFT does not involve impermissible discrimination because the gender-normed standards are based on innate physiological differences between males and females and these standards impose no greater burden on males than on females.

The parties have extensively briefed and argued the various questions presented and the matter is now ripe for resolution.

#### $\mathbf{I}^2$

#### A. The Parties

Plaintiff Jay Bauer is a 40-year-old<sup>3</sup> male who currently resides in Mount Prospect, Illinois with his wife and two children. Compl. ¶¶ 2–3. Plaintiff received his Bachelor of Science, Master's, and Ph.D. degrees from Northwestern University in 1996, 2001, and 2004, respectively. Plaintiff first decided that he wanted to become an FBI Special Agent after the tragic events of September 11, 2001. Plaintiff now serves as an FBI Intelligence

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2, *et seq.* 

**2.** Unless otherwise noted, the facts recited here are derived from paragraphs 1–55 of the

parties' Joint Stipulation of Facts [hereinafter Stip.].

**3.** Bauer Dep., Def.'s Summ. J. Br. Ex. E, at 78:12 [hereinafter Bauer Dep.].

Analyst in the FBI's Chicago Division, a position he accepted after failing to pass the PFT following 22 weeks in the FBI's New Agent Training Program ("NATP").

Defendant Eric Holder, Jr. is the Attorney General at the U.S. Department of Justice. The FBI is a bureau of the U.S. Department of Justice, and thus the Attorney General is the proper defendant in a Title VII action against the FBI as the head of the relevant department. *See* 42 U.S.C. § 2000e–16(c).

#### B. The PFT

The NATP is designed (i) to ensure that, upon graduation, a NAT has "attained the necessary proficiencies in specialized knowledge, skills, and abilities needed to effectively perform the duties of a[n] FBI [Special Agent]" and (ii) "to assess each NAT's suitability for the [Special Agent] position as measured by the NAT's level of conscientiousness, cooperativeness, emotional maturity, initiative, integrity and judgment." Stip. ¶ 12 (emphasis in original). To complete the NATP successfully, NATs must meet designated requirements in each of four categories: (1) academics, (2) firearms training, (3) physical/defensive tactics training, and (4) practical applications/skills training. The Physical Training program and the PFT are components of the physical/defensive tactics training category. A document distributed to all NATs titled "Rules, Regulations and Requirements at the FBI Academy for New Agent Trainees" ("Requirements Document") includes the requirements and standards for each of these four categories and provides that failure to demonstrate proficiency in any one of the four categories could result in dismissal from the NATP.

The Physical Training program for NATs at the FBI Academy is important for at least two reasons: (i) "a basic level of fitness and conditioning is essential for a NAT to perform at his/her best in all aspects of training and to successfully complete the entire fast-paced training program without serious physical injury and undue mental stress," and (ii) "a NAT's level of fitness serves as a foundation for his/her ability to effectively apply principles and non-deadly force alternatives being taught in the [defensive tactics] program." Stip. ¶ 25. Successful completion of an Academy-administered PFT, considered a "key component" of the Physical Training program, is an FBI Academy graduation requirement. See Stip. ¶26. The PFT contains four individual tests: (1) one-minute sit-ups, (2) 300 meter run, (3) push-ups to maximum, and (4) 1.5 mile run. Each NAT must achieve a minimum cumulative score of twelve points with at least one point in each of the four events. Each PFT event is scored on a ten-point scale, for a maximum overall score of 40 points. One point is awarded for achieving the minimum standard in an event, and three points are awarded for reaching the mean. To achieve one point in each of the four events, NATs must meet the following minimum standards by sex:

Event	Male	Female			
Sit-ups	38	35			
300 meter run	52.4 sec	64.9 sec			
Push-ups	30	14			
1.5 mile run	12:42 min	13:59 min			

The PFT was implemented in 2004 as a NATs. The process by which the FBI semandatory physical fitness test for all

lected the PFT events and minimum passing standards is recorded in two reports. both authored by Amy D. Grubb, Ph.D., an Industrial/Organizational Psychologist employed by the FBI: <sup>4</sup> (i) a 2003 study titled "Validation of a Physical Training Test: Report of Standards, Findings, and Recommendations" ("2003 Grubb Report")<sup>5</sup> and (ii) a 2005 study titled "The Physical Fitness Test: An Evaluation of the Standards and Report of Validation Evidence" ("2005 Grubb Report").<sup>6</sup> Minimum passing scores for the PFT were developed through a pilot study of 324 NATs (260 male and 64 female), in which the FBI set minimum passing scores for each event at one standard deviation below the mean performance for each sex.<sup>7</sup> Stip. ¶ 126, 131; 2003 Grubb Report at 6. Defendant chose to set gender-specific minimum standard and mean scores in order to take account of the innate physiological differences that exist, on average, between males and females. 2003 Grubb Report. In the case of the push-up test, this process resulted in the minimum standard

- **4.** Charles Greathouse, a Supervisory Special Agent with the FBI's Physical Training Unit at Quantico, worked with Dr. Grubb in developing the PFT.
- 5. Def.'s Summ. J. Br. Ex. G [hereinafter "2003 Grubb Report"].
- **6.** Def.'s Summ. J. Br. Ex. I [hereinafter "2005 Grubb Report"].
- 7. The 2005 Grubb Report considered various alternative scoring methods, including the 30–39 age group norms published by the Cooper Institute for Aerobic Research ("Cooper Institute"), which norms are derived from the largest known set of fitness data in the United States. 2005 Grubb Report at 35–36. In the end, the FBI chose to develop its own minimum passing standards rather than to rely on the Cooper Institute data reflects fitness norms for the general population, not the more specific law enforcement population, which, in general, has a higher level of fitness than the general

score being set at the 15.7th percentile for males and at the 15.9th percentile for females. *Id.* at 12.

The record reflects that the PFT is the last mandatory physical fitness test that FBI Special Agents must pass during their FBI careers. There is no required physical fitness test for incumbent FBI Special Agents, despite the fact that the FBI's own validation study suggested that the FBI consider adopting a mandatory physical fitness test for incumbent Special Agents.<sup>8</sup> The record also reflects that the FBI encourages incumbent Special Agents to take a voluntary fitness test using norms for persons in the 30-39 year age group published by the Cooper Institute-24 push-ups for men and 11 for women at the 40th percentile—as suggested minimum fitness goals.

# C. Plaintiff's Performance on the PFT

By letter dated February 24, 2009, the FBI offered plaintiff an appointment as a Special Agent and required plaintiff, if he

al population. Id. As of 2009, the Cooper Institute norms for the 30–39 age group at the 60th percentile were 30 push-ups for men and 15 push-ups for women, and norms for the 30-39 age group at the 40th percentile were 24 push-ups for men and 11 push-ups for women. The Cooper Institute: Physical Fitness Assessments and Norms for Adults and Law Enforcement, Pl.'s Summ. J. Br. Ex. 4, at 32, 40. The Cooper Institute norms also differ from the FBI PFT in the key respect that the PFT tests push-ups to maximum number without a time limit, while the Cooper Institute norms require that the number of pushups be completed in one minute. Id.; 2003 Grubb Report at 2.

8. 2003 Grubb Report at 2 ("[I]mplementation of a fitness assessment for on-board agents should be considered (with age-appropriate norms) to ensure continued safe performance in the Special Agent position, as well as to increase the defensibility of any personnel actions taken at the applicant or NAT phase of selection."). accepted the offer, to report to the FBI Academy in Quantico, Virginia on March 1, 2009. Thereafter, on the appointed date, plaintiff, then age 35,<sup>9</sup> entered on duty with the FBI NAT Class 09–08 at the FBI Academy to begin the NATP. When he started the NATP on March 1, 2009, plaintiff received the Requirements Document and acknowledged, in writing, that he understood and agreed to the document's terms.

Plaintiff took the PFT a total of seven times, twice at the FBI's Milwaukee Field Office prior to starting the NATP and five times during the NATP at the FBI Academy in Quantico. He attained satisfactory passing scores in each component of the NATP other than the PFT,<sup>10</sup> and his NAT class selected him as "class leader" and "class spokesperson" to represent the class at graduation.<sup>11</sup> Plaintiff passed the pushup test the second time he took the PFT at the Milwaukee Field Office, but failed it every other time. The following chart records each time plaintiff took the PFT and his score on each occasion:

Date	Location	Sit- ups	Points	300 meter	Points	Push- ups	Points	1.5 mile	Points	Total Points
10/31/2008	FBI Milwaukee Field Office	48	5	43sec	7	25	0	10:50 min	4	16
1/12/2009	FBI Milwaukee Field Office	51	6	44sec	6	32	1	11:25 min	3	16
Week 1 NATP	FBI Academy Quantico	40	2	42.6sec	8	26	0	10:49 min	4	14
Week 7 NATP	FBI Academy Quantico	47	4	43.4sec	7	25	0	10:24 min	5	16
Week 14 NATP	FBI Academy Quantico	50	6	43.7sec	7	28	0	10:45 min	4	17
Week 18 NATP	FBI Academy Quantico	51	6	43.8sec	7	27	0	11:09 min	4	17
Week 22 NATP	FBI Academy Quantico	49	5	44.1sec	6	29	0	10:57 min	4	15

Females in plaintiff's NAT Class 09–08 passed the PFT and became Special Agents with the following scores:

	Sit-		300		Push-		1.5		Total
NAT	ups	Points	meter	Points	ups	Points	mile	Points	<b>Points</b>
Female A <sup>12</sup>	39	2	54.3sec	5	16	1	10:49min	4	14
Female B	42	3	54.3sec	5	24	3	12:51min	3	14
Female C	46	4	54.7sec	5	19	2	12:26min	4	15
Female D	41	3	55.2sec	5	15	1	11:50min	5	14

9. Bauer Dep. at 78:12.

11. Stip. ¶¶ 78–79.

**10.** See Stip. ¶¶ 14–24.

On July 30, 2009, during week 22 of plaintiff's NATP, plaintiff was able to complete only 29 push-ups in the PFT, rather than the required 30. Immediately following this event, FBI personnel Melinda Casey, Gerald Jackson, and Jason VanGoor met with plaintiff and informed him that he had three "options": (i) to resign as a Special Agent and preserve the *possibility* of working as an FBI Intelligence Analyst in Chicago; (ii) to resign and forgo the possibility of any future position with the FBI; or (iii) to be terminated from employment with the FBI. Plaintiff was required, then and there, to choose one of the three options. He chose the first option, and FBI personnel provided him with a template resignation letter addressed to then-FBI Director Robert Mueller that gave plaintiff precisely what he must say to resign from the NATP while preserving the possibility of being considered in the future for an FBI Intelligence Analyst position. Plaintiff, as directed, then and there handwrote and signed a resignation memorandum addressed to Director Mueller using the provided template. Plaintiff's decision to choose that option was, in his view, the only way to mitigate damages at that time in terms of being able to provide for his family. After resigning, plaintiff left Quantico and drove to Chicago, where his wife and two children were then living. Two weeks later, the FBI offered plaintiff an Intelligence Analyst position, and he accepted.

**12.** The scores for Female A, taken directly from Stip. ¶ 36, presumably contain an error,

as 2 + 5 + 1 + 4 = 12, not 14.

IV.

[13] As plaintiff has established that he suffered an adverse employment action, it is now necessary to address the central question presented in this case; namely whether the FBI's gender-normed PFT violates Title VII by requiring male NATs to perform 30 push-ups, while requiring female NATs to perform only 14. Plaintiff, who has the burden to demonstrate that the PFT is discriminatory,<sup>18</sup> claims this disparity is plainly facially discriminatory. Defendant argues that the PFT is not discriminatory because it is undeniable that, on average, there are physiological differences between men and women, and the gender-normed PFT standards simply reflect these differences to ensure that

- **18.** See Gerner, 674 F.3d at 266.
- **19.** See Othi v. Holder, 734 F.3d 259, 265 (4th Cir.2013) ("We begin, as always in deciding questions of statutory interpretation, with the text of the statute."); United States v. Ashford, 718 F.3d 377, 382 (4th Cir.2013) (quoting Chesapeake Ranch Water Co. v. Bd. of Comm'rs of Calvert Cnty., 401 F.3d 274, 279 (4th Cir.2005) ("As in all cases of statutory interpretation, our inquiry begins with the text of the statute.")).

males and females are treated equally. Defendant's argument is not without a measure of intuitive appeal and common sense. Yet, this question cannot be resolved solely on the basis of intuition and common sense; rather, the question's resolution requires the interpretation and construction of the governing statutory provisions—§ 2000e-2(a)(1) and § 2000e-2(l)—in light of and in accord with the pertinent Supreme Court and circuit authority. Plaintiff claims the PFT violates both of these provisions, and hence each is separately addressed.

#### A. § 2000e-2(a)(1)

[14] The starting point of the analysis must be the language of the statute,<sup>19</sup> which provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual ... because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1). Unless Congress indicates otherwise, statutory terms are given "their ordinary, contemporary, common meaning." United States v. Powell, 680 F.3d 350, 355 (4th Cir.2012). The infinitive "to discriminate," when used as an intransitive verb, means "to make distinctions on the basis of a class or category without regard to individual merit." The American Heritage Dictionary. Thus, as this and other dictionary definitions<sup>20</sup> make clear, the plain

**20.** See, e.g., Cambridge Dictionary ("to treat a person or particular group of people differently and esp. unfairly, in a way that is worse than the way people are usually treated"); Collins American Dictionary ("to make distinctions in treatment"); Dictionary.com ("to make a distinction in favor of or against a person or thing on the basis of the group, class, or category to which the person or thing belongs rather than according to actual merit"); Merriam-Webster Dictionary ("to make a distis other than individual merit"); Oxford

meaning of "to discriminate ... because of [an] individual's ... sex" in § 2000e-2(a)(1) is to treat an individual differently on the basis of sex. It follows that this provision's plain language captures and makes unlawful the PFT's differential treatment of men and women based on their sex. Nor is there any statutory exception for average, innate physiological differences between the sexes. Congress was clearly aware of any such average physiological differences, but chose to make no reference to, or accommodation for, them in § 2000e-2(a)(1). Nor do the plain words of the statute authorize discriminating against an individual on the basis of sex if that discrimination results in equal burdens on the sexes. In short, § 2000e-2(a)(1)'s plain language reaches and captures the PFT's differential treatment based on sex regardless of the average physiological differences between men and women and regardless of whether the burden placed on the sexes is equal.

The scant relevant Supreme Court authority on this issue supports this conclusion. Although no Supreme Court decision considers the precise question whether gender-normed physical fitness tests violate Title VII, two analogous cases lend substantial support to the result reached here. Most pertinent is City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), where a majority of the Supreme Court held that a city violated Title VII's prohibition on sex discrimination by requiring females to pay more into pension funds

**21.** The pertinent portion of the *Manhart* opinion—Part I—was authored by Justice Stevens simply because females, on average, live longer than males.<sup>21</sup> In reaching this result, the Supreme Court acknowledged that it is true that women, on average, live longer than men. Yet importantly, the Court did not accept this as a justification for the city's differential treatment of male and female employees with respect to payments to a pension fund. In other words, disparate treatment discrimination may exist even if, as in Manhart, it is based on a "generalization that [is] unquestionably true." Id. at 707, 98 Similarly, in Int'l Union, S.Ct. 1370. United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991), the Supreme Court held that, even though child-bearing capacity is a real physiological difference that exists between men and women, a policy barring female employees capable of bearing children from jobs with a risk of lead exposure was plainly facially discriminatory under Title VII because it "create[d] a facial classification based on gender." 499 U.S. at 197, 111 S.Ct. 1196. In so holding, the Johnson Controls Court adhered to the principle announced in Manhart that Title VII's "focus on the individual is unambiguous," and as such, "[i]t precludes treatment of individuals as simply components of a ... sexual ... class." Manhart, 435 U.S. at 708, 98 S.Ct. 1370. Significantly, the majority in Manhart reached this result by applying a "simple test" that makes discrimination turn on "whether the evidence shows treatment

*English Dictionary* ("[t]o treat a person or group in an unjust or prejudicial manner, esp. on the grounds of race, gender, sexual orientation, etc."). In addition, *Black's Law Dictionary* (9th ed. 2009) defines the noun "discrimination" as "differential treatment."

and joined by (i) Justice Stewart, (ii) Justice White, (iii) Justice Marshall, and (iv) Justice Powell. Chief Justice Burger, Justice Blackmun, and Justice Rehnquist dissented to Part I. Justice Brennan took no part in the consideration or decision of the case.

of a person in a manner which but for that person's sex would be different." 435 U.S. at 711, 98 S.Ct. 1370 (internal quotations omitted). Measured by this test, the PFT clearly falls within § 2000e-2(a)(1)'s prohibition against discrimination on the basis of sex: plaintiff was treated in a manner which but for his sex would have been different.

Jay J. BAUER, Plaintiff-Appellee,

#### v.

#### Loretta E. LYNCH, Attorney General, Department of Justice, Defendant– Appellant.

No. 14-2323.

United States Court of Appeals, Fourth Circuit.

Argued: Sept. 15, 2015.

Decided: Jan. 11, 2016.

**Background:** Former candidate for appointment as a Federal Bureau of Investigation (FBI) Special Agent brought action against Attorney General, alleging that gender-normed physical fitness test (PFT) constituted gender-based disparate treatment under Title VII. Parties cross-moved for summary judgment. The United States District Court for the Eastern District of Virginia, T.S. Ellis, III, Senior District Judge, 25 F.Supp.3d 842, granted candidate's motion. Attorney General appealed.

KING, Circuit Judge:

For more than ten years, the FBI has measured the physical fitness of its New Agent Trainees ("Trainees") by using gender-normed standards. In July 2009, plaintiff Jay J. Bauer flunked out of the FBI Academy after falling a single pushup short of the thirty required of male Trainees. Bauer then filed this Title VII civil action, alleging that the FBI had discriminated against him on the basis of sex, in that female Trainees were required to complete only fourteen push-ups. The Attorney General and Bauer filed cross-motions for summary judgment, and the district court granted Bauer's motion. See Bauer v. Holder, 25 F.Supp.3d 842 (E.D.Va.2014). The Attorney General has appealed and, as explained below, we vacate and remand.

B.

[2] Having considered the foregoing authorities, we must ascertain and identify the rule that is applicable in this proceeding.

v. Duke Power Co., 401 U.S. 424, 430, 91 S.Ct.

849, 28 L.Ed.2d 158 (1971).

[3] Men and women simply are not physiologically the same for the purposes of physical fitness programs. The Supreme Court recognized as much in its discussion of the physical training programs addressed in the VMI litigation, albeit in the context of a different legal claim than that presented today. The Court recognized that, although Virginia's use of "generalizations about women" could not be used to exclude them from VMI, some differences between the sexes were real, not perceived, and therefore could require accommodations. See VMI, 518 U.S. at 550 & n. 19, 116 S.Ct. 2264. To be sure, the VMI decision does not control the outcome of this appeal. Nevertheless, the Court's observation therein regarding possible alterations to the physical training programs of the service academies informs our analysis of Bauer's Title VII claims. That is, physical fitness standards suitable for men may not always be suitable for women, and accommodations addressing physiological differences between the sexes are not necessarily unlawful. See Lanning, 181 F.3d at 490 n. 15 (suggesting that use of gender-normed cutoff scores for aerobic capacity would not contravene Title VII); see also Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464, 469, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981) (plurality opinion) ("[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.").

At bottom, as the Powell and Hale decisions recognized, the physiological differences between men and women impact their relative abilities to demonstrate the same levels of physical fitness. In other words, equally fit men and women demonstrate their fitness differently. Whether physical fitness standards discriminate based on sex, therefore, depends on whether they require men and women to demonstrate different levels of fitness. A singular focus on the "but for" element of Bauer's claim offers the obvious conclusion that the numbers of push-ups men and women must complete are not the same, but skirts the fundamental issue of whether those normalized requirements treat men in a different manner than women. In recognition of that distinction, we agree with the rule enunciated in Powell and in Hale.

Put succinctly, an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each. Because the FBI purports to assess physical fitness by imposing the same burden on both men and women, this rule applies to Bauer's Title VII claims. Accordingly, the district court erred in failing to apply the rule in its disposition of Bauer's motion for summary judgment.