THE TWO LAWS OF SEX STEREOTYPING

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Abstract: This Article offers two main contributions to the study of sex stereotyping. First, it identifies an organizing principle that explains why some forms of sex stereotyping are today legally prohibited while others are not. Second, it argues for a shift in the current rights framework—from equal opportunity to individual liberty—that could assist courts and other legal actors to appreciate the harms of currently permissible forms of sex stereotyping. Commentators and courts have long observed that the law of sex stereotyping has many inconsistencies. For instance, it is lawful today for the state to require that unwed biological fathers, but not mothers, establish a relationship with a child as a condition for parental rights, but it is unlawful to exclude fathers from the category of "primary caregiver" for medical leave purposes. It is lawful to deny a female guard a position at an all-male prison but unlawful to refuse to hire a woman as a researcher for a physics clinic. It is lawful to post a "men only" sign on a bathroom door but unlawful to post the same sign on a courthouse door. This Article offers an organizing principle that explains these seeming inconsistencies. The main thesis is that there are today two primary branches of sex-stereotyping law: one that prohibits stereotyping and one that permits it. The prohibiting branch reflects an event in antidiscrimination law that began in the 1960s and involved integrating the private sphere of the family with the public spheres of the market and political life. This event involved three steps: (1) a new rationale regarding the harm of sex stereotyping—anti-subordination; (2) a new concept of gender—gender role; and (3) a new articulation of an equality principle—equal opportunity for women to participate in the market and for men to participate in domestic activities. These shifts produced statutes and decisions that rejected traditional division-of-labor stereotyping. In the same years, however, a parallel branch of permissible sex stereotyping flourished. This branch includes mandatory appearance codes in the workplace, schools, and prisons; denial of parental rights of unwed fathers; and sex segregation in bathrooms, locker rooms, prisons, and the military. This Article argues for a shift of focus in the law of sex stereotyping. It underscores the limits of an equal opportunity framework and argues that an indi-

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vidual liberty framework better captures the harms of many individuals who are today subjected to currently lawful forms of body stereotyping.

INTRODUCTION

The idea of anti-stereotyping has shaped sex discrimination law since the 1970s.[1] Yet the law of sex stereotyping has many inconsistencies to offer.[2] Consider a few. It is lawful today to require students, employees, and prisoners to adhere to gender-based dress and grooming codes[3] but unlawful to require that a female employee "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[4] It is lawful for the state to require that unwed biological fathers, but not mothers, establish a relationship with a child as a condition for parental rights[5] but unlawful to exclude fathers from the category of "primary caregiver" for medical leave purposes.[6] It is lawful for an employer to deny a transgender woman access to the women's restrooms[7] but unlawful for an employer to deny a transgender plaintiff a job opportunity.[8] It is lawful to deny a female guard a position at an all-male prison[9] but unlawful to refuse to hire a woman as a re-

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[1] *See* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1448 (2000); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 122 (2010); David H. Gans, *Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1876–81 (1995).

[2] *See* Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of* Price Waterhouse v. Hopkins*, and the Prospect of ENDA*, 66 STAN. L. REV 1333, 1364 (2014); Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 926 (2014) ("[T]he normative underpinnings of the [sex stereotyping] theory remain elusive. When the Supreme Court declared that sex stereotyping violated Title VII, it never really explained why.").

[3] *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112 (9th Cir. 2006) (holding that an employer could require female employees to wear makeup without violating Title VII's prohibition on sex discrimination); Olesen v. Bd. of Educ. of Sch. Dist. No. 228, 676 F. Supp. 820, 823 (N.D. Ill. 1987) (holding that prohibiting male students from wearing earrings did not violate the Equal Protection Clause because the gender-based restriction was substantially related to the legitimate government function of curtailing gang activity); Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. REV. 859, 897 (2012) (identifying, as one example, fifteen jurisdictions with specific maximum hair length requirements, mostly for male prisoners).

[4] Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

[5] Lehr v. Robertson, 463 U.S. 248, 261–62 (1983).

[6] Knussman v. Maryland, 272 F.3d 625, 634–35 (4th Cir. 2001).

[7] Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007).

[8] Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012).

[9] Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

searcher for a physics clinic.[10] These outcomes may seem chaotic. This Article argues that they are not.

This Article makes two main contributions. First, it identifies an organizing principle that explains why some forms of sex stereotyping are legally prohibited while others are not.[11] Second, it argues for a shift of legal rights framework, from equal opportunity to individual liberty, that could assist courts and other legal actors to appreciate the harms of sex stereotyping that are currently endorsed by lawmakers.[12]

Scholarly debates have so far turned on the real or desired scope of legal limits on sex stereotyping. Scholars have articulated two principal views. Under the broad view, most or all sex-based stereotyping by an employer, the state, or the federal government should be considered unlawful under Title VII and the Constitution respectively. Scholars supporting this view have argued that the "bulk of the work" in sex discrimination law since the early 1970s has been based on "the proposition that there are constitutional objections to 'gross, stereotyped distinctions between the sexes,' that is to say, to 'classifications based on sex . . . premised on overbroad generalizations.'"[13] They have also emphasized the centrality of the anti-stereotyping principle, arguing that Ruth Bader Ginsburg's 1970s campaign as a litigator introduced a new and radical theory of anti-stereotyping that "dictated that the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles."[14] These well-articulated positions represent a progressive feminist goal that favors expanding anti-stereotyping prohibitions. They often characterize judicial decisions that validate sex stereotypes as legal errors.[15]

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[10] Vogan v. U.S. Oncology, Inc., 301 F. Supp. 2d 1038, 1045 (W.D. Mo. 2003) (allowing a female clinical research coordinator to pursue her claim that she was discriminated against when she was fired after going on pregnancy leave).

[11] *See infra* notes 59–286 and accompanying text.

[12] *See infra* notes 287–325 and accompanying text.

[13] Case, *supra* note 1, at 1449–50; *see also id.* ("[V]irtually every sex-respecting rule struck down by the Court in the last quarter century embodied a proxy that was overwhelmingly, though not perfectly, accurate. Moreover, overbreadth alone seems to be enough to doom a sex-respecting rule.") (citation omitted).

[14] Franklin, *supra* note 1, at 88. According to Franklin, the theory's scope may have even broadened in *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003), "which suggested that even 'real' differences . . . cannot justify sex classifications that steer men and women into traditional roles in the family." Franklin, *supra*, at 168.

[15] *See, e.g.*, Case, *supra* note 1, at 1474 ("The [Supreme] Court has notoriously failed to consider anything that is not a sex-respecting rule to violate the constitutional norm against the denial of equal protection on grounds of sex. What it has required is not that the protection be equal, but that the rule be the same."); Franklin, *supra* note 1, at 173 ("[T]here persists in contemporary legal discourse an idea that the contours of constitutional sex discrimination law were set in the 1970s—that the kinds of sex stereotyping the second wave of the women's movement challenged are the only kinds of sex stereotyping that constitute sex discrimination under the Equal Protection Clause. The anti-

Others have advanced a narrow view of anti-stereotyping law. These scholars have claimed that the "dominant conception of American antidiscrimination law [i.e., the broad approach] distorts and masks the actual operation of that law."[16] According to this view, Title VII does not prohibit all sex stereotyping and is better understood "as marking a frontier between those gender conventions subject to legal transformation and those left untouched or actually reproduced within the law."[17] Under this approach, Title VII's anti-stereotyping prohibition is, and ought to be, significantly less robust than that offered by those who support the broad view.[18] Accordingly, gender stereotyping should not be prohibited in all its instances, and "[e]mployers may recognize some norms without impeding [sex] equality in the workplace."[19] The goal of Title VII is "to end caste-like sex hierarchy in the workplace. . . . Yet not all gender norms are created equal, and not every gender difference should be equated with gender inequality."[20]

These debates reflect not only the centrality of an anti-stereotyping principle in statutory and constitutional law but also its uncertainty. A systematic analysis of the dual nature of the law of sex stereotyping is necessary. This is the task of this Article. Katherine Franke has observed that assumptions about real biological differences between males and females have played a significant role in shaping modern sex discrimination law.[21] This Article shows how such assumptions produced today's bifurcated law of sex stereotyping.

The central thesis of this Article is that there are currently two primary branches of sex stereotyping law: one that prohibits stereotyping and one that permits it. The prohibited type of sex stereotyping is division-of-labor stereotyp-

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stereotyping principle that became law in those cases was more capacious and more capable of expansion than this conventional wisdom suggests.").

[16] Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 16 (2000).

[17] *Id.*

[18] Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 172 (2004).

[19] *Id.* at 201.

[20] *Id.* at 235. Yuracko adds that a man in a dress should not be protected against discrimination because he does not implicate the "substantive sex equality that is Title VII's goal." *Id.* at 202; *see also* Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 761 (2013) (arguing that Title VII's sex stereotyping prohibition reflects not a coherent antidiscrimination principle but only a pragmatic burden-shifting framework that turns on compliance costs for workers).

[21] *See, e.g.*, Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995) ("By accepting . . . biological differences, equality jurisprudence reifies as foundational fact that which is really an effect of normative gender ideology."). *But see* Franklin, *supra* note 1 ("[VMI] makes clear that anti-stereotyping doctrine governs all instances of sex-based state action, whether or not 'real' differences are involved . . . .").

ing.[22] This is stereotyping that stems from the traditional presumption that women are homemakers and men are breadwinners.[23] Courts have invalidated sex-based alimony rules,[24] exclusion of women cadets from the Virginia Military Institution,[25] and exclusion of men from medical leave provisions;[26] all of which represented traditional ideas about division of labor between men and women. By contrast, currently permissible types of sex stereotyping involve stereotyping along the male/female binary for a range of regulatory purposes. Examples include the inferior legal status of unwed fathers,[27] sex-based mandatory appearance policies,[28] and segregated bathrooms and prisons.[29] This Article takes a close look at the rationales and legal doctrines that underlie both branches of the law of sex stereotyping: the prohibited and the permissible.

The prohibited type of sex stereotyping, division-of-labor stereotyping, is deeply rooted in anti-subordination rationales.[30] In 1971, in *Reed v. Reed*, then-litigator Ruth Bader Ginsburg's brief was a turning point in rejecting traditional division of labor stereotyping.[31] This was part of a gender revolution that involved legislation such as Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and later statutes such as the Family and Medical Leave Act of 1993 ("FMLA").[32] Bruce Ackerman has called this the Civil Rights Revolu-

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[22] *See* Franklin, *supra* note 1, at 124 (discussing Ginsburg's brief in *Reed v. Reed* and observing that "[i]n sections entitled 'Male as head of household' and 'Women and the role of motherhood,' she asserted that '[t]he traditional division within the home—father decides, mother nurtures—is reinforced by diverse provisions of state law'").

[23] *Id.*

[24] Orr v. Orr, 440 U.S. 268, 283 (1979).

[25] *United States v. Virginia*, 518 U.S. at 519.

[26] *Knussman*, 272 F.3d at 634–35.

[27] Michael H. v. Gerald D., 491 U.S. 110, 142–43 (1989); *Lehr*, 463 U.S. at 261–62.

[28] *Jespersen*, 444 F.3d at 1112.

[29] Pitts v. Thornburgh, 886 F.2d 1450, 1459–60 (D.C. Cir. 1989) (upholding constitutionality of sex segregated prisons). Courts have invalidated body stereotyping that violates division of labor principles. *See, e.g.*, *United States v. Virginia*, 518 U.S. at 515; City of L.A. v. Manhart, 435 U.S. 702, 711 (1978).

[30] Ruth Colker has argued that two different principles, anti-differentiation and anti-subordination, underlie equal protection jurisprudence, and that "anti-differentiation contends that it is inappropriate to treat individuals differently because of their race or sex, [while a]nti-subordination argues that it is inappropriate for groups to be subordinated in society[, thereby] reject[ing] policies, even if facially neutral, that perpetuate the historical subordination of groups, while embracing even facially differentiating policies that ameliorate subordination." Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1003 (1986).

[31] Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4) (drawing an analogy between race-based and sex-based stereotyping and arguing that both should be impermissible because both are based on unalterable biological traits over which an individual has no control).

[32] Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.); Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended in 29 U.S.C. § 206(d)(2012)); Family Medical Leave Act of 1993 ("FMLA"), Pub. L. No. 103–3, 107 Stat. 6 (codified as amended in 29 U.S.C § 2612 (2012)).

tion and a Second Reconstruction.[33] From *Reed* and on, the Court rejected various manifestations of division-of-labor stereotyping and the ideology of separate spheres,[34] relying on Ginsburg's conceptualization of anti-subordination and "gender role stereotyping."[35] Since then, courts and other legal actors have rejected government and private policies that rely on stereotypes about female domesticity and male wage winning.[36]

By contrast, three types of reasoning have supported the permissible branch of sex-stereotyping law. The first type is reasoning from cultural or community norms. A prominent contemporary example of this is the validation of sex-based appearance codes, including grooming and dress codes that mandate how individuals should appear at work, in school, or in prisons.[37] The second type of reasoning when validating body stereotyping is from "real" biological differences. An example of this is a line of cases that affirm the inferior status of unwed fathers,[38] all of which reason primarily from biological differences in the reproductive process.[39] The third type of reasoning in support of body stereotyping is from heterosexual risk and privacy. An example of this is the validation of sex-segregated spaces, such as prisons and bathrooms, based

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[33] 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 81 (2014) (describing these developments as "one of the greatest acts of popular sovereignty in American history").

[34] *See* NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1970–1935, at xxiv (1977).

[35] *See, e.g.*, *Hibbs*, 538 U.S. at 736; *United States v. Virginia*, 518 U.S. at 533–34; Frontiero v. Richardson, 411 U.S. 677, 685–86, 690–91 (1973); Reed v. Reed, 404 U.S. 71, 77 (1971); *see also* Case, *supra* note 1, at 1449 ("VMI is . . . the logical culmination of a long line of cases . . . . Justice Ruth Bader Ginsburg, author of the majority opinion, stands at both ends of this line . . . . All of the moving parts of the present law are fully articulated in her brief for the appellant in *Reed v. Reed* . . . ."); Franklin, *supra* note 1, at 124 ("Taken together, Ginsburg's briefs in *Moritz* and *Reed* articulated a new constitutional argument: Sex-based state action violates equal protection when it entrenches the traditional role divisions that confine men and women to separate spheres.").

[36] *See infra* notes 91–177 and accompanying text (outlining and analyzing the Court's rejection of gender stereotyping).

[37] *See infra* notes 181–233 and accompanying text (outlining and analyzing the Court's acceptance of mandatory appearance codes). Part II examines how courts have distinguished mandatory appearance codes from the Court's holding in *Hopkins*. *See* 490 U.S. at 235.

[38] *See infra* notes 236–247 and accompanying text (analyzing the reasoning behind the inferior status of unwed fathers).

[39] Interestingly, this type of body stereotyping has ancient roots in Western traditions. In the book of Genesis, for example, God cursed woman after eating from the Tree of Knowledge, declaring, "I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee." *Genesis* 3:16 (King James). Similarly, in Aristotle, the basic biological difference between men and women involves the ability to produce semen, which only man can do. *See, e.g.*, Marguerite Deslauriers, *Sexual Difference in Aristotle's Politics and His Biology*, 102 CLASSICAL WORLD 215–31 (2009) (discussing Aristotle's *Generation of Animals*).

on perceived risk of sexual violence.[40] Table 1, at the end of Part II, visualizes the split nature of the law of sex stereotyping.

The bifurcated nature of sex stereotyping law is the consequence of an equality doctrine that is focused on integrating the family and the market. This Article underscores the limits of an equal opportunity framework and argues that an individual liberty framework better captures the harms of many individuals who are currently subjected to harmful body stereotyping.[41] It also demonstrates how courts and other legal actors can rely on this individual liberty framework to contest these forms of body stereotyping.[42]

This Article proceeds in three Parts. Part I describes the decline of separate spheres ideology in U.S. law in the second half of the twentieth century.[43] It begins with insights of feminist historians in the 1970s who articulated the metaphor of separate spheres to describe the traditional division of labor between men and women.[44] It then gives a few illuminating examples of the Court's validation of the traditional division of labor between men and women from the end of the nineteenth century until the 1960s.[45] By 1971, a new feminist opposition to division of labor stereotyping was fully developed in a brief that Ginsburg submitted in *Reed*, in which the Supreme Court ultimately held that "[b]y providing dissimilar treatment for men and women who are . . . similarly situated, [a statute that prefers males over females to administer estates] violates the Equal Protection Clause."[46] The brief elaborated a new anti-subordination rationale, alongside a new understanding of equal opportunity.[47] In the years that followed, the anti-subordination rationale and the equal opportunity doctrine became the centerpiece of sex discrimination law. This happened through judicial decisions that demanded the integration of women in the workplace and public spheres,[48] and a parallel line of decisions that recognized the role of men as participants in domestic activities.[49]

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[40] *See infra* notes 225–233 and accompanying text (outlining cases permitting sex-segregation in prisons).

[41] *See infra* notes 287–314 and accompanying text.

[42] *See infra* notes 315–319 and accompanying text.

[43] *See infra* notes 59–176 and accompanying text.

[44] *See infra* notes 59–72 and accompanying text (tracking the use of the "separate sphere" metaphor in scholarly literature).

[45] *See infra* notes 74–85 and accompanying text (detailing the cases using "separate sphere" justifications in their reasoning).

[46] *Reed*, 404 U.S. at 77; *see* Brief for Appellant, *supra* note 31.

[47] *See* Brief for Appellant, *supra* note 31, at 5 (arguing that the Idaho law requiring males be preferred to females in the administration of estates mandated "*subordination of women* to men without regard to individual capacity, creat[ing] a 'suspect classification' requiring close judicial scrutiny") (emphasis added).

[48] *See infra* notes 104–141 and accompanying text (outlining the cases that integrated women into the marketplace).

[49] *See infra* notes 145–176 and accompanying text (outlining the cases that integrated men into family life).

Part II explores three contemporary legal and cultural rationales for validating sex stereotyping.[50] First, to illustrate judicial reasoning from culture, this Part examines the strange life of sex-based appearance policies in the United States.[51] With some exceptions, such codes are today legally permissible, based on the rationale that employers, schools, and prisons can legitimately require conformity with cultural and community norms as long as individuals are not denied equal opportunity.[52] Second, to illustrate reasoning from "real" biological difference, this Article examines the rights of unwed fathers[53] and the medical practice of surgeries on intersex infants.[54] In both situations individuals are subject to harsh legal or medical consequences based on their biological sex. In the case of unwed fathers, based on the understanding that a biological father and a biological mother are differently situated in the reproductive process, unwed fathers are treated as legally inferior to unwed mothers. In the case of intersex infants, since the 1950s parents have been consenting to "corrective" surgeries on infants whose genitals at birth do not conform to "normal" appearance of male and female genitals. This Part discusses the first, though unsuccessful, federal lawsuit in the United States that claimed the right of intersex infants to be free from such surgeries.[55] Third, to illustrate reasoning from heterosexual risk and privacy, this Part discusses the application of Title VII's Bona Fide Occupational Qualification ("BFOQ") exception to same-sex privacy cases,[56] and the judicial upholding of sex-segregated spaces such as bathrooms and prisons.[57]

Part III argues for a change of framework in the law of sex stereotyping, in which individual liberty would replace equal opportunity as the leading principle.[58] This Part demonstrates how a focus on liberty could bring within the scope of sex discrimination law those forms of harmful body stereotyping that have so far been neglected by it.

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[50] *See infra* notes 177–286 and accompanying text.

[51] *See infra* notes 179–233 and accompanying text (outlining and analyzing the Court's acceptance of mandatory appearance codes).

[52] *See infra* notes 180–232 and accompanying text.

[53] *See infra* notes 236–247 and accompanying text (analyzing the legal reasoning behind the inferior status of unwed fathers).

[54] *See infra* notes 248–263 and accompanying text (highlighting important issues and new cases regarding "corrective" surgeries).

[55] Complaint at 3, M.C. v. Aaronson, No. 2 :13-cv-01303-DCN (D.S.C. May 14, 2013), 2013 Wl 1961775; *see infra* note 256 and accompanying text.

[56] *See infra* notes 264–275 and accompanying text (discussing the application of Title VII "BFOQ" exception).

[57] *See infra* notes 276–286 and accompanying text (reviewing cases upholding the segregation of prisons and bathrooms).

[58] *See infra* notes 287–321 and accompanying text.

I. THE DEMISE OF DIVISION-OF-LABOR STEREOTYPING

A systematic feminist challenge to the sex-based traditional division of labor has been the primary characteristic of sex discrimination law in the United States since the 1960s. At the core of this legal reform is the idea of integrating men in the family and women in the market by altering both the family and the market to facilitate greater sex equality.[59] This has also involved reforming the family and the market to resemble each other.[60] Making the family more like the market has included enforcing intra-familial contracts and recognizing torts and criminal liability between spouses; making the market more like the family has involved reforms such as on-site childcare facilities and gender-neutral parental leave policies.[61] This legal shift is well reflected in legislation such as Title VII of the Civil Rights Act of 1964,[62] the Equal Pay Act of 1963,[63] and the FMLA.[64] For the Supreme Court, the turning point was *Reed*, although the Court had already begun to express unease with division-of-labor stereotyping.[65]

A. Reasoning from Nature, Divinity, or Tradition

The metaphor of separate spheres gained prominence in the 1960s when historians realized that the study of women's history could benefit from the framework of ideology.[66] In particular, historians identified the idea of "sepa-

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[59] *See* Cary Franklin, *Separate Spheres*, 123 YALE L.J. 2878, 2894 (2014) ("[A]ttention to and concern about interspherical impacts is one major theme in sex equality legislation and constitutional sex discrimination law."); *infra* notes 104–177 and accompanying text (focusing on the integration of both these spheres).

[60] *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1519 (1983).

[61] *See* FMLA, 29 U.S.C. § 2601 (2012).

[62] Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

[63] Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended in 29 U.S.C. § 206(d)(2012).

[64] FMLA, Pub. L. No. 103–3, 107 Stat. 6 (codified as amended in 29 U.S.C § 2612 (2012)).

[65] *Reed*, 404 U.S. at 77; *see, e.g.*, United States v. Dege, 364 U.S. 51, 54 (1960) ("[T]o act on [the] medieval view that husband and wife 'are esteemed but as one Person in Law, and are presumed to have but one Will' would indeed be 'blind imitation of the past.' . . . It would require us to disregard the vast changes in the status of woman—the extension of her rights and correlative duties—whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country . . . ."); *see also* Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring) ("By adding [Title VII] Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.' . . . Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity . . . .").

[66] Linda K. Kerber, *Separate Spheres, Female Words, Woman's Place: The Rhetoric of Womem's History*, 75 J. AM. HIST. 9, 11 (1988). For a thoughtful analysis of the metaphor and its shortcomings, *see generally id.*

rate spheres" as central to understanding women's experience of subordination, and located the origin of spheres in the antebellum era.[67] One key text was Nancy Cott's *The Bonds of Womanhood*, which examined how the idea of female domesticity was established in New England when nineteenth-century bourgeoisie made the "family pattern of domesticity" seem necessary and natural.[68] The moral character of the domestic sphere, according to Cott, was formed in relation to the notion of the impersonal nature of the market: "The purpose of women's vocation was to stabilize society by generating and regenerating moral character . . . . [T]he impersonal world of money-making lacked institutions to effect moral restraint."[69] The question became "how to regulate personal relations—how to regulate morality—if 'the world' had become an arena of amoral market struggles."[70] The answer was the creation of a sacred and moral field: the family.[71] This conceptual separation of spheres, according to Cott, also created the necessary bonds for political sisterhood that would eventually lead to group consciousness and feminist legal reform.[72]

Late nineteenth and early twentieth century cases reflect the ideal of separate spheres for men and women. Judicial reasoning in support of this ideal was typically either from nature, God, tradition, or a combination of those three. In 1873, in *Bradwell v. Illinois*, the Supreme Court upheld a law that

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[67] Barbara Welter, *The Cult of True Womanhood: 1920–1960*, 18 AM. Q. 151, 152 (1966) (identifying nineteenth-century stereotypes about women that included domesticity, piety, purity, and submissiveness as female virtues); *see also* Gerda Lerner, *The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson*, 10 MIDCONTINENT AM. STUD. J. 5, 11 (1969) (viewing the "cult of true womanhood" as a vehicle for marking class differences, and especially elevating the status of middle-class women). *See generally* AILEEN KRADITOR, *Introduction* to UP FROM THE PEDESTAL: SELECTED WRITINGS IN THE HISTORY OF AMERICAN FEMINISM (Aileen Kraditor ed., 1968) (identifying the question of separate spheres as central to American feminism).

[68] COTT, *supra* note 34. Later historians paid closer attention to class and race dimensions of the idealization of domesticity, showing how the emergence of a bourgeoisie class in the United States relied on the family and its practices of domesticity and unpaid female labor. *See generally* JEANNE BOYDSTON, HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC (1990); MARY P. RYAN, CRADLE OF THE MIDDLE CLASS (Robert Fogel & Stephan Thernstrom eds., 1981); CHRISTINE STANSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789–1860 (1986).

[69] COTT, *supra* note 34, at 97.

[70] *Id.* at 97–98.

[71] *Id.* at 98 ("The Canon of domesticity answered by constituting the home as a redemptive counterpart to the world . . . .").

[72] *Id.* at 99–100; *see, e.g.*, *id.* (quoting a letter in praise of the importance of the women's sphere, published in the name of an eighteen-year-old in the *Ladies' Magazine* in 1831); *see also* CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 189–90 (1980) (arguing that the separation of spheres in the nineteenth century enabled women to see themselves as individuals with their own interests, thus marking an important milestone on the road to equality).

denied the plaintiff a license to practice law.[73] The Court reasoned that, "as a married woman [she] would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client."[74] In a famous concurrence, Justice Bradley, reasoning from religion and nature, declared that "[t]he 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."[75]

Although by the end of the nineteenth century women were included in a range of professions,[76] judicial acceptance of traditional division of labor persisted. In 1948, in *Muller*,[77] the Supreme Court upheld a law that limited working hours such that "no female [shall] be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day."[78] The Court emphasized that because "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[79] The distinction between males and females was justified in that "[t]he two sexes differ in structure of body, in the functions to be performed by each,

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[73] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 131 (1873) (noting that at the time the legislature enacted the statute governing admission to the bar it was generally regarded that "God designed the sexes to occupy different spheres of action").

[74] *Id.*

[75] *Id.* at 141 (Bradley, J., concurring). For similar rulings and reasoning by state courts, see *In re* Lockwood, 9 Ct. Cl. 346, 351 (1873); Robinson's Case, 131 Mass. 376, 377 (Mass. 1881); *In re* Opinion of Justices, 107 Mass. 604 (Mass. 1871); *In re* Goodell, 39 Wis. 232, 245 (Wis. 1875) ("The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all lifelong callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it.). *But cf. In re* Ricker, 29 A. 559, 583–84 (N.H. 1890) (holding that a woman was entitled to practice law because attorneys were not official public officers, positions from which women were legitimately excluded under the common law).

[76] *See, e.g.*, *Recent Case: Constitutional Law—Notaries Public—Appointment of Women*, 10 HARV. L. REV. 187, 187 (1896) ("The legislation in Massachusetts admitting women to the bar, and a later statute providing that such women as had qualified as attorneys might be appointed special commissioners to take depositions . . . indicate[s] an inclination of the community to grant to women at least some of the most important powers attaching to the office[s]."); Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex*, 1 SIGNS 137, 160 (1976), *available at* http://www2.widener.edu/~spe0001/266Web/266Webreadings/HartmanCapPat.pdf [https://perma.cc/AT7D-ZGAU] (describing women working in the late 1700s and 1800s as teachers, telephone operators, typists, clerks, boot and shoe manufacturers, and cigar-makers).

[77] Muller v. Oregon, 208 U.S. 412, 421 (1908) ("[A] state may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract.").

[78] *Id.* at 416–17 (quoting 1903 OR. LAWS 148).

[79] *Id.* at 421.

in the amount of physical strength . . . [and] the influence of vigorous health upon the future well-being of the race . . . ."[80]

The ideology of separate spheres is also reflected in judicial decisions midway through the twentieth century. In 1948, in *Goesaert v. Cleary*, the Supreme Court upheld a Michigan statute that denied a woman the opportunity to be a licensed bartender unless she was "the wife or daughter of the male owner" of a licensed liquor establishment.[81] The Court held that the state could, "beyond question, forbid all women from working behind a bar . . . despite the vast changes in the social and legal position of women,"[82] and added that "[t]he fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic."[83] The statute was understood as necessary to prevent "moral and social problems" that could arise if women were employed as bartenders.[84] Although the Court did not repeat Justice Bradley's dramatic separate spheres rhetoric, the outcome and the tone of *Goesaert* reflect the idea that the proper sphere of women is the home. Up until the 1970s, courts and other legal actors relied on assumptions about the proper domestic and maternal roles of women,[85] regularly upholding sex-based distinctions under the logic of protecting women's domesticity (*Bradwell*), maternal bodies (*Muller*), and sexual morals (*Goesaert*). This would change dramatically in the 1970s.

B. Responding from Anti-Subordination

"[N]ot on a pedestal, but in a cage."

—Justice Brennan (*Frontiero v. Richardson*)[86]

Since the 1970s, feminists made concerted efforts to integrate the family and the market. As Frances Olsen observed, the market and the family had

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[80] *Id.* at 422–23.

[81] Goesaert v. Cleary, 335 U.S. 464, 465 (1948).

[82] *Id.* at 465–66.

[83] *Id.* at 466.

[84] *Id.* In full, the Court opined, "[T]he 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 . . . ." *Id.*

[85] Thirteen years after *Goesaert*, the Court persisted in furthering this ideology in *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding a statute that excused women from jury service, and reasoning that "woman is still regarded as the center of home and family life").

[86] *Frontiero*, 411 U.S. at 684.

been perceived in U.S. law and culture as moral opposites.[87] The feminist strive to equality was characterized by calls to "enabl[e] women to participate in the market as freely and effectively as men do."[88] Janet Halley further elaborated that this early feminist commitment to the family and market binary involved two related themes: (1) constitutional equality as a leading principle,[89] and (2) a structural understanding of the subordination of women in terms of private and public spheres, that is, the idea that men used the private and public divide to subordinate women.[90]

This began in 1971, in *Reed*, which involved a challenge to a statutory preference of males over females as administrators of estates.[91] Ginsburg and the American Civil Liberties Union ("ACLU") submitted a brief that offered a new rationale based on anti-subordination and challenged the legality of division-of-labor stereotyping.[92] At the core of the *Reed* brief is an analogy between sex-based and race-based stereotyping. The brief compared the infamous race segregation case *Plessy v. Ferguson* with *Goesaert*, in which the Court ruled that, with minimal justification, legislation could draw "a sharp line between the sexes."[93] The main point of this analogy was that stereotyping based on race and sex is impermissible because it is based on "congenital and unalterable biological traits of birth over which the individual has no control and for which he or she should not be penalized."[94] Applying a feminist-

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[87] *See* Olsen, *supra* note 60, at 1499–1500 ("[T]he home was referred to as 'sacred,' and home life was celebrated as the reward for which men should be willing to suffer in the earthly world of work."). Olsen underscored that both have been posited as private spheres vis–à–vis the public state and that although "the values of the market provide the basis for a critique of the family, the values of the family provide the basis for a critique of the market." *Id.* at 1528, 1575.

[88] *Id.* at 1529 (emphasis added) ("Reformers who have sought to improve the status of women have tried reforming the family either (1) to promote equality within the family, or (2) to encourage husbands to behave altruistically toward their wives. Reformers have tried to improve the status of women in the market either (1) by requiring market actors to deal equally with women and men, or (2) by making the market more responsive to the needs of women.").

[89] Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE. J.L. & HUMAN. 189, 264 (2011) ("Constitutional equality was the measure of everything . . . . Four key innovations come into our story . . . : 1. a focus on rights, 2. specifically rights to equality, 3. preferably based in the Constitution, 4. to be realized through adjudication.").

[90] *Id.* at 265 ("Separate spheres ideology and the market/family distinction—typically dubbed the private/public distinction—constituted the key structural feature of the legal system and made law indispensable to the maintenance of male domination."). In the article, Halley discusses a legal feminist conference that took place at NYU School of Law in 1972, in which Ruth Bader Ginsburg wrote that "the [Equal Rights Amendment]—not the Fourteenth Amendment or legislation—would be needed to produce change." *Id.* at 263 (quotation omitted).

[91] *Reed*, 404 U.S. at 73.

[92] Brief for Appellant, *supra* note 31, at 5.

[93] *Goesaert*, 335 U.S. at 466. Ginsburg's brief noted that, regarding *Plessy*, "[s]imilarly, it was once settled law that differential treatment of the races was constitutionally permissible." Brief for Appellant, *supra* note 31, at 5.

[94] Brief for Appellant, *supra* note 31, at 6.

Marxist critique of group subordination,[95] the brief argued that "[l]egal and social proscriptions based upon race and sex have often been identical, and have generally implied the inherent inferiority of the proscribed class to a dominant group. Both classes have been defined by, and subordinated to, the same power group—white males."[96] Namely, the main problem with sex stereotyping is that it supports the subordination of women to men.

The anti-subordinationist rationale was accompanied by a new theory of equality: sex stereotyping denies women equal opportunity to participate in the economy, the market, and politics. Excluding women from traditionally male activities and vice versa denies individuals of both sexes equal opportunity.[97] The brief argued that "absent firm constitutional foundation for equal treatment . . . women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles."[98] To make equal opportunity real, sex classifications must be examined as suspect.[99] The opportunity at stake is a woman's opportunity "to be judged on [her] own individual merits"[100] The brief emphasized "the political, business and economic arenas," in which excluding women is "often characterized as 'protective' and beneficial."[101] Using a subordinationist metaphor to reverse the previous rationales of nature and tradition, the brief claimed that "[t]he pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."[102] The *Reed* Court invalidated the statute under the Equal Protection Clause but without explicitly adopting Ginsburg's anti-subordination rationale.[103]

1. Integrating Women in the Market

The feminist challenge to separate spheres ideology was incorporated into sex discrimination law in 1973, in *Frontiero v. Richardson*, when the Supreme Court adopted the anti-subordination rationale and the equal opportunity test.[104] An Air Force officer and her husband challenged a law providing that spouses of male members of the uniformed services are dependents for pur-

[95] For a different systematic analogy of feminism and Marxism, see generally Catherine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982).

[96] Brief for Appellant, *supra* note 31, at 18–19.

[97] *See id.* at 10 ("The distance to equal opportunity for women in the United States remains considerable in face of the pervasive social, cultural and legal roots of sex-based discrimination.").

[98] *Id.*

[99] *Id.* at 12. ("[W]ithout this recognition, the struggle for an end to sex-based discrimination will extend well beyond the current period in time, a period in which any functional justification for difference in treatment has ceased to exist.").

[100] *Id.* at 10.

[101] *Id.* at 21 (emphasis added).

[102] Brief for Appellant, *supra* note 31, at 21.

[103] *Reed*, 404 U.S. at 77 ("By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.").

[104] *Frontiero*, 411 U.S. at 686.

poses of obtaining certain allowances and benefits but that spouses of female members are not unless they can prove actual dependency.[105] The Court viewed the legislation as unlawful sex stereotyping,[106] utilized the sex and race analogy and the idea of systematic class subordination,[107] and relied on the framework of equal opportunity.[108] Such sex-based distinctions "often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."[109] *Frontiero* invalidated a government-imposed stereotype that reflected the traditional division of labor between men and women.

Following this rationale, in 1975, in *Stanton v. Stanton*, the Supreme Court invalidated a statutory provision that obliged parents to support boys until the age of twenty-one but girls only until the age of eighteen.[110] The Court rejected the assumption that "'generally it is the man's primary responsibility to provide a home and its essentials,' [and] that 'it is a salutary thing for him to get a good education and/or training before he undertakes those responsibilities,' [but] that 'girls tend generally to mature physically, emotionally and mentally before boys'; and 'tend to marry earlier.'"[111] These "old notions," observed the Court, cannot justify sex-based discrimination.[112] Women are "no longer [. . .] destined solely for the home and the rearing of the family," and their "activities and responsibilities are increasing and expanding."[113] A younger age of minority for girls denies women the equal opportunity of becoming powerful participants in society.[114]

Likewise, in 1979, in *Califano v. Westcott*, the Supreme Court invalidated a section in the Social Security Act that provided benefits "to families whose dependent children have been deprived of parental support because of the unemployment of the father, but . . . not . . . when the mother becomes unem-

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[105] *Id.* at 679–80 (citing 10 U.S.C. §§ 1072, 1076 (2012); 37 U.S.C. §§ 401, 403 (2012).

[106] *Id.* at 684 ("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 . . . .").

[107] *Id.* at 685 ("[O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes . . . .").

[108] *Id.* at 686.

[109] *Id.* at 687.

[110] Stanton v. Stanton, 421 U.S. 7, 17 (1975).

[111] *Id.* at 10 (quoting Stanton v. Stanton, 517 P.2d 1010, 1012 (Utah 1974)), *rev'd*, 421 U.S. 7 (1975)).

[112] *Id.* at 14.

[113] *Id.* The Court added that "the presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice." *Id.* at 15.

[114] *Id.* ("[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.").

ployed."[115] This policy explicitly reflected the assumption that men are primary breadwinners.[116] The Court clarified that "[the statute] is obviously gender biased, for it deprives [mothers who are primary providers] and their families of benefits solely on the basis of their sex."[117] The Court characterized the traditional division of labor as a "'baggage of sexual stereotypes' that presumes the father has the 'primary responsibility to provide a home and its essentials' while the mother is the 'center of home and family life,'"[118] and concluded that "[l]egislation that rests on such presumptions, without more, cannot survive scrutiny under the Due Process Clause of the Fifth Amendment."[119]

A central characteristic of the equal opportunity legacy is that even if a sex-based stereotype is statistically true (for example, women are shorter than men on average), employers cannot rely on it. In 1978, in *City of Los Angeles v. Manhart*, the Supreme Court ruled in favor of female employees challenging a benefits policy that was based on the different life expectancies of males and females.[120] The female employees were required to make larger contributions to their pensions than male employees because, on average, female employees were projected to live a few years longer than their male counterparts; thus, the female employees' pensions would, on average, pay out benefits for a longer period of time.[121] The Court admitted that this generalization is "unquestionably true," and that "the two classes are in fact different"[122] but nonetheless held that "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[123] With physical stereotyping that does not trigger equal opportunity concerns, however, courts often validate sex stereotyping.[124]

Perhaps the most oft-cited and illustrative decisions regarding integration of women in male-dominated spheres are *Price Waterhouse v. Hopkins*[125] and

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[115] Califano v. Westcott, 443 U.S. 76, 78 (1979).
[116] *Id.* at 83.
[117] *Id.* at 84.
[118] *Id.* at 89 (citations omitted).
[119] *Id.*
[120] *Manhart*, 435 U.S. at 706.
[121] *Id.* at 705.
[122] *Id.* at 707–08.
[123] *Id.* at 708; *see also* 29 C.F.R. § 1604.2(a)(1)(ii) (2015) (mandating that a BFOQ exception should not be granted where "[t]he refusal to hire an individual" is "based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship."). Mary Anne Case has called this "a Quest for Perfect Proxies." *See* Case, *supra* note 1, at 1447; *see also* Post, *supra* note 16, at 19 ("[Courts] explain that the purpose of Title VII is 'to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work'" (quoting Rosenfeld v. S. Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971)).
[124] *See infra* notes 177–233 and accompanying text (discussing permissible sex stereotyping).
[125] *Hopkins*, 490 U.S. at 258.

United States v. Virginia ("*VMI*").[126] *Hopkins* and *VMI* reflect the Court's commitment to enforcing equal opportunity of women in traditionally male provinces. In both cases, women were effectively denied access to male-dominated fields; they were denied access to forms of social power. Notably, the sex stereotyping in *Hopkins* was not typical division-of-labor stereotyping. The Court held that an accounting firm violated Title VII's antidiscrimination prohibition when it did not promote a highly qualified woman who was too masculine.[127] Nonetheless, the plaintiff was effectively subjected to division-of-labor stereotyping: she was not promoted to partnership in a situation whereas an equally positioned man would have been.

Judicial reasoning from anti-subordination and equal opportunity also guided the Court's *VMI* decision. In this case, Justice Ginsburg rejected the claim that biological differences can justify excluding women from military education.[128] Ginsburg explained that although "'[i]nherent differences' between men and women . . . remain cause for celebration, . . . [sex] classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."[129] Indeed, the main flaw in Virginia Military Institute's ("VMI") alternative scheme for women was that it did not provide women the same access to social resources that male VMI graduates enjoy.[130] The Court concluded that "Virginia ha[d] shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI."[131]

Obtaining equal opportunities for pregnant employees has also been an important aspect of this spheres-integration legal reform. In 1978, Congress enacted the Pregnancy Discrimination Act ("PDA") as an amendment to Title VII of the Civil Rights Act of 1964.[132] The PDA provides that Title VII's pro-

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[126] *United States v. Virginia*, 518 U.S. at 519.

[127] *Hopkins*, 490 U.S. at 258 ("[W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.").

[128] *United States v. Virginia*, 518 U.S. at 533–34.

[129] *Id.*

[130] *Id.* at 552–53 ("The [Virginia Women's Institute for Leadership (VWIL)] student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the legions of VMI 'graduates [who] have distinguished themselves' in military and civilian life . . . . A VWIL graduate cannot assume that the 'network of business owners, corporations, VMI graduates and non-graduate employers . . . interested in hiring VMI graduates' . . . will be equally responsive to her search for employment.") (citations omitted).

[131] *Id.* at 534.

[132] Pregnancy Discrimination Act, Pub. L. No. 95-955, 92 Stat. 2076 (codified as amended in 42 U.S.C. § 2000(e)(k) (2012)) ("[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ."). Thus, Congress reversed the holding of *General Electric Co. v. Gilbert*, holding that excluding

hibition includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[133] Courts have understood the goal of the PDA to be "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees,"[134] but it is unclear how much the PDA requires of employers. In 2015, in *Young v. United Parcel Service, Inc.*, the Supreme Court examined an employment policy that offered light-duty accommodations to employees who were injured on the job and to disabled workers but denied the same accommodation to pregnant employees.[135] The ACLU brief, submitted on behalf of the plaintiff, advanced anti-subordination and equal opportunity arguments,[136] claiming that policies that disadvantage pregnant workers undermine the spheres-integrating goals of the PDA and Title VII.[137] The Court, however, took a much narrower approach when it remanded the case to the lower court to "determine whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination."[138]

Since the 1970s, judicial understanding of equal opportunity has been primarily about equal access to economic and social power.[139] Ginsburg's brief in *Reed* expressed the significance of equal opportunity in moral terms: "Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications . . . lest outdated social stereotypes result in invidious laws or practices."[140] The societal evil at stake, according to the brief, is that "the dominant male society, exercising its political

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pregnancy-related disabilities from employee disability plans does not violate Title VII. 429 U.S. 125 (1976).

[133] 42 U.S.C. § 2000e(k).

[134] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

[135] Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1344–45 (2015).

[136] Brief for American Civil Liberties Union and a Better Balance, et al. as Amici Curiae Supporting Petitioners at 5–6, Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. 2013) (No. 12-1226) ("Congress enacted the Pregnancy Discrimination Act of 1978 (PDA) to put an end to widespread practices of discrimination against women because of pregnancy . . . . [W]omen were subject, as a class, to economic disadvantages and to exclusion from the public sphere more broadly once they became mothers . . . . To remedy this systemic discrimination, the PDA requires an employer to provide the same accommodation to pregnant workers as the employer gives to workers who are similar in their ability or inability to work." (citations omitted)).

[137] *Id.* at 6 ("Policies . . . that push pregnant workers out of the workplace when they need an accommodation that other workers receive perpetuate women's second-class status in the workforce and in society more broadly. When women are forced to leave the workplace because of pregnancy-related conditions . . . women suffer the very discrimination that Congress sought to eradicate. They lose income, economic security, and benefits, including health insurance, often with devastating results . . . .").

[138] *Young*, 135 S. Ct. at 1344.

[139] Brief for Appellant, *supra* note 31, at 40 ("[T]he status of women in the labor force is separate and unequal . . . .").

[140] *Id.* at 20–21 (emphasis added).

power, has secured women's place as the second sex."[141] Integrating women in the market and public sphere is a first step towards challenging this societal evil. The other side of this legal reform is integrating men in the family.

2. Integrating Men in Family

Men have posed two types of challenges to division-of-labor stereotyping: one involving financial dependence on female spouses and the other involving caregiving to children or other family members.[142]

a. Men as Dependents

In *Frontiero*, a statute embodied the presumption that husbands are financially independent, so when a female Air Force officer claimed her husband as a dependent, she had to supply evidence to support her claim.[143] The Court invalidated the statute and rejected the stereotype that a man could not be financially dependent on his wife.[144] A similar anti-stereotyping logic appeared in *Weinberger v. Wiesenfeld*, in which, in 1975, the Supreme Court invalidated a distinction in the Social Security Act that provided that "benefits based on the earnings of a deceased husband and father . . . are payable . . . both to the widow and to the couple's minor children in her care," but that "[s]uch benefits are payable on the basis of the earnings of a deceased wife and mother . . . only to the minor children and not to the widower."[145] Justice Brennan observed that "the framers of the Act legislated on the 'then generally accepted presumption that a man is responsible for the support of his wife and children,'" and that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."[146]

Similarly, in 1979, in *Orr v. Orr*, the Supreme Court invalidated an Alabama alimony statute that provided that husbands, but not wives, may be required to pay alimony upon divorce.[147] Once again, Justice Brennan rejected division-of-labor stereotyping and invalidated the statutory distinction.[148] Justice Brennan reasserted that the old notion that it is the man's responsibility to provide for the family can no longer justify a statute that discriminates on the

[141] *Id.* at 59.
[142] *See infra* notes 152–176 and accompanying text (outlining cases that functioned to fully integrate men into the family sphere).
[143] *Frontiero*, 411 U.S. at 688–89.
[144] *Id.* at 690–91.
[145] Weinberger v. Wiesenfeld, 420 U.S. 636, 637–38, 653 (1975).
[146] *Id.* at 644–45.
[147] *Orr*, 440 U.S. at 270.
[148] *Id.* at 279.

basis of gender.[149] He further observed that "[n]o 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."[150] Brennan further clarified that "even if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women, these factors still would 'not adequately justify . . . ' [this] statutory scheme."[151] The Court concluded that a sex neutral statute would end this discrimination against financially dependent men.[152]

b. Men as Fathers and Caregivers

Fathers have challenged laws or policies that reflect traditional division-of-labor stereotyping in three differing contexts: (1) the tender-years presumption in custody disputes; (2) legal rights of unwed fathers; and (3) the right to family or medical leave to care for newborns or other family members.

First, lawmakers and courts have, state by state, abolished the gender- stereotyping tender-years presumption, which provided that it is generally in the best interest of a young child to be raised by the child's mother.[153] As the Supreme Court of Utah put it, "the rule lacks validity because it is unnecessary and perpetuates outdated stereotypes."[154] The court added that "[t]he development of the tender-years doctrine was perhaps useful in a society in which fathers traditionally worked outside the home and mothers did not; however, since that pattern is no longer prevalent . . . . [T]he tender years doctrine is equally anachronistic."[155] Today, the sex-neutral "best interest of the child" standard is the guiding standard in custody determinations in many jurisdictions.[156]

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[149] *Id.* at 279–80 (quoting *Stanton*, 421 U.S. at 10).

[150] *Id.* at 280 (quoting *Stanton*, 421 U.S. at 14–15).

[151] *Id.* at 281 (quoting Craig v. Boren, 429 U.S. 190, 202–03 (1976)).

[152] *Id.*

[153] *See, e.g.*, COL. REV. STAT. § 14-10-124(b)(3) (2014) ("In determining parenting time or decision making responsibilities, the court shall not presume that any persons is better able to serve the best interests of the child because of that person's sex."); FLA. STAT. § 61.13(2)(b)(1) (2006) ("The court shall determine all matters relating to custody of each minor child in accordance with the best interests of the child . . . the father of the child shall be given the same consideration as the mother in determining custody."); WIS. STAT. § 767.41.24(3) (2013) ("[T]he court shall consider all facts in the best interest of the child. The court may not prefer one parent over the other on the basis of the sex."); Garrett v. Garrett, 464 S.W.2d 740, 742 (Mo. Ct. App. 1971) ("[In] all proceedings . . . in which shall be involved the right to the custody and control of minor children, . . . neither parent as such shall have any right paramount to that of the other parent, but . . . the court shall decide only as the best interests of the child itself . . . ."); State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285, 290 (1973) ("[A]pplication of the 'tender years presumption' would deprive [the father] of his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution.").

[154] Pusey v. Pusey, 728 P.2d 117, 120 (Utah 1986).

[155] *Id.*

[156] Pruitt v. Key, 203 So.2d 450, 453 (Ala. 1967) ("The paramount governing legal principle applicable to child custody cases is the welfare of the child, both presently and in the future.");

A second category of challenges involves unwed fathers. In 1972, in *Stanley v. Illinois*, the Supreme Court invalidated a statute that provided that children of unwed fathers should be considered wards of the state upon the death of their mother.[157] The statutory presumption was that unwed fathers are unfit parents.[158] After his female partner's death, Stanley's three children were declared wards of the state and placed with court-appointed guardians. Stanley challenged the statute.[159] In a decision by Justice White, the Court agreed that not all unmarried men are presumably unfit parents and held that "denying [a hearing on parental fitness before children are removed from custody] to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause."[160] Similarly, in 1979, in *Caban v. Mohammed*, the Supreme Court invalidated a statute that allowed for the adoption of an unwed father's biological child without his consent.[161] The plaintiff, Caban, had been involved in the lives of his children from birth and was eager to raise them.[162] The New York Domestic Relations Law at the time provided that consent for adoption would be required only of a parent of a child born in wedlock or of a mother of a child born out of wedlock.[163] Consent of unwed fathers was unnecessary. The Court held that the distinction between unmarried mothers and unmarried fathers was unconstitutional and that "maternal and paternal roles are not invariably different in importance."[164] In *Stanley* and *Caban*, the Court rejected the stereotype that men are not caregivers, but under different circumstances, unwed fathers have lost claims for legal recognition. In those situations, courts' reasoning was based on biological difference in the reproductive process.[165]

Boardman v. Boardman, 62 A.2d 521, 527 (Conn. 1948) ("In any proceeding to determine the custody of a child, the controlling elements are his welfare and best interests."); Wainwright v. Moore, 374 So.2d 586, 587–88 (Fla. Dis. Ct. App. 1979) ("It is well established in this State that in any proceeding involving child custody the paramount and controlling consideration is the best interest and welfare of the child.").

[157] Stanley v. Illinois, 405 U.S. 645, 646 (1972).

[158] *See* 37 ILL. COMP. STAT. 701/14 (1969). The statute defined a "parent" as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent." *Id.* The term did not include unwed fathers. *Id.*

[159] *Stanley*, 405 U.S. at 646.

[160] *Id.* at 654, 658. *But see id.* at 665 (Blackmun, J., dissenting) ("[T]he biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter.").

[161] Caban v. Mohammed, 441 U.S. 380, 382 (1979) (challenging N.Y. DOM. REL. LAW § 111 (McKinney 2016).

[162] *Id.* at 389.

[163] N.Y. DOM. REL. LAW § 111(1)(b)–(c) (emphasis added); *see also Caban*, 441 U.S. at 385.

[164] *Caban*, 441 U.S. at 382, 389.

[165] *See infra* notes 236–247 and accompanying text (analyzing the legal reasoning behind the inferior status of unwed fathers).

A third type of successful challenge to division-of-labor stereotyping has involved the right of fathers to take leave to care for a newborn or a spouse. For instance, in 2004, in *Knussman v. Maryland*, a state police employee sought leave to care for his newborn after his wife had suffered from serious medical complications during and after the pregnancy.[166] A Maryland statute enabled "primary care givers" to "use . . . up to 30 days of accrued sick leave to care for [a newborn] child . . . ."[167] Knussman, however, was told that he did not qualify as a "primary care giver" because fathers "couldn't breastfeed a baby."[168] This categorical exclusion, the Fourth Circuit Court of Appeals held, was unlawful sex discrimination, because "'overbroad generalizations about the different talents, capacities, or preferences of males and females' will not suffice."[169] The court observed that "gender classifications that appear to rest on nothing more than conventional notions about the proper station in society for males and females have been declared invalid time and again by the Supreme Court."[170]

Another distinct manifestation of the Supreme Court's rejection of division-of-labor stereotyping appeared in 2003, in *Nevada Department of Human Resources v. Hibbs*.[171] The issue in *Hibbs* was whether individuals could recover against the state for money damages under the FMLA's provision that entitles eligible employees to up to twelve weeks of unpaid leave for a range of reasons.[172] The Court held that Congress had acted within its power when it abrogated state immunity for FMLA's leave provisions. The Court observed that FMLA "aims to protect the right to be free from gender-based discrimination in the workplace" and that the statutory goal was to promote the integration of women in the workforce by recognizing male employees as potential caregivers.[173] Despite Title VII's prohibition on sex discrimination, "the persistence of such unconstitutional discrimination by the States justifies Congress'

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[166] *Knussman*, 272 F.3d at 628. Knussman argued that the state violated the Equal Protection Clause and the FMLA when it denied his request for a thirty-day leave to care for his newborn. *Id.* at 631. The district court vacated a jury verdict in employee's favor on FMLA claim but entered judgment in his favor on equal protection claim and approved a $375,000 damages award. Knussman v. Maryland, 65 F. Supp. 2d 353, 360 (D. Md. 1999), *rev'd in part, aff'd in part*, 272 F.3d 625 (4th Cir. 2001). The personnel officer appealed. *Knussman*, 272 F.3d at 627.

[167] MD. CODE ANN., STATE PERS. & PENS. § 7-508(a)(1) (1994). By contrast, a "[s]econdary care giver" was entitled under the statutory provision to use up to ten days of such accrued sick leave. *Id.* § 7-508(b)(1).

[168] *Knussman*, 272 F.3d at 629 (internal quotation marks omitted).

[169] *Id.* (quoting *United States v. Virginia*, 518 U.S. at 533).

[170] *Id.*

[171] *Hibbs*, 538 U.S. at 725.

[172] FMLA § 2612 (a)(1)(C)(2012); *Hibbs*, 538 U.S. at 724.

[173] *Hibbs*, 538 U.S. at 728, 736.

passage of prophylactic § 5 legislation."[174] Thus, the Court upheld the FMLA as a statute that sought to demolish a stereotype of women as primary caregivers.[175]

In sum, the brief in *Reed* announced a gender event in sex discrimination law: gender role stereotyping became the primary site for feminist legal reform. This event involved integrating the private sphere of the family with the public spheres of the market and political life.[176] Three conceptual novelties reflect this event: (1) a new rationale regarding the harm of sex stereotyping: anti-subordination; (2) a new concept of gender: gender role; and (3) a new articulation of an equality principle: equal opportunity. The opportunity at stake is an opportunity for women to participate in the market and for men to participate in domestic activities. Males were granted equal opportunity to engage in a range of domestic activities in *Orr*, *Caban*, *Stanley*, and *Hibbs*; and women to engage in market and political activities in *Reed*, *Frontiero*, *VMI*, and *Hopkins*. Table 1 below visualizes these three conceptual shifts.

II. The Persistence of Body Stereotyping

Although stereotypes about division of labor are regularly invalidated even when based on real or perceived physical differences, sex stereotypes that do not reflect traditional division-of-labor stereotyping are regularly validated.[177] Three different kinds of reasoning have appeared in support of currently permissible body stereotyping: (1) reasoning from cultural or community norms, (2) reasoning from "real" biological differences, and (3) reasoning from heterosexual desire. This Part analyzes these three types of reasoning by examining representative illustrations in today's law of sex stereotyping.[178]

A. Reasoning from Cultural or Community Norms

Across different areas of life, courts have validated mandatory sex-based appearance codes, reasoning that it is legitimate to require individuals to adhere to dress or grooming codes that are considered culturally appropriate. The

[174] *Id.* (citing 42 U.S.C. § 2000e-2(a) (2012) (adding that "stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread").

[175] *Id.* at 737.

[176] Of sex discrimination law scholars, Cary Franklin's account of the anti-stereotyping principle is descriptively closest to the account offered here. *See* Franklin, *supra* note 1, at 168 (emphasizing the holdings in *VMI* and *Hibbs*, "which suggested that even 'real' differences . . . cannot justify sex classifications that steer men and women into traditional roles in the family").

[177] *E.g.*, United States v. Virginia, 518 U.S. 515, 53–34 (1996); City of L.A. v. Manhart, 435 U.S. 702, 708 (1978).

[178] *See* notes 177–288 and accompanying text. The purpose of this Article is not to identify all instances of currently valid body stereotyping but to examine the current ways that body stereotyping is justified.

leading equality doctrine that courts apply in these cases is the equal burdens doctrine, according to which, if both sexes are equally (even if differently) burdened by a policy, that policy can be upheld.

1. Appearance at Work

Since the 1970s, employees have challenged appearance policies in the workplace that mandate female femininity and male masculinity.[179] In the early 1970s, the Equal Employment Opportunity Commission ("EEOC"),[180] followed by some courts,[181] viewed sex-based appearance policies as violating Title VII. The fate of these policies, however, lay elsewhere. Many federal courts since the 1970s have validated sex-based appearance codes,[182] leading the EEOC to concede in 1981 that legal authorities had not adopted its original progressive position.[183]

Under the oft-applied equal burdens test, courts have regularly held that sex-based appearance policies do not violate Title VII because they "do not pose distinct employment disadvantages for one sex. Neither sex is elevated by

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[179] For discussion of early appearance cases, *see generally* Post, *supra* note 16.

[180] *See, e.g.*, EEOC Decision No. 72-1380, 4 Fair Empl. Prac. Cas. (BNA) 847 (1972) ("To maintain one employment standard for females and another for males discriminates because of sex . . . and is unlawful unless the employer demonstrates the applicability of the narrow [BFOQ] exception . . . [which w]e hold, . . . as a matter of law, . . . is not applicable to . . . Employer's long hair policy."). For background on the legal history of appearance policies, see generally Case, *supra* note 2.

[181] *See, e.g.*, Aros v. McDonnell Douglas Corp., 348 F. Supp. 662, 666 (C.D. Cal. 1972) ("Males with long hair conjure up exactly the sort of stereotyped responses Congress intended to be discarded . . . . Title VII does not permit the employer to indulge such generalizations."); Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357, 1359 (C.D. Cal. 1972) ("[T]he EEOC has determined that the refusal to hire a male because of the length of his hair, when women who wear their hair at a similar length are hired, constitutes a violation of [Title VII]. This interpretation of the Act by the EEOC is entitled to great deference by the courts . . . .").

[182] Craft v. Metromedia, Inc., 766 F.2d 1205, 1216 (8th Cir. 1985) (holding that female anchor was not subjected to sex discrimination through the network's appearance standards); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1976) (upholding employer personal appearance regulations that restricted hair length for men but not for women); Boyce v. Safeway Stores, 351 F. Supp. 402, 404 (D.D.C 1972) (holding employer supermarket's grooming standards to not constitute sex discrimination).

[183] 2 EEOC Compl. Man. (CCH) § 619.1 (Oct. 1981). Several commentators have criticized this position, based on *Price Waterhouse v. Hopkins*'s observation that "'in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" 490 U.S. 229, 251 (1989) (quoting *Manhart*, 435 U.S. at 707 n.13); *see, e.g.*, Case, *supra* note 2; Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1374 ("In order to explain this line of cases, it seems clear that 'we would have to seek an explanation in the domain of social, not formal, logic.'") (citation omitted); Kramer, *supra* note 2. *See generally* Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033 (2009); Erica Williamson, *Moving Past Hippies and Harassment: A Historical Approach to Sex, Appearance and the Workplace*, 56 DUKE L.J. 681 (2006).

these regulations to an appreciably higher occupational level than the other."[184] Employers today can mandate female femininity and male masculinity in the workplace. The Supreme Court rejected a similar rationale of equal burdens in *Brown v. Board of Education*, in the context of race-based segregation in schools,[185] and in *Loving v. Virginia*, in the context of miscegenation laws.[186] Lawmakers, however, have refused to adopt an analogous anti-classificationist stance in sex discrimination cases.

Courts have recently applied the equal burdens test in casino cases such as *Jespersen v. Harrah's Operating Co.* and *Schiavo v. Marina District Development Co.*[187] In these cases, courts rejected Title VII challenges to sex-based appearance policies brought by female employees, and, in particular, their reliance on the anti-stereotyping theory from *Price Waterhouse v. Hopkins*.[188] The *Jespersen* court opined that, in contrast with Ann Hopkins's situation, applying makeup does not objectively harm a female bartender's opportunities in a casino and held that "objection to the makeup requirement, without more, can [not] give rise to a claim of sex stereotyping under Title VII."[189] The New Jersey Supreme Court applied the same equal burdens test to the Borgata's "Babes Program" and reasoned explicitly from cultural norms.[190] The court

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[184] Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336–37 (1973) ("Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities."); *see also Craft*, 766 F.2d at 1215 (holding that "a reasonable dress or grooming code is a proper management prerogative").

[185] Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954) ("We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.").

[186] Loving v. Virginia, 388 U.S. 1, 8 (1967) ("Because we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld . . . .").

[187] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006); Schiavo v. Marina Dist. Dev. Co., No. ATL-L-2833-08, 2013 WL 4105183, at *14 (N.J. Super. Jul. 18, 2013); *see also* Rohaly v. Rainbow Playground Depot, Inc., No. 56478-1-I, 2006 WL 2469143, at *5 (Wash. Ct. App. Aug. 28, 2006) ("We conclude this case is more like *Jespersen* . . . . Because the policy imposes requirements on both sexes and does not appear to impose unequal burdens on its face, we conclude PNW's dress code policy is not facially discriminatory.").

[188] The Ninth Circuit also rejected Darlene Jespersen's claim that Harrah's makeup requirement established a prima facie case of discriminatory intent in violation of Title VII 42 U.S.C. § 2000e-2(e)(1) (2012). *Jespersen*, 444 F.3d at 1109 ("[S]ex-based difference in appearance standards alone [does not], without any further showing of disparate effects, create . . . a prima facie case.").

[189] *Id.* ("If we were to [accept the sex stereotyping claim], we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.").

[190] *Schiavo*, 2013 WL 4105183, at *14 ("[A]ccording to Plaintiffs' Counsel unlawful gender stereotyping occurs whenever an employer requires females to appear attractive in a manner that they deem to be 'stereotypical'—even if an equally burdensome request is made of males. Nonetheless, that is not the law.").

clarified that an employer can lawfully require women to appear stereotypically feminine, show a preference for employees who possess a sexually attractive appearance, and "rely upon 'stereotypical notions of how men and women should appear' when expressing these preferences."[191] It is lawful, according to the court, to require conformity to sex-based cultural stereotypes so long as the equal opportunity rationale is not violated.[192] On the other hand, personal appearance challenges have been successful when courts have found that plaintiffs had suffered other harms such as violation of equal opportunity,[193] sexual harassment,[194] or when employers did not satisfy the equal burdens test.[195]

Similar reasoning appears in the judicial sanctioning of grooming requirements for men.[196] For example, in 1973, in *Dodge v. Giant Food, Inc.*, the D.C. Circuit Court observed that hair-length policies "do not limit employment opportunities by making distinctions based on immutable personal characteristics, which do not represent any attempt by the employer to prevent the employment of a particular sex."[197] Hair length regulations "do not pose distinct employment disadvantages for one sex. Neither sex is elevated by these regu-

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[191] *Id.* (citing *Jespersen*, 444 F.3d at 1112; *Craft*, 766 F.2d at 1214–15).

[192] *Id.* ("What employers cannot do is use stereotypes to impose a professional disadvantage on one sex or the other nor can they punish one sex for having a personal or physical trait that is praised in the other.") (citations omitted).

[193] *See, e.g.*, Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1043 (8th Cir. 2010) (holding that plaintiff who did not conform to feminine sex stereotypes "presented sufficient evidence to make out a prima facie case on her claims for sex discrimination and retaliation and a sufficient showing . . . that [employer's] proffered reason for her termination was pretextual").

[194] EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608 (S.D.N.Y 1981) ("[Defendants] required [plaintiff] to wear, as a condition of her employment, a uniform that was revealing and sexually provocative and could reasonably be expected to subject her to sexual harassment when worn on the job and a uniform that Sage and Monahan Cleaners knew did subject her to such harassment.").

[195] *E.g.*, Frank v. United Airlines, 216 F.3d 845, 854 (9th Cir. 2000) ("United's weight policy 'applie[d] less favorably to one gender,' [since] men could generally weigh as much as large-framed men whether they were large-framed or not, while women could generally not weigh more than medium-framed women." (citation omitted)); Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 608 (9th Cir. 1982) ("Where a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender, this court has held that the plaintiff need not otherwise establish the presence of discriminatory intent."); Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1033 (7th Cir. 1979) (requiring only female employees to wear uniforms is "disparate treatment," "demeaning to women" and "based on offensive stereotypes"); O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (requiring only women to wear uniforms is facially discriminatory); Laffey v. Nw. Airlines, Inc., 366 F. Supp. 763, 790 (D.D.C. 1973) (requiring only female flight attendants to wear contact lenses instead of glasses is discriminatory).

[196] *E.g.*, Harper v. Blockbuster Entm't, 139 F.3d 1385, 1387 (11th Cir. 1998); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1088 (5th Cir. 1975); Baker v. Cal. Land Title Co., 507 F.2d 895, 896 (9th Cir. 1974); *Boyce*, 351 F. Supp. at 403.

[197] *Dodge*, 488 F.2d at 1337 (emphasis added); *see also Willingham*, 507 F.2d at 1091 ("[G]rooming codes or length of hair is related more closely to the employer's choice of how to run a business than to equality of employment opportunity.").

lations to an appreciably higher occupational level than the other."[198] Sex-based classifications that regulate appearance are deemed harmless, as "Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities."[199]

This did not change even after the Court in *Hopkins* included gender stereotyping within the realm of prohibited sex discrimination. For example, in 1996, in *Tavora v. New York Mercantile Exchange*, the Second Circuit Court of Appeals held that it was permissible to fire a male employee for having long hair in violation of a policy that allowed women but not men to have long hair.[200] The Second Circuit reiterated the rule that grooming policies do not violate Title VII because "hair length policies are not within the statutory goal of equal employment . . . . [S]uch employment policies have only a *de minimis* effect . . . ."[201]

There is an important exception here. In recent years, transgender plaintiffs have prevailed in personal appearance challenges.[202] This reflects a broad legal and cultural pattern of recognizing and protecting transgender individuals.[203] Recently, the President has also named transgender rights among the

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[198] *Dodge*, 488 F.2d at 1337.

[199] *Id.*

[200] *Tavora*, 101 F.3d at 909.

[201] *Id.*

[202] *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding, in a § 1983 case alleging an Equal Protection violation, that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination"); Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) ("[E]mployers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); Schroer v. Billington, 424 F. Supp. 2d 203, 211 (D.D.C. 2006) (holding that a transgender plaintiff could plead a *Hopkins*-like claim that she had been discriminated against because of her failure to appear masculine enough for her employer); Macy v. Holder, E.E.O.C. Decision No. 0120120821, 2012 WL 1435995 at *1 (2012); *see also* Case, *supra* note 2.

[203] According to a 2011 national survey, transgender people are still "four times as likely as the general population to live in extreme poverty, twice as likely to be unemployed and almost twice as likely to be homeless." *Recent Administrative Policy: Administrative Law-Identity Records-Social Security Administration Eliminates Surgical Requirement for Changing Trans Individuals' Gender Markers.-Soc. Sec. Admin., Program Operations Manual System, Rm 10212.200 Changing Numident Data for Reasons Other Than Name Change*, 127 HARV. L. REV. 1863, 1863–64 (2014) (citing JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2–4 (2011)). Forty-seven percent of survey respondents reported experiencing adverse job outcomes because of their trans status, and significant numbers also reported being refused medical care, suffering sexual assault in prison, and being harassed and assaulted in school as a result of their trans or gender-nonconforming status. *Id.* at 1864. In addition, 41% percent of survey respondents had attempted suicide, compared to 1.6% of the general population. *Id.* Things have improved, however, in the areas of Medicare and Social Security. *See Recent Administrative Policy*, *supra*, at 1863; Parker Marie Molloy, *HHS Lifts Medicare Ban on Gender-Confirming Surgeries*, ADVOCATE (May 30, 2014), http://www.advocate.com/politics/transgender/2014/05/30/hhs-lifts-medicare-ban-gender-confirming-surgeries [https://perma.cc/TQ3Y-2777].

civil rights issues of our time.[204] Rulings in favor of transgender litigants have often depended on an ongoing medical understanding of transgender identities.[205] The basic principle in these decisions is that employers can lawfully enforce stereotypical appearance norms, but transgender plaintiffs are exceptional because they suffer a special harm understood through the diagnostic category of gender dysphoria[206] (previously known as "Gender Identity Disorder").[207] An outlier in this regard is the EEOC's recent *Macy v. Holder* decision, which, without mentioning any clinical criteria, established that, "[w]hen an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.'"[208] Exceptions for transgender plaintiffs have not involved reassessing norms of mandatory appearance; they only suspend these norms when they harm individual transgender identified plaintiffs.

Interestingly, the shift from the early 1970s, when plaintiffs prevailed in challenges to appearance codes, to today, when they do not,[209] has involved a

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[204] *See, e.g.*, President Barack Obama, State of the Union (Jan. 20, 2015) ("That's why we defend free speech, and advocate for political prisoners, and condemn the persecution of women, or religious minorities, or people who are lesbian, gay, bisexual, or transgender. We do these things not only because they're right, but because they make us safer."); *see also* Zachary A. Goldfarb, *Obama Announces Executive Order Protecting Federal Employees from Gender-Identity Discrimination*, WASH. POST (June 30, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/06/30/obama-announces-executive-order-protecting-federal-employees-from-gender-identity-discrimination [https://perma.cc/QJ5R-6F9G] ("President Obama . . . announced he would sign an executive order protecting federal employees from being discriminated against on the basis of gender identity . . . .").

[205] *See generally* Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51 (2006); Jennifer Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90 (2006); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15 (2003).

[206] *See, e.g.*, Konitzer v. Frank, 711 F. Supp. 2d 874, 905 (E.D. Wis. 2010) (declaring it "undisputed that [plaintiff's Gender Identity Disorder] is a serious medical need" in a case alleging that a prison failed to follow the Standards of Care when it followed its own preferred course of treatment rather than the treatment the prisoner would have chosen); *Schroer*, 424 F. Supp. 2d at 212–13 (referring to plaintiff's diagnosis of gender dysphoria in holding that transsexual employees may bring claims for discrimination "because of sex" under Title VII); Doe v. Reg'l Sch. Unit 26, 86 A.3d 600, 606 (Me. 2014) (holding that a school violated the Maine Human Rights Act when it prohibited a transgender student diagnosed with gender dysphoria from using the girls' bathroom).

[207] THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, § 302.85 (Am. Psychiatric Ass'n 4th ed., 1994). The psychiatric diagnosis of "Gender Identity Disorder" first appeared in the Diagnostic and Statistical Manual of Mental Disorders in 1980—the first DSM to exclude homosexuality as a psychiatric disorder—and as Eve Sedgwick has claimed, gender has replaced homosexuality as a site of diagnosis. Eve Kosofsky Sedgwick, *How to Bring Your Kids up Gay: The War on Effeminate Boys*, 29 SOCIAL TEXT 18, 20 (1991); *see also* Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 516–26 (2016) (discussing the history of the Gender Dysphoria diagnosis as well as its treatment under the law).

[208] Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *7 (Apr. 20, 2012).

[209] *See* notes 180–235 and accompanying text (outlining and analyzing the Court's acceptance of mandatory appearance codes).

shift in reasoning from liberty to equality. For example, in *Donohue v. Shoe Corporation of America*, a hair-length challenge decided in 1972, a federal court observed that, "[i]n our society we too often form opinions of people on the basis of skin color, religion, national origin, style of dress, hair length, and other superficial features," and "[t]hat tendency to stereotype people is at the root of some of the social ills that afflict the country, and in adopting the Civil Rights Act of 1964, Congress intended to attack these stereotyped characterizations so that people would be judged by their intrinsic worth."[210] This liberationist rationale was eventually dropped when courts and the EEOC shifted to an equal opportunity rationale.[211]

2. Appearance in Public Schools

A parallel shift occurred in public schools. In the 1960s and 1970s, female students successfully challenged policies that denied them the opportunity to wear masculine attire such as pants,[212] and male students also attained relative but lesser success in such sex-based challenges.[213] Notably, many of these ear-

[210] Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357, 1359 (C.D. Cal. 1972) (holding that the complaint of a former shoe salesman who claimed that his employer discharged him because of length of his hair alleged a prima facie violation of Title VII); *see also* Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973) ("We hold only that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation."); *Aros*, 348 F. Supp. at 666 ("The issue of long hair on men . . . is no different from the issues of race, color, religion, national origin and equal employment rights for women, all of which are raised in Title VII . . . . [T]he message of the Act is clear: every person is to be treated as an individual, with respect and dignity. Stereotypes based upon race, color, religion, sex or national origin are to be avoided.").

[211] *See infra* notes 287–321 and accompanying text.

[212] Johnson v. Joint Sch. Dist. No. 60, Bingham Cty., 508 P.2d 547, 548 (Idaho 1973) (holding that a school dress code that prohibited female students from wearing slacks, pantsuits, or culottes impermissibly discriminated on the basis of sex); Scott v. Bd. of Educ., 305 N.Y.S.2d 601, 606 (Sup. 1969) (finding invalid provision of school dress regulations prohibiting girls from wearing slacks except with permission of principal when warranted by cold weather); *see also* Natalie Smith, *Eliminating Gender Stereotypes in Public School Dress Codes: The Necessity of Respecting Personal Preference*, 41 J.L. & EDUC. 251, 253 (2012).

[213] *See Recent Cases: Constitutional Law—Schools and School Districts—Prohibition of Long Hair*, 84 HARV. L. REV. 1702, 1703 (1971) (observing that out of forty-one cases reviewed "students have lost in a slim majority of the cases, as courts have taken widely divergent positions on the hair issue"). *Compare* Crews v. Cloncs, 432 F.2d 1259, 1266 (7th Cir. 1970) (ruling that a male student denied equal protection by public high school dress code limiting hair length of male students but not female students when school failed to offer an explanation as to why health and safety concerns should apply only to male students), Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970) (holding that a male high school student suspended for refusing to cut his hair has due process right of personal liberty not to cut his hair short and there is no state interest of decency, unattractiveness, or compelled conformity justifying his suspension), *and* Breen v. Kahl, 419 F.2d 1034, 1037 (7th Cir. 1969) (holding that a student's right to govern the style and length of his hair is a personal freedom protected under the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment), *with* King v. Saddleback Junior Coll. Dist., 445 F.2d 932, 940 (9th Cir. 1971) (ruling that a lawsuit by male students who objected to a school regulation limiting the length of their hair failed to establish

ly decisions were grounded in the individual liberty interest in governing one's hairstyle. From the 1980s and on, however, courts have tended to uphold mandatory gender appearance policies in schools, especially for males,[214] because anxiety about male effeminacy is deeply rooted in American culture.[215]

As in the workplace, courts today utilize the equal burdens rationale, meaning that when both sexes are subject to dress regulations, they are perceived to be equally burdened.[216] For instance, the Seventh Circuit has recently clarified that "sex-differentiated standards consistent with community norms may be permissible to the extent they are part of a comprehensive, evenly-enforced grooming code that imposes comparable burdens on both males and females alike . . . ."[217] In that case, the court held that a "hair-length policy for the boys basketball team but for not for [sic] the girls basketball team" deprived male basketball players of equal protection.[218] In other successful student challenges, courts have relied on other exceptional grounds, such as religion and transgender status. For instance, in 2010, in *A.A. v. Needville Independent School*, the Fifth Circuit ruled in favor of a Native American family

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"the existence of any substantial constitutional right . . . ."), Jackson v. Dorrier, 424 F.2d 213, 216–17 (6th Cir. 1970) (wearing of excessively long hair caused classroom disruption and constituted a distraction from the educational process, and banning it did not violate students' constitutional rights), *and* Ferrell v. Dallas Indep. Sch. Dist., 392 F.2d 697, 704 (5th Cir. 1968) (banning long hair by school was not discriminatory under Civil Rights Statutes).

[214] *See, e.g.*, Alabama & Coushatta Tribes of Tex. v. Tr. of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1336 (E.D. Tex. 1993) (ruling that equal protection rights of Native American student were not violated by school dress code restricting hair length of male students where code was endorsed for "reasonable, nondiscriminatory reasons, including the maintenance of discipline and the promotion of respect for authority"); Olesen v. Bd. of Educ. of Sch. Dist. No. 228, 676 F. Supp. 820, 823 (N.D. Ill. 1987) (prohibiting male students from wearing earrings did not violate equal protection because the restriction was substantially related to legitimate government function of curtailing gang activity); Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1353, 1355 (S.D. Oh. 1987) ("School officials did not violate any rights plaintiffs might have under the First Amendment by prohibiting them from attending the Junior-Senior Prom dressed as members of the opposite sex."); Hines v. Caston Sch. Corp., 651 N.E.2d 330, 336 (Ind. Ct. App. 1995) (holding that school policy prohibiting wearing of earrings by male students did not violate equal protection as policy was substantially related to legitimate educational goal of enforcing community standards of dress in order to instill discipline); Jones *ex rel.* Cooper v. W.T. Henning Elementary Sch. Principal, 721 So. 2d 530, 532 (La. Ct. App. 1998) (ruling that school rule prohibiting male students from wearing earrings did not violate the Equal Protection Clause because school presented sufficient reasons to establish that the sex distinction was related to education);.

[215] SEDGWICK, *supra* note 207, at 156 (1993); Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 46–56, 61–69 (1995); *The Sissy Boy Experiment* (CNN television broadcast June 7, 2011).

[216] *Harper*, 655 F. Supp. at 1356. ("[T]he dress code requires all students to dress in conformity with the accepted standards of the community [and] 'such regulations . . . are a part of the disciplinary process which is necessary in maintaining a balance between the rights of individual students and the rights of the whole in the functioning of schools.'" (quoting Gfell v. Rickelman, 441 F.2d 444, 446 (6th Cir. 1971)).

[217] Hayden *ex rel.* A.H. v. Greensburg Cmty. Sch. Corp., 743 F.3d 569, 581–82 (7th Cir. 2014).

[218] *Id.* at 579.

that challenged a sex-based grooming policy that required boys to wear their hair short.[219] The court accepted a free exercise claim because the child "demonstrated a sincere religious belief in wearing his hair uncovered—visibly long."[220] At the same time, the court clarified that "the wearing of long hair and unconventional dress by most boys may be seen as an act of defiance—and a rejection of authority."[221] Likewise, courts and lawmakers have increasingly come to recognize the right of transgender children and youth to adhere to appearance codes of the gender of their identity.[222] The University of Vermont has gone even further in validating the choice of a third, neutral gender for its students, with no need for medical diagnosis.[223]

Overall, with the exception of religious objection or transgender status, courts today readily enforce stereotypical gender norms in the workplace or schools, so long as these policies equally burden men and women.[224]

3. Appearance in Prisons

In an insightful study of prison dress regulations, Gabriel Arkles has shown how prisons today enforce gender norms by heavily regulating hair and clothing of inmates.[225] Arkles observed that "[m]ost systems that regulate hair length do so only for men's prisons."[226] Namely, cultural anxiety over male effeminacy and relative tolerance of female masculinity is manifested in prison

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[219] A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248, 253 (5th Cir. 2010). The court decided the case under a strict scrutiny test on state free exercise grounds only. *Id.* at 272.

[220] *Id.* at 262.

[221] *Id.* at 271 (emphasis added).

[222] *See, e.g.*, Doe v. Reg'l Sch. Unit 26, 86 A.3d 600, 607 (Me. 2014). The Maine Human Rights Act ("MHRA") was amended to add "sexual orientation," which includes gender identity, as a protected class. *Id.* at 605 n.5 (citing P.L. 2005, ch. 10, §§ 3, 17 (2005)).

[223] Julie Scelfo, *A University Recognizes a Third Gender: Neutral*, N.Y. TIMES (Feb. 3, 2015), http://www.nytimes.com/2015/02/08/education/edlife/a-university-recognizes-a-third-gender-neutral.html [https://perma.cc/76TL-7YRR] ("Vermont is at the forefront in recognizing the next step in identity politics: the validation of a third gender. The university allows students . . . to select their own identity—a new first name, regardless of whether they've legally changed it, as well as a chosen pronoun—and records these details in the campus-wide information system so that professors have the correct terminology at their fingertips.").

[224] *See* Case, *supra* note 2 (arguing that the court blended the sexuality claim with the gender claim and seemed to be more persuaded by plaintiff's lesbian identity). *But see* McMillen v. Itawamba Cty. Sch. Dist., 702 F. Supp. 2d 699, 705 (N.D. Miss. 2010) ("[Because the plaintiff] has been openly gay since eight grade and she intended to communicate a message by wearing a tuxedo and to express her identity through attending prom with a same-sex date [her] expression and communication of her viewpoint falls squarely within the purview of the First Amendment.").

[225] Arkles, *supra* note 3, at 862.

[226] Arkles identifies fifteen U.S. jurisdictions with "specific maximum hair length requirements set forth in written rules," adding that "[j]urisdictions without written requirements may still regulate hair length through other means, such as through staff commands or through harassment that incentivizes conformity." *Id.* at 897.

hair regulations as well.[227] Arkles' study also reveals that styles of dress that are associated with non-Whiteness, non-Christianity, or "non-mainstream political views," are often banned.[228] Almost all jurisdictions today differentiate between male and female inmate appearance, either by distribution of products or by directly prohibiting feminine dress in men's facilities and masculine dress in women's facilities.[229] In this context as well, with the exception of transgender[230] and religious[231] prisoners, courts have been unreceptive to challenges of prison dress codes, often characterizing them as frivolous.[232]

In sum, employers, schools, and prisons can today lawfully impose sex-based appearance codes on employees, students, and prisoners. The supporting rationale for this kind of stereotyping is the expectation that individuals conform with cultural or community norms about how males and females should appear. The legal test typically applied when such policies are challenged is the equal burdens test. Part III of this Article argues that a liberty rationale may prove more productive in future challenges to such policies.[233]

B. Reasoning from "Real" Biological Difference

Two examples demonstrate body stereotyping that depends on reasoning from "pure" biological differences between males and females: the inferior status of unwed fathers and the practice of early "corrective" surgeries on intersex infants. What these two examples have in common is that they are both justified by courts or medical experts purely based on perceptions of physical difference between males and females. Reasoning from biology differs from reasoning from cultural or community norms in the following sense: in enforcing a community norm, the decision maker does not assume that the norm nec-

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[227] *Id.*

[228] Examples include sagging pants, baseball caps, headscarves, doo rags, and hoods. *Id.* at 899–900.

[229] *Id.* at 901.

[230] *See Konitzer*, 711 F. Supp. 2d at 908 (holding that a triable issue existed as to whether male prisoner, diagnosed with Gender Identity Disorder, should be allowed modest makeup, female undergarments, hair growth, and removal items). *But see* Lee v. Young, No. 99-6012, 2000 U.S. App. LEXIS 28068, at *3 (6th Cir. Nov. 6, 2000) (affirming district court dismissal of claim concerning male prisoner's right to wear a female hairstyle and makeup as frivolous); Claybrooks v. Tenn. Dep't of Corr., No. 98-6271, 1999 U.S. App. LEXIS 15174, at *3 (6th Cir. July 6, 1999) (affirming district court dismissal of claim concerning denial of female clothing and hormone therapy to male-to-female ("MTF") transgender prisoner as frivolous); Jones v. Warden of Stateville Corr. Ctr., 918 F. Supp. 1142, 1145–46 (N.D. Ill. 1995) (dismissing claims concerning MTF transgender prisoner's right to women's clothing and makeup as frivolous).

[231] *See, e.g.*, Holt v. Hobbs, 135 S. Ct. 853, 866 (2015).

[232] *See, e.g.*, Wilson v. Dir. of Div. of Adult Insts., No. CIVS-06-0791FCDGGHP, 2008 WL 927696, at *3 (E.D. Cal. Apr. 4, 2008) (recommending a claim concerning inadequate clothing in prison be dismissed as frivolous).

[233] *See infra* notes 287–321 and accompanying text (arguing for a jurisprudence that goes beyond just "anti-subordination" to include liberty considerations).

essarily stems from the physical body. For instance, the judges who validated the makeup requirements in *Jespersen* did not base their analysis on the fact that there is something in the female body that necessitates applying makeup; rather, the rationale for enforcing such a policy is that it is a cultural or community norm that employers can lawfully mandate.[234] The items in this Section concern reasoning from the body per se.[235]

1. The Inferior Legal Status of Unwed Fathers

Unwed fathers are consistently treated as legally inferior to unwed mothers. In 1983, in *Lehr v. Robertson*, the Supreme Court ruled against an unwed biological father who was denied an opportunity to object to his biological child's adoption.[236] The Court denied Lehr's claim to constitutional protection, reasoning that only "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause."[237] The Court underscored that "the mere existence of a biological link does not merit equivalent constitutional protection."[238] Likewise, in 1989, in *Michael H. v. Gerald D.*, the Supreme Court rejected an unwed father's claim for legal recognition—this time because the child was born of an extra-marital affair.[239] Justice Scalia reasoned that existing judicial precedent protects "the marital family . . . against the sort of claim Michael asserts."[240] In *Lehr* and in *Michael H.*, the Court differentiated between biological mothers and fathers purely based on biological sex. The biological bond of mother to child needs no further support to establish legal parentage, whereas the biological bond of father to child does.

Similar reasoning from biological difference also appeared in *Tuan Anh Nguyen v. Immigration & Naturalization Services* ("INS"), where the plaintiff challenged an immigration statute that governs the acquisition of citizenship by those born out of wedlock and outside of the country to a citizen and a non-

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[234] *Jespersen*, 444 F.3d at 1112 .

[235] *See* notes 228–265 and accompanying text.

[236] Lehr v. Robertson, 463 U.S. 248, 251 (1983). Under New York law, notice of an adoption proceeding had to be given to registered putative fathers as well as to other "possible fathers of children born out of wedlock." *Id.* Lehr did not fit into any of these categories. *Id.* at 251–52.

[237] *Id.* at 261 (citation omitted).

[238] *Id.*; *see also* Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (upholding child's adoption by stepfather where unwedded biological father had not petitioned for legitimation of the child prior to the filing of the adoption petition and provided only sporadic child support).

[239] Michael H. v. Gerald D., 491 U.S. 110, 131–32 (1989) (holding that a California statute that created a presumption that a child born to a married woman living with her husband is child of the marriage did not violate due process or equal protection rights of putative natural father).

[240] *Id.* at 123–24 (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)); *Lehr*, 463 U.S. at 261; Caban v. Mohammed, 441 U.S. 380, 389 (1979); *Quilloin*, 434 U.S. at 254–55 (1978).

citizen.[241] The statute imposed stricter requirements for acquiring citizenship when the citizen parent was a father than it did for a citizen parent mother.[242] The Court validated this sex-based distinction on the grounds that "requirements on unmarried fathers that differ from those on unmarried mothers [are] based on the *significant difference between their respective relationships to the potential citizen at the time of birth* . . . ."[243] Justice Kennedy emphasized that "[t]he difference between men and women *in relation to the birth process* is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender."[244] In 2008, the Ninth Circuit also upheld this statute in *United States v. Flores-Villar*, in which the plaintiff contested the different residency requirements for unwed mothers (one year) and unwed fathers (five years).[245] The court relied on the Supreme Court's reasoning in *Nguyen* and held the "the one-year period applicable to unwed citizen mothers seeks to insure that the child will have a nationality at birth."[246]

In sum, unwed biological fathers are treated as legally inferior to similarly situated mothers, and the primary justification for this has been the alleged

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[241] Immigration and Nationality Act, 8 U.S.C. § 1409 (1993); Tuan Anh Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53, 57–58 (2001) (deciding the immigration status of Nguyen, a lawful permanent resident, who had been born out of wedlock in Vietnam after his U.S. citizen father appealed the decision of Board of Immigration Appeals ordering Nguyen's deportation).

[242] 8 U.S.C. § 1409(a)(1)–(4), (c) ("[A] person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States . . . for a continuous period of one year."). The statute set forth the following requirements for the child to obtain citizenship when the father is the citizen parent: "(1) a blood relationship between the person and the father is established by clear and convincing evidence, (2) the father had the nationality of the United States at the time of the person's birth, (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of eighteen years, and (4) while the person is under the age of eighteen years- (A) the person is legitimated under the law of the person's residence or domicile, (B) the father acknowledges paternity of the person in writing under oath, or (C) the paternity of the person is established by adjudication of a competent court." *Id.* In addition, § 1401(g) established a residency requirement for the citizen parents of a total of five years, at least two of which were after the parent turned fourteen years of age. *Id.* § 1401(g).

[243] *Nguyen*, 533 U.S. at 62 (emphasis added).

[244] *Id.* at 70 (emphasis added).

[245] United States v. Flores-Villar, 536 F.3d 990, 995, 997 (9th Cir. 2008) (citing 8 U.S.C. § 1409(a)–(c) (1974)) (holding that plaintiff was not deprived of equal protection rights by different residency requirements for unwed mothers and fathers; that he lacked standing to assert substantive due process rights of his father; and that he lacked substantive due process right to parental involvement).

[246] *Id.* at 997.

naturalness of the biological relationship of mother and child versus the social construction of the father-child relationship.[247]

2. "Corrective" Surgeries on Intersex Infants

The practice of early normalizing surgeries on intersex infants is among the most harmful contemporary forms of sex stereotyping. An estimated one in 2000 infants is born with anatomy and/or chromosome patterns that do not fit typical definitions of male or female.[248] Since the 1950s, a medical practice of "corrective" surgeries became the standard pediatric treatment for intersexuality.[249] These medical guidelines advised pediatricians that the genitals of newborns with inadequate size penises should be surgically removed so the infant can appear feminine, and that an over-sized clitoris in a female infant should be surgically reduced so as not to appear offensive.[250] The theory behind these guidelines was that, regardless of chromosomal sex or internal reproductive organs, in order to become well adjusted, children must have genitalia that appear as either male or female.[251] Since the 1950s, pediatricians and hospitals regularly made recommendations based on those guidelines, and many parents gave "informed consent" to such surgeries after being advised that this will give their child a chance for "normal" development and mature sexuality. The medical practice of "corrective surgeries" has not yet entered the scope of protection of sex-stereotyping law.

In 1993, individuals who had undergone "corrective" surgeries formed the Intersex Society of North America ("ISNA"). ISNA's mission was to "end shame, secrecy, and unwanted genital surgeries for people born with an anatomy that someone decided is not standard for male or female."[252] ISNA and

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[247] *But see* Trimble v. Gordon, 430 U.S. 762, 776 (1977) (holding that statute that allows illegitimate children to inherit by intestate succession only from their mothers violated the Equal Protection Clause of the Fourteenth Amendment).

[248] *How Common Is Intersex?*, INTERSEX SOC'Y OF N. AM., http://www.isna.org/faq/frequency [https://perma.cc/4N59-UFN9].

[249] Ben-Asher, *supra* note 205, at 61 ("[I]f a newborn displays a penis that is less than two centimeters in length, 'a trial of testosterone injections should be given . . . and the infant raised as a boy only when there is a very good response' and that 'testes should be removed soon after birth in infants . . . in whom a very small penis mandates a female sex of rearing.'" (quoting Am. Acad. of Pediatrics, *Evaluation of the Newborn with Developmental Anomalies of the External Genitalia*, 106 PEDIATRICS 138, 141 (2000)). For genetic females, the guidelines advised that "infants raised as girls will usually require clitoral reduction." *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.* at 62 (quoting *Our Mission*, INTERSEX SOC'Y OF N. AM., http://www.isna.org); *see also* Cheryl Chase, *"Cultural Practice" or "Reconstructive Surgery"? U.S. Genital Cutting, the Intersex Movement and Medical Double Standards*, *in* GENITAL CUTTING AND TRANSNATIONAL SISTERHOOD: DISPUTING U.S. POLEMICS 126, 128 (Stanlie M. James & Claire C. Robertson eds., 2002) ("[We] advocate that surgery need not be performed on children born with ambiguous genitals unless there is a medical reason (to prevent physical pain or illness).").

other intersex-advocacy coalitions engaged in tireless political efforts that eventually led to two important developments. In May 2006, the U.S. and European endocrinological societies published a consensus statement that replaced the term "intersex" with "disorders of sex development" ("DSDs"),[253] and the ISNA and medical allies published a consortium position with new patient-centered guidelines.[254] As of today, early "corrective" surgeries are still performed in the United States and elsewhere though data suggests that the volume of surgeries has declined.[255]

The first lawsuit challenging intersex surgeries in the United States was filed in 2013 in a federal court in South Carolina.[256] The plaintiff was born in 2004 with a condition called ovotesticular difference/disorder of sex development ("ovotesticular DSD"), which is characterized by the presence of both ovarian and testicular tissues.[257] While in the custody of South Carolina Department of Social Services, a team of physicians recommended that he undergo sex assignment surgery in order to make his body appear female.[258] A physician performed sex assignment surgery on the plaintiff when he was about fifteen months old, removing his phallus and testicular tissue.[259] Two months later, plaintiff was adopted by parents who initially raised him as a girl, but after realizing that he had developed male gender identity, are now raising him

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[253] I.A. Hughes, et al., *Consensus Statement on Management of Intersex Disorders*, 91 ARCHIVES OF DISEASE IN CHILDHOOD 554, 554 (2006); *see also* Ellen K. Feder, *Imperatives of Normality: From "Intersex" to "Disorders of Sex Development,"* 15 GLQ: J. OF LESBIAN AND QUEER STUD. 225, 225 (2009). Notably, many intersex activists and allies objected to the term "disorders" which would attach unnecessary stigma. *See id.* (citing examples of "letters to the editor" sent to the Archives of Disease in Childhood).

[254] INTERSEX SOC'Y OF N. AM., CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT IN CHILDHOOD: CONSORTIUM ON THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT 1–3 (2006).

[255] A recent study in Britain has shown that after the new DSD guidelines were published in 2006, a study of a group of adolescents compared to a similar group of adolescents who had been treated ten years earlier found that clitoral surgery remained common (93% vs. 100%, current cohort vs. historical cohort). Lina Michala et al., *Practice Changes in Childhood Surgery for Ambiguous Genitalia?*, 10 J. PEDIATRIC UROLOGY 934, 934 (2014). Concomitant vaginoplasty, however, was performed less frequently (80% vs. 100%, current vs. historical). Vaginoplasty revision surgery was also less commonly required (65% vs. 81%) although 24% of the recent cohort still required major revision surgery prior to intercourse. *Id.* A larger European survey showed the following surgical results: 52% and 44.8% of surveyed medical centers reported having performed fewer or similar numbers, respectively, of clitoroplasties than in previous years and only 3.4% reported an increase. Vickie Pasterski et al., *Consequences of the Chicago Consensus on Disorders of Sex Development: Current Practices in Europe*, 95 ARCHIVES OF DISEASE IN CHILDHOOD 618, 618 (2009).

[256] Complaint, M.C. v. Aaronson, No. 13-1303 (D.S.C. May 14, 2013), 2013 WL 1961775.

[257] *Id.* at 10–12. Physicians who evaluated plaintiff in the first months of his life determined that, with surgery, the child could be "raised, surgically reconstructed, and treated to be male or female." *Id.* at 14. Shortly after birth, M.C. was placed in South Carolina Department of Social Services custody after his biological parents relinquished their parental rights. *Id.* at 11.

[258] *Id.* at 15.

[259] *Id.* at 2.

as a boy.[260] Plaintiff's complaint against the physicians who recommended and performed the sex assignment surgery and the Department officials who authorized it, alleged that defendants violated his substantive and procedural due process rights to bodily integrity, privacy, procreation, and liberty.[261] The district court denied the defendant's motion to dismiss, finding that the defendant "violated [plaintiff's] clearly established constitutional right to procreation," and that the complaint "state[s] a plausible claim that [they] violated [plaintiff's] procedural due process rights."[262] The Fourth Circuit Court of Appeals , however, reversed, reasoning that "the alleged rights at issue in this case were not clearly established at the time of M.C.'s 2006 sex assignment surgery [and therefore] we need not reach the question of whether M.C. alleged sufficient facts to show that the surgery violated his constitutional rights."[263]

Interestingly, the plaintiff's claims to bodily integrity, privacy, procreation, and liberty have significant overlaps with the claims of unwed fathers above. In both cases the leading rationale for the medical or legal norm is the physical nature of the male and female binary. In the case of unwed fathers, the reasoning rests on the different reproductive capacities of males and females; in the case of intersex infants, this reasoning rests on the importance of different genital appearance of males and females.

C. Reasoning from Heterosexual Desire

A third type of reasoning that has supported sex-stereotyping laws and policies presumes that males and females are in importantly different categories for assessing risk of sexual violence. Under this presumption, males are perceived as real or potential predators and females as vulnerable and in need of protection. This rationale differs from the previous two in that it is about sexual desire, specifically heterosexual desire, and in that the adopted policy is often segregation of individuals based on biological sex.

1. Title VII's Same-Sex Privacy Exception

Although Title VII prohibits sex discrimination in hiring and work conditions, an employer can demonstrate that sex is a bona fide occupational qualification "reasonably necessary to the normal operation of that particular business or enterprise".[264] Among the predominant sex-based BFOQ defenses is

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[260] *Id.* at 2–3.

[261] *Id.* at 22–25.

[262] Order Denying Motion to Dismiss at 10, 12, M.C. v. Aaronson, No. 13-1303 (D.S.C. Aug. 9, 2013).

[263] M.C. v. Aaronson, No. 13-2178, at *9 (4th Cir. Jan. 26, 2015).

[264] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a)(1) (2006) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or other-

the privacy BFOQ, which allows employers to exclude potential employees in order to protect the privacy interests of customers of the opposite sex.[265] As Amy Kapczynski has argued, "[s]ex-based BFOQs are of interest not only because they authorize acts that would otherwise be considered discriminatory, but because they are a key location where sexual difference is symbolized in the law."[266] Examples include refusal to hire men to full nursing positions in labor and delivery rooms,[267] sex-based assignments in psychiatric institutions,[268] prisons,[269] and nursing homes.[270]

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wise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."). To qualify as a BFOQ, "a job qualification must relate to the 'essence,' or to the 'central mission of the employer's business.'" Int'l Union, et al. v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) (quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977); W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 413 (1985)).

[265] *See* Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 152 (2004) (observing that courts are "far more permissive of sex discrimination on behalf of privacy concerns than they are of discrimination on behalf of sexual-titillation desires"); Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1259 (2003) (observing that the same-sex privacy BFOQ "eclipses all others in terms of its legitimacy, persistence, and breadth").

[266] Kapczynski, *supra* note 265, at 1259.

[267] Veleanu v. Beth Israel Med. Ctr., No. 98CIV.7455 (VM), 2000 WL 1400965, at *8 (S.D.N.Y. Sept. 25, 2000); EEOC v. Mercy Health Ctr., 29 Fair Empl. Prac. Cas. (BNA) 159 (W.D. Okla. 1982); Backus v. Baptist Med. Ctr., 510 F. Supp. 1191, 1198 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100, 1103 (8th Cir. 1982); Katt v. Dep't of the Army, EEOC Decision No. 01850870, 1986 WL 635587, at *3 (Nov. 5, 1986); *see also* Slivka v. Camden-Clark Mem'l Hosp., No. 01-C-21, 2002 WL 34587531 (W. Va. Cir. Ct. 2002), *rev'd*, 594 S.E.2d 616, 624 (W. Va. 2004) (reversing and remanding by state supreme court on basis of genuine issues of material fact with explicit preservation of possibility that privacy concerns could support gender as a BFOQ).

[268] Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 134 (3d Cir. 1996) (holding that sex is a BFOQ in a youth psychiatric facility); Jennings v. N.Y. State Office of Mental Health, 786 F. Supp. 376, 387 (S.D.N.Y 1992), *aff'd*, 977 F.2d 731 (2d Cir. 1992) (holding that gender is a BFOQ in state mental health facility).

[269] *Dothard*, 433 U.S. at 335 (upholding a regulation prohibiting women from working in "positions requiring continual close physical proximity to inmates," and finding "basis in fact for expecting that sex offenders who have criminally assaulted women in the past would . . . do so again if access to women were established within the prison"); Henry v. Milwaukee Cty., 539 F.3d 573, 583 (7th Cir. 2008) (holding that same-gender "direct role model/mentoring form of supervision" was "necessary to achieve the [facility's] mission of rehabilitation"); Everson v. Mich. Dep't of Corr., 391 F.3d 737, 753 (6th Cir. 2004) ("[T]he exclusion of males from these positions is 'reasonably necessary' to 'the normal operation' of the MDOC's female facilities . . . a BFOQ would materially advance . . . the security of the prison, the safety of inmates, and the protection of the privacy rights of inmates . . . ."); Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998). *But see* Ambat v. City of S.F., 757 F.3d 1017, 1028 (9th Cir. 2014) ("[The] County has not met its burden of showing that there is no genuine dispute over whether excluding men from supervisory positions in female housing units is a legitimate proxy for requiring that deputies in those positions not pose a threat to the safety of female inmates."); Breiner v. Nev. Dep't of Corr., 610 F.3d 1202, 1216 (9th Cir. 2010) (ruling that sex not a BFOQ for correctional lieutenants in women's prison); Torres v. Wisc. Dep't of Health & Soc. Servs., 838 F.2d 944, 954 (7th Cir. 1988) (holding that female sex not a BFOQ for guards in women's prison); Forts v. Ward, 621 F.2d 1210, 1217 (2d Cir. 1980) (denying a sex-based BFOQ for prison guards because measures to accommodate inmate privacy concerns were available); Harden v. Dayton Human Rehab.

The same-sex privacy exception often presumes heterosexuality, male aggression, and female vulnerability. Consider for instance the Transportation Security Administration's ("TSA") patdown policy which requires that "If a patdown is required to order complete screening . . . [t]he patdown should be conducted by an officer of the same gender."[271] Under this policy a "same-gender" pat-down is not optional — it is mandatory.[272] This rule assumes that the biological sex of the officer is relevant for performing the security task,[273] and it reflects an assumption of opposite-sex desire.[274] The same-sex BFOQ responds to this presumed heterosexual desire by denying opposite sex contact.[275]

2. Segregated Spaces: Bathrooms, Prisons

> *"A sign that says 'men only' looks very different on a bathroom door than a court-house door."*
>
> —Justice Marshall (*City of Cleburne v. Cleburne Living Ctr.*)[276]

Preventing sexual assault and protecting sexual privacy have been leading justifications in segregating spaces by sex, including education, the military, restrooms, prisons, and athletics.[277] In many such instances of sex segregation,

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Ctr., 520 F. Supp. 769, 781 (S.D. Ohio 1981) (rejecting a female-sex BFOQ for a prison guard position because could avoid the conflict between privacy and equal employment), *aff'd*, 779 F.2d 50 (6th Cir. 1985); Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952, 957 (N.D. Iowa 1979) (refusing to grant a male-sex BFOQ for corrections officers in a men's penal institution because institutional adjustments could be made to respect inmate privacy), *aff'd*, 612 F.2d 1079 (8th Cir. 1980).

[270] Jones v. Hinds Gen. Hosp., 666 F. Supp. 933, 935 (S.D. Miss. 1987) ("The job duties of male and female nurse assistants and male orderlies often require that such employee view or touch the private parts of their patients."); Fesel v. Masonic Home of Del. Inc., 447 F. Supp. 1346, 1352 (D. Del. 1978), *aff'd mem.*, 591 F.2d 1334, 1352–53 (3d Cir. 1979) ("Fulfillment of that responsibility necessitates intimate personal care including dressing, bathing, toilet assistance, geriatric pad changes and catheter care. Each of these functions involves a personal touching . . . .").

[271] *Pat-Downs*, TRANSP. SEC. ADMIN., https://www.tsa.gov/travel/security-screening [https://perma.cc/2JPS-CZXK]. The TSA clearly means (biological) "sex," not "gender."

[272] *Id.* ("[A]ll pat-downs are only conducted by same-gender officers.").

[273] *Id.* This policy survived an equal protection challenge in *Wade v. Napolitano*, No. 3-07-0892, 2009 WL 9071049 at *10 (M.D. Tenn. Mar. 24, 2009).

[274] One could argue that *other* justifications exist that could support same-sex pat-downs, such as the familiarity of employees with anatomy that resembles one's own. Simple employee training, however, could address such concerns.

[275] This logic of eliminating desire could lead to the conclusion that asexuality offers an ideal BFOQ here: an openly asexual officer could serve the task of not making anyone feel uncomfortable. *See* Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 373 (2014).

[276] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 468–69 (1985) (Marshall, J., dissenting).

[277] David Cohen has observed that sex-segregating laws can be "mandatory, administrative, permissive [or] voluntary." David Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 55 (2011). Cohen notes that a legal movement towards stopping sex-segregated

lawmakers apply the equal burdens test. For example, the Department of Education has issued regulations that permit sex segregation if educational opportunities are implemented in an "evenhanded" manner and are "completely voluntary."[278] Similarly, in decisions affirming sex-segregated restrooms and locker rooms, the equal opportunity and burden logic has prevailed. For instance, the Tenth Circuit has held that "an employer's requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms . . . ."[279] Both sexes are burdened with using separate bathrooms, so neither is disadvantaged.[280]

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education—led by Supreme Court interpretations of the Equal Protection Clause and Office of Civil Rights of the Department of Education efforts—was reversed in 1996, especially with legislative and regulatory action, such as in the No Child Left Behind Act and explicit Department of Education permission of sex-segregated education under Title IX. *Id.* at 62–65. Cohen discusses, for example, federal statutes that provide for sex-segregated housing for Army, Navy, and Air Force recruits in basic training, and a statute that requires that only drill instructors of the same sex as the recruits have access to the recruits' living quarters after the end of the training day. *Id.*at 78 (citing 10 U.S.C. §§ 4319–4320 (2012) (Army), 6931–6932 (Navy), 9319–9320 (Air Force)). Cohen discusses federal and state laws mandating sex-segregated bathrooms in specific locations, such as places of employment, schools, gas stations, restaurants, and hotels, and laws mandating sex-segregated bathrooms based on the presence of specific numbers of men and/or women in particular locations. *Id.* at 81–83. Cohen also discusses laws for prison segregation as well as athletics. *Id.* at 79, 109 ("[T]hese laws range from segregating the inmate population of an entire state's penal system to the jails of particular localities to specifically applying to cells, rooms, apartments, bathing facilities, work opportunities, bathrooms, showers, educational and recreational programs, drug and alcohol rehab programs, death row, waiting areas pre-trial and chain gangs."); *see also* EILEEN MCDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS 34 (2008). *See generally* Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513 (2007).

[278] 34 C.F.R. § 106.34(b)(1)(ii)-(iii) (2015).

[279] Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224–25 (10th Cir. 2007) (holding that the employer's concern that "the use of women's public restrooms by a biological male [employee] could result in liability" constituted a legitimate, nondiscriminatory reason for termination under Title VII (quoting Oncale v. Sundowner Offshores Servs., 523 U.S. 75, 80 (1998)). *But see supra* notes 205–208 and accompanying text (discussing the increasing recognition of transgender exceptions to this reasoning).

[280] *See* Kastl v. Maricopa Cty. Comm. Coll. Dist., 325 F. App'x. 492, 493–94 (9th Cir. 2009) (holding that employer satisfied its burden of providing evidence that it was motivated by safety, not by MTF transgender plaintiff's sex, in refusing her access to women's restrooms); Hispanic Aids Forum v. Estate of Bruno, 16 A.D.3d 294, 298 (N.Y. App. Div. 2005) ("[Transgender individuals] were excluded on the same basis as all biological males and/or females are excluded from certain bathrooms—their biological sexual assignment. In this vein, we find the Minnesota Supreme Court's decision in *Goins v. West Group*, 635 N.W.2d 717 (2001) to be instructive. In *Goins*, plaintiff claimed that defendant discriminated against her . . . by designating restrooms and restroom use on the basis of biological gender, in violation of the Minnesota Human Rights Act. . . . Nevertheless, the court concluded that the defendants' designation of restroom use, applied uniformly, on the basis of 'biological gender,' rather than biological self-image, was not discrimination. We agree with this rationale . . . ."); Sullivan v. City of Cleveland Heights, 869 F.2d 961, 962 (6th Cir. 1989) ("[T]he facility afforded to [ten-year-old plaintiff girl for changing clothes in public hockey arena] was substantially equal to the locker room utilized by the boys on her team . . . . [Plaintiff] was not accorded treatment unequal to that of the male hockey players, [therefore] it is unnecessary to consider whether the difference in the facilities was substantially related to an important objective.").

In this area as well, transgender is the exception. Transgender-identified students have had some recent success in challenging sex segregation in bathrooms.[281] For example, the Maine Supreme Court has recently determined that denying a fifth-grade, female-identified transgender student access to the female bathrooms constitutes sexual orientation discrimination in violation of the Maine Human Rights Act.[282] The court extended the protection to the plaintiff by viewing her as exceptional. The sex-segregating norm itself was not condemned. The court underscored that its decision "rests heavily on [plaintiff's] gender identity and gender dysphoria diagnosis, both of which were acknowledged and accepted by the school" and that "[o]ur opinion must not be read to require schools to permit students casual access to any bathroom of their choice."[283] Only where "it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination. . . ."[284] Unfortunately, a sex-segregating norm was strengthened rather than weakened in this important legal victory for transgender rights.[285]

In general, when evaluating sex segregation in prisons, locker rooms, and bathrooms, courts have applied equal burden and opportunity rationales.[286] If

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[281] California recently became the first state to pass a law enabling students to use restrooms and join sports teams according to their gender identity, without proof of any medical diagnosis. *See* School Success and Opportunity Act, 2013 Cal. Legis. Serv. 85 (A.B. 1266), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1251-1300/ab_1266_bill_20130812_chaptered.pdf [https://perma.cc/QGM6-NFWC] ("A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."). *But see* Steve Rothaus, *Proposed Law Would Limit Transgender Protections Throughout Florida*, MIAMI HERALD (Feb. 6, 2015), http://www.miamiherald.com/news/local/community/gay-south-florida/article9390389.html [https://perma.cc/3PEP-R797] (describing a proposed Florida bill that would provide a private cause of action against individuals who use single-sex facilities that are restricted to "persons of other biological sex").

[282] *Doe*, 86 A.3d at 607. The MHRA was amended to add "sexual orientation," which includes gender identity, as a protected class. *Id.* at 605 n.5 (citing P.L. 2005, ch. 10, §§ 3, 17 (effective Mar. 31, 2005)).

[283] *Id.* at 607.

[284] *Id.*

[285] The dissenting judge continued to explore this idea of sex blindness that he found absurd. *See id.* at 609–10 (Mead, J., dissenting).

[286] *See, e.g.*, Roubideaux v. N.D. Dep't of Corr. & Rehab., 570 F.3d 966, 975 (8th Cir. 2009) ("The statutes substantially further the government's legitimate and important objective of segregating women inmates from male inmates while providing them with the same type of services that are available within the DOCR system."); Klinger v. Dep't of Corr., 107 F.3d 609, 615 (8th Cir. 1996) ("When considering single-sex prisons, the only logical and workable application of the definition of 'program or activity' under Title IX requires comparison of educational opportunities for female and male prisoners within the entire system of institutions operated by a state's federally-funded correctional department or agency . . . ."); Jeldness v. Pearce, 30 F.3d 1220, 1226–27 (9th Cir. 1994) ("The prohibited activity would be the offering of educational programs only in the men's prisons, without offering

both sexes have similar access to a facility or are similarly burdened by a policy, sex classifications are typically upheld. The guiding principle is that individuals cannot be directly excluded from domains that are associated with social, economic, and political power. Male and female bodies, however, are regularly separated, ostensibly for their own protection, based on assumptions of sexual difference and heterosexual desire.

In sum, legally permissible sex stereotyping today has many forms but can be classified into three main supporting rationales: cultural and community norms, real biological difference, and sexual danger and privacy. Various legal doctrines are used to support body stereotyping, but the most prevalent today is the equal burdens doctrine, which has been used to validate a range of sex-based classifications, from dress and grooming codes to bathroom and prison separation. The following table summarizes these insights and contrasts them with the second branch of sex-stereotyping law, prohibited division-of-labor stereotyping:

Table 1

	"Division of Labor" Stereotyping	Body Stereotyping
Is Sex Stereotyping valid?	No	Yes
Primary Rationale (s) * Representative Examples	*Anti-Subordination* * Inclusion of women in VMI * Upholding Family and Medical Leave Act * Recognizing men as dependents * Recognizing men as caregivers	*1.Culture* *Sex-based appearance policies *2.Biology* * Inferior status of unwed fathers * Intersex surgeries *3. Sexuality* *Sex-segregated jobs and spaces
Primary Concept(s) of Gender	"Gender Role"	"Cultural/Community Norm"; "Disorders of Sex Development"; "Gender Dysphoria"
Primary Equality Doctrine/Test	Equal Opportunity	Equal Burdens

equivalent programs in the women's prison . . . ."); Glover v. Johnson, 478 F. Supp. 1075, 1079 (E.D. Mich. 1979) (holding that Equal Protection Clause does not require that men's and women's prisons have identical programs, it only requires programs "equivalent in substance if not in form").

III. LIBERTY HARMS OF BODY STEREOTYPING

Perhaps the primary harm of body stereotyping is better understood as a harm to liberty. Integrating the family and the market has been a primary goal of legal feminists, and this effort has centered on equality.[287] As Part I demonstrated, the equal opportunity doctrine that appeared in statutory and constitutional sex discrimination law since the 1970s has promoted access to economic and social power.[288] Women were granted access to the Virginia Military Institute, promoted to partnerships, and recognized as breadwinners.[289] In a parallel shift, men were legally recognized as caregivers, homemakers, and nurses.[290]

Despite these shifts in supporting access to economic and social power, the equal opportunity and burdens doctrines have also, as Part II has demonstrated, supported multiple forms of body stereotyping.[291] Currently lawful body stereotyping that does not fall conceptually under prohibited division-of-labor stereotyping regularly violates individual liberty. Examples include mandatory appearance codes in the workplace, in schools, and in prisons; unequal treatment of unwed fathers; exclusion from job opportunities in reliance on privacy BFOQs; sex segregation in bathrooms, locker rooms, prisons, or the military; and an ongoing practice of "corrective" surgery based on a theory that genitals must appear male or female.[292] As illustrated in Part II and visualized in Table 1, equality doctrines have yielded limited success for individuals who have been harmed by such body stereotyping.[293]

An individual liberty framework can yield better legal outcomes for such plaintiffs. This Part revisits the domains examined above to demonstrate that they are better conceptualized as liberty harms.[294] It argues that courts and oth-

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[287] *See* notes 104–176 and accompanying text (focusing on the integration of both these spheres, including discussion of Olsen and Halley's critique of the market/family binary).

[288] *See* notes 104–176 and accompanying text; *see also* JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 1–24 (2014) (arguing that equal opportunity efforts should focus on opportunity pluralism—broadening the range of opportunities available to people at every stage in life—rather than artificial concepts of literal equalization).

[289] United States v. Virginia, 518 U.S. 515, 519 (1996); Price Waterhouse v. Hopkins, 490 U.S. 229, 257 (1989); Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

[290] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730–31 (1982) (ruling that Mississippi University for Women's single sex admissions policy for its nursing school violated equal protection guarantees).

[291] *See, e.g.*, Frank v. United Airlines, 216 F.3d 845, 854 (9th Cir. 2000) ("[B]ias against female flight attendants infected [the airline's] weight maximums for all age groups. Because of this consistent difference in treatment of women and men we conclude that [the airline's] weight policy between 1980 and 1994 was facially discriminatory.").

[292] *See supra* notes 179–286 and accompanying text

[293] *See* Suzanne Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011) (arguing that equality doctrines are limited by the requirement of finding comparators, who are similar to the complainant in all respects but for the protected characteristic).

[294] *See infra* notes 295–319 and accompanying text.

er legal actors should elaborate and underscore those individual liberty harms even when litigating and deciding cases under traditional equality doctrines.

A. Prioritizing Liberty Arguments

Consider, for example, the personal appearance cases. Challenges to grooming and dress codes under Title VII frequently fail under the equal burdens test, which is comparative by nature. Courts often conclude that both sexes are burdened by a given policy. The problem is that the equal burdens test, however, usually fails to capture the primary harm of grooming and dress codes: harm to personal liberty. Articulating claims against appearance policies as claims for liberty may generate more expansive results. In fact, in early grooming cases several courts, using a liberty rationale, rejected mandatory appearance codes. In 1972, in *Donohue v. Shoe Corporation of America*, for example, a federal court invalidated a hair length workplace policy for men, observing that the "tendency to stereotype people is at the root of some of the social ills that afflict the country."[295] Similarly, in a successful challenge to a workplace hair length policy, the Second Circuit commented that "choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation."[296] This type of reasoning appreciates how policies that are based on sex stereotyping can violate the personal liberty of those subjected to them.

Similarly, in the context of public schools in the 1960s and 1970s, courts reasoned explicitly from liberty to invalidate mandatory appearance codes.[297] For instance, in 1970, in *Richards v. Thurston*, the First Circuit held that suspending a male high school student for refusing to cut his hair violated the student's due process right of personal liberty.[298] The Seventh Circuit likewise held that a student's right to govern the style and length of his hair is a personal freedom protected under the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.[299] When litigators and courts perceive the harm of dress and grooming codes as a harm to personal liberty and individual choice, they have more robust grounds to invalidate these codes. By contrast, when courts engage the comparative test of equal burdens, even oppressive policies such as the one examined in *Jespersen v. Harrah's Operating Co.*, can

[295] Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357, 1359 (C.D. Cal. 1972).
[296] Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973).
[297] *See supra* notes 179–233 and accompanying text (outlining cases that upheld mandatory appearance policies in the workplace, schools, and prisons).
[298] Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970).
[299] Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969).

survive judicial scrutiny when those policies seem to apply equally to men and women.[300]

For unwed fathers as well, Due Process arguments have proven more productive than Equal Protection ones. In fact, the first time that the Supreme Court addressed the constitutional rights of unwed fathers, in *Stanley v. Illinois*,[301] the Court framed the issue "as a matter of due process of law."[302] The primary interest was understood by the Court to be "[t]he private interest [of] a man in the children he has sired and raised. . . ."[303] The Court concluded that "[a]ll Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause."[304] In other words, if all parents are entitled to this liberty interest, it should be equally distributed.

Nevertheless, that emphasis on the liberty interest of unwed fathers in their children declined in later decisions. In *Lehr v. Robertson*, an unwed father claimed that his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment had been violated when he was denied an opportunity to object to his biological child's adoption.[305] He claimed that "a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law."[306] The Court, however, held that there is no broad liberty interest for unwed fathers. Rather, only "when an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause."[307]

In the absence of a meaningful liberty interest of unwed fathers in a relationship with their children, equal protection claims have had no bite. Thus, in *Lehr*, the Court could easily conclude that "[i]f one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights."[308] In *Mi-*

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[300] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112 (9th Cir. 2006).

[301] Stanley v. Illinois, 405 U.S. 645, 647 (1972) (challenging a state law in a case where an unwed biological father challenged a dependency proceeding that was brought by the State upon the death of the biological mother of his children).

[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] Lehr v. Robertson, 463 U.S. 248, 250 (1983).

[306] *Id.* at 255 (emphasis added).

[307] *Id.* at 261.

[308] *Id.* at 267–68.

chael H. v. Gerald D., the Court's protection of the liberty interest of unwed fathers was narrowed further when Justice Scalia interpreted the liberty interest of fathers to "rest not upon such isolated factors but upon the historic respect-indeed—sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."[309]

Although unwed fathers have typically asserted a combination of equal protection and liberty claims, the liberty right has been outcome determinative. Equal protection claims often fail due to perceived real biological differences between men and women. Future litigators and courts seeking to enhance the rights of unwed fathers should underscore the liberty interest that all individuals, male or female, have in a relationship with their children.

Arguments for liberty are also central for ending the practice of early corrective surgery on intersex infants. "Corrective" or "normalizing" surgeries on non-consenting intersex infants violate the most basic of protected liberties: the autonomy to make decisions regarding one's own body in situations that do not constitute medical emergencies.[310] As described above, this surgical practice has gained increased social and medical scrutiny since the 1990s. Today, courts are only beginning to assess the legal consequences of these surgeries.[311] Most recently, the Fourth Circuit has ruled that "the alleged rights at issue in this case [including the bodily autonomy right not to be subjected to surgery] were not clearly established at the time of M.C.'s 2006 sex assignment surgery," and that it need not address the issue of whether the surgery violated plaintiffs' constitutional rights.[312]

Intersex "corrective" surgeries should not be viewed as a peculiar, standalone practice that concerns only those with intersex conditions. Instead, intersex surgeries constitute a fragment in the bigger social and legal fabric of reproducing a male and female binary. There is no obvious equality harm in these surgeries. Classifying an individual as male or female via medical intervention does not necessarily violate one's equality vis-à-vis other humans. The real harm here is a liberty harm. A federal court has recently recognized this liberty harm when it denied a hospital's motion to dismiss in a lawsuit of an individual who had been subjected to non-consensual surgery. The court found that "[they] violated [plaintiff's] clearly established constitutional right to procreation," and that the complaint "state[s] a plausible claim that [they] violated

[309] Michael H. v. Gerald D., 491 U.S. 110, 142–43 (1989).

[310] *See generally* Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51 (2006).

[311] *See supra* notes 248–263 and accompanying text (highlighting important issues and new cases regarding corrective surgeries).

[312] M.C. v. Aaronson, No. 13-2178, at *9 (4th Cir. Jan. 26, 2015).

[plaintiff's] procedural due process rights."[313] The Fourth Circuit overruled this decision.[314]

Until very recently, courts and lawmakers had not scrutinized this type of sex stereotyping. Intersex surgeries do not have much to do with division-of-labor stereotyping. When examined alongside other current lawful practices of sex stereotyping such as mandatory appearance polices, the law of unwed fathers, and segregation of bodies and jobs, however, intersex surgeries vividly demonstrate the limits of equality doctrines and the need to shift the attention of courts and other legal actors to liberty from sex-stereotyping practices.

B. Resisting Segregation

When individuals are classified as male or female for the purpose of exclusion from job opportunities or public spaces, they suffer a harm to their liberty. The sex-based BFOQ exception should be viewed as a serious infringement on individual liberty.[315] Title VII's prohibition on sex discrimination in hiring and work conditions includes the exception of sex when it is a BFOQ "reasonably necessary to the normal operation of that particular business or enterprise."[316] Policies that attempt to protect customer privacy often presume male heterosexuality, female vulnerability, and opposite-sex desire. Consider the example, discussed above, of TSA's current pat-down policy.[317] Today, the mandatory same-sex pat-downs in airport security lines does not allow for an opposite-sex search even if an officer wishes to pat down customers of the opposite sex for a possibly legitimate reason.[318] Although the policy was enacted to protect customers, a customer's wish to be patted down by an officer of the opposite sex would also be denied under this policy. The consequence is a broad limitation on liberty and individual choice.

Likewise, when sex segregation occurs in prisons, locker rooms, and bathrooms, courts have applied equal burden and opportunity rationales.[319] If males and females have similar access to a facility or a program or are perceived to be similarly burdened by a policy, sex-based classifications are regu-

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[313] Order Denying Motion to Dismiss at 10, 12, M.C. v. Aaronson, No. 13-1303 (D.S.C. Aug. 9, 2013).

[314] M.C. v. Aaronson, No. 13-2178, at *9.

[315] *See supra* notes 193–253 and accompanying text (highlighting permissible body stereotyping).

[316] Civil Rights Act, 42 U.S.C. § 2000e-2(e) (1) (2006). To qualify as a BFOQ, "a job qualification must relate to the 'essence,' or to the 'central mission of the employer's business.'" Int'l Union, et al. v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) (quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977); W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 413 (1985)).

[317] TSA informs on its website that "If a patdown is required to order complete screening . . . [t]he patdown should be conducted by an officer of the same gender." TRANSP. SEC. ADMIN., *supra* note 272.

[318] *Id.* ("[A]ll pat-downs are only conducted by same-gender officers.").

[319] *See supra* notes 193–253 and accompanying text (highlighting permissible body stereotyping).

larly upheld. Male and female bodies are regularly separated, ostensibly for their own protection, based on assumptions of sexual difference and heterosexual desire. Although these types of sex-based segregation are usually supported by interests in individual safety and privacy, they often end up violating individual liberty.

CONCLUSION

Every generation has its social and legal truths about sexual difference. A century ago, not many were puzzled by Justice Bradley's observation in the first sex discrimination case decided by the Court that "the domestic sphere . . . properly belongs to the domain and functions of womanhood."[320] Today, there are other social and legal truths. These include that "a sign that says 'men only' looks very different on a bathroom door than a court-house door;"[321] that "the mere existence of a biological link [between father and child] does not merit . . . constitutional protection;"[322] and that "employers are allowed to rely upon stereotypical notions of how men and women should appear."[323]

The present task is to be puzzled by gender so that it remains a useful category for legal analysis.[324] The gender event of the 1970s was primarily about access to social and economic power. In the 1970s, the Supreme Court adopted a new rationale regarding the harm of sex stereotyping, anti-subordination; a new concept of gender, "gender role"; and a new articulation of an equality principle, equal opportunity. These conceptual shifts have supported a gender revolution in which the equal opportunity doctrine was a useful legal tool for integrating the family and the market. Unfortunately, in the same years, a parallel branch of permissible sex stereotyping has flourished. It is based on reasoning from cultural and community norms, "real" biological difference, and heterosexual risk and privacy. This branch rests on a narrow concept of equality. The 1970s gender revolution, its grounding in anti-subordination, and its supporting equal opportunity doctrine have not been useful legal tools for those marginalized by currently permitted forms of body stereotyping.

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[320] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873).

[321] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 468–69 (1985) (Marshall, J., dissenting).

[322] Lehr v. Robertson, 463 U.S. 248, 261 (1983); *see also* Michael H. v. Gerald D., 491 U.S. 110, 142–43 (1989).

[323] Schiavo v. Marina Dist. Dev. Co., No. ATL-L-2833-08, 2013 WL 4105183, at *14 (N.J. Super. Jul. 18, 2013) (emphasis omitted); *see also* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112 (9th Cir. 2006); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996); Dodge v. Giant Food, Inc. 488 F.2d 1333, 1336–37 (D.C. Cir. 1973).

[324] *Cf.* Joan Scott, *Gender: A Useful Category for Historical Analysis*, 91 AM. HIST. REV. 1053, 1057 (1986).

In *Frontiero v. Richardson*, Justice Brennan described the ideal of female domesticity as "[n]ot . . . a pedestal, but . . . a cage."[325] In what has essentially been a spheres revolution, the idea of equal opportunity and the concept of gender role have operated together to destroy an ideology that subjected men and women to unequal traditional roles of homemaker and breadwinner. It is time to conceptualize legal reforms for the twenty-first century that would identify and mend instances in which gender—once a liberating concept—has turned into a cage.

[325] Frontiero v. Richardson, 411 U.S. 677, 684 (1973).