Regulate Now, Explain Later: Understanding the Civil Rights State's Redefinition of "Sex"

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Abstract: In what seems like the blink of an eye, transgender rights has catapulted from a non-issue in American politics to the peak of the culture wars. Scholarship on the transgender rights movement has proliferated rapidly in recent years, most of it sympathetic to the cause but some of it critical. Missing from this literature, however, is a serious examination of how courts and agencies have justified their efforts to advance what Vice President Joe Biden in 2012 called "the civil rights issue of our time." This dissertation tries to fill that gap. Through an in-depth analysis of court precedents and agency pronouncements, and an examination of the assumptions behind regulators' redefinition of male and female, it suggests that noble intentions have led civil rights institutions into a thicket of interpretive difficulties and regulatory dilemmas.

First, judges and administrators have declared biological sex a "stereotype," but have offered virtually no explanation for why this is so. This has resulted in regulatory peculiarities, including: courts relying on "stereotypes" when invalidating policies that they deem stereotypical; agencies instructing schools to adopt conflicting definitions of male and female; and government officials unable or unwilling to explain why separating restrooms and athletic teams by a non-physical understanding of sex is necessary in the first place. The deeper reason for these peculiarities, I argue, is a failure to articulate a coherent account of what makes us sexed beings.

Second, civil rights officials have argued that their interpretation of federal law finds unambiguous support in a body of court rulings that condemn stereotyping. The problem with this argument, I suggest, is that the precedents that are cited actually say the opposite of what

they are made out to say. They say that sex is biological, and that transgender women are biological men who fail to live up to social expectations about maleness. By invoking the abstract notion "stereotype," regulators hide their break with precedent from citizens and perhaps also from themselves. Transgender regulation thus raises important questions about legal interpretation in relation to constitutional government, and about the role of the legal profession within liberal democracy.

This dissertation challenges two dominant narratives about transgender rights. According to one, transgender rights is part and parcel of a broader postmodernism that is tearing through American institutions and weakening the foundations of Western societies. According to the other, transgender rights is a logical extension of the original civil rights revolution and a fulfillment of liberalism's deeper humanitarian impulses. I argue that transgender regulations are more "conservative" than those who decry (or hope for) postmodernism believe, but more postmodernist than those who appeal to liberal equality seem willing to acknowledge.

TABLE OF CONTENTS

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Introduction

In May of 2016 the Obama administration announced, through an obscure bureaucratic device known as a "Dear Colleague Letter" (DCL), that schools could no longer treat students in accordance with the sex they were designated at birth, but instead would have defer to students' "internal sense" of gender or "gender identity" for purposes of access to sex-specific facilities and activities. The Department of Education's official argument was that the idea that sex is biological is a "stereotype" and federal antidiscrimination law prohibits stereotyping. Although the Trump administration rescinded the DCL with a DCL of its own in 2017, a number of federal courts have since held that the original guidelines reflect an accurate interpretation of Title IX, the 1972 law that conditions federal funding upon non-discrimination "on the basis of sex," and the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

The controversies set off by the civil rights state's[1] actions on transgender students rippled across the nation and have not died down ever since. It is possible to divide these controversies roughly into four categories.

First, is biological sex in fact a "stereotype"? Is the conventional view of male and female, affirmed both by common sense and by most of the scientific establishment, an unsupportable social construct? Do humans have a "gender identity," if by that term we mean an innate and immutable sense of who they are that is authentic and socially valuable? Or might "gender identity" be a misunderstood form of erotic desire? What, in other words, makes us male and female (or neither or both)? Related to these questions about human nature are what we can broadly call therapeutic questions. Is gender dysphoria—the experience of clinically significant

[1] I borrow this term from R. Shep Melnick, who means by it "the extensive set of statutes, court decisions, and administrative regulations, guidelines, interpretations, and settlement agreements designed to prevent and rectify" various forms of discrimination. R. Shep Melnick, *The Transformation of Title IX: Regulating Gender Equality in Education* (Washington, D.C.: Brookings, 2018), p. 13.

distress that accompanies the feeling that one's designated sex at birth does not match one's internal sense of who one is—a pathology (i.e. a disorder of sex development), or does it arise from bad cultural norms and social institutions that enforce an inaccurate understanding of the human person? How can clinicians distinguish between dysphoria that is real and persistent from the kind of gender self-questioning and even confusion that very often accompanies adolescence? Is administering puberty blockers to prepubescent teenagers a guarantee of their future autonomy or a violation of it? Do policies that defer to adolescents' "internal sense" of gender always make for good clinical practice? What does science currently tell us about gender identity? What *can* modern science tell us about the erotic side of our natures?

A second set of controversies has to do with public policy. How much discretion and flexibility should schools have in crafting their own internal policies for dealing with transgender students? Must schools defer unquestioningly to their students' gender identities, or is some form of gender gatekeeping necessary? And if the latter, how might schools distinguish legitimate from contrived identities without relying on "stereotypes"? Does it matter that non-transgender students experience embarrassment and discomfort at sharing a locker room with someone with the opposite anatomy? How should schools balance privacy interests? How can they integrate transgender girls in girls' athletics without compromising competitive fairness? What should school administrators do when the parents of a child who says she is transgender insist that she is just passing through a phase? And finally, to what extent does transgender accommodation require changes to curriculum and school culture? Are the changes being demanded in the name of "inclusion" neutral with regard to matters of ideological belief and sexual morality, or do they impose a view of human nature and the human good that some might legitimately find objectionable?

Third are what I would call regime-level controversies. Did the Obama administration use the proper procedures when issuing its guidelines? Did the federal courts uphold the rule of law in deferring to them? What theory of legal interpretation justifies the claim that transgender regulations were always implicit in Title IX, a law that was passed when transgender issues were on nobody's mind? Is the sex stereotype theory of law—about which we will speak at length—compatible with republican self-government, or does it shift too much power to the hands of an unaccountable legal elite? How has a question that is fundamentally philosophical in character—what makes us male or female—been turned into a legal one? Who gets to decide the answer to this question? By what authority and subject to what constraints?

Finally, transgender regulation touches on the deeper fault lines of American politics, liberal democracy and even modern science. Are is the expressive individualism that drives transgender regulation a sign of moral progress or moral decay? Does this newest iteration of the civil rights revolution underscore the health of our political institutions or their weakness? What is the relationship between the regulations discussed in these chapters and broader trends of polarization and civil distrust observable among Western societies today? Is the idea of "lived experience," a core tenet of the transgender movement that draws on a tradition of philosophic relativism, ultimately compatible with liberalism? Can the radical subjectivism of transgender advocacy be cabined to apply only to matters of gender? To what extent is transgender ontology consistent with modern science? And for that matter, can modern science successfully move beyond teleological conceptions of human nature?

In the short run at least, the Obama administration's actions sparked worries about overbearing federal authority.[2] Although some of these worries were probably driven by

[2] Republican Platform, 2016, p. 35 (www.gop.com/the-2016-republican-party-platform/).

opposition to the substance of the regulations, some were no doubt driven by the manner in which the regulations appeared. Prior to 2015 or so, very few Americans had ever given two thoughts to the transgender issue; transgender people were, in the words of their own advocates, "invisible." Within about a year, a consensus within parts of the American professional and political class had emerged that any association drawn between human reproductive anatomy and the labels "male" and "female" was not merely mistaken, but an inexcusable act of bigotry.

While these trends were visible in other Western countries, in America they seemed to take on added urgency. In no small part, this is because of the civil rights framing that invites comparisons to America's troubled history of race. Just four days before the Obama administration released its DCL, Attorney General Loretta Lynch gave a speech in Washington, D.C. defending her department's decision to take legal action against the state of North Carolina, which had just passed an ordinance requiring that people use the restrooms that are consistent with the sex listed on their birth certificate. Lynch explicitly compared North Carolina's "bathroom bill" to laws that had segregated drinking fountains by race.[3] The implication was clear: if you think sex is biological, you are no different from someone who thinks that whites are superior to blacks. Meanwhile, some of the nation's leading media and cultural outlets were demonstrating their commitment to transgender authenticity with celebratory cover stories and television series.

The charge of "political correctness" that began to circulate around this time had at least as much to do with the astonishing speed at which these developments were unfolding as with their substance. Unlike the two centuries of agitation on racial equality that produced the civil

[3] "Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discriminating Against Transgender Individuals," May 9, 2016 (https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint).

rights bills of the 1960's, a century or more of women's activism (and enduring debates over the meaning of women's equality), and five decades of gay rights protests and mobilization, transgender rights did not have the usual precursors of a civil rights cause. There was no transgender version of the Montgomery Bus Boycott or the March on Washington. For all but a very small group of "issue network" insiders, the transgender regulations appeared practically out of nowhere. In what seemed like a heartbeat, visible and powerful sectors of the American elite class denounced a belief held as a matter of common sense until yesterday by almost everyone—including themselves.

The charge of "political correctness" is a questioning of the regime itself. Democracy assumes a minimal competence in its citizens to make sense of the world in which they live and come to reasoned judgments. The premise of the enlightenment is that science need not be confined only to the wise; as it spreads and enlightens the people, their competence and thus right to rule themselves is underscored with increasing confidence. Sudden and dramatic shifts in elite opinion against common sense—even if that common sense turns out to have been wrong—will therefore almost always be interpreted as an implicit challenge to the principle of popular self-government. Underlying the concern over political correctness is the belief that, as far as some elites are concerned, with their diligent moral guidance society will fail to progress, will be left on the "wrong side of history."

It is this deeper angst about the nature of the regime that candidate Donald Trump intuitively understood and gave voice to. Trump has prided himself in being the enemy of political correctness, and his triumph over Hillary Clinton surely had something to do with the very kind of controversies that transgender regulations created. Clinton made her "basket of deplorables" comment at the "LGBT for Hillary" gala on September 10, 2016, just as the battles

over transgender bathrooms were reaching peak national exposure. Was it a stretch to interpret her remarks as a dramatic example of coastal, upper-class contempt for "average" Americans? Although Clinton immediately clarified that the other half of Trump voters were legitimately worried about bread and butter (i.e. economic) issues, what she seemed not to understand was that cultural issues and economic issues could no longer be separated in the way that she (and much of the Democratic establishment) had assumed. Culture war now had a class dimension, and vice versa.[4] To the extent that our political parties have begun to reflect these deeper socio-cultural trends, class/culture wars fuel and are fueled by partisan polarization. Transgender rights was sucked into the vortex of polarization just as quickly as it surfaced.

It is natural to expect that the transgender debate will focus primarily on the first and second sets of questions and less on the third or fourth. Part of the reason for this is that transgender students are teenagers with stories that evoke sympathy and admiration, whereas debates over administrative law, judicial review or even privacy are abstract. The complexity of American government itself—for instance, the degree of sophistication needed to understand how *Auer* deference works—is also a reason why the substantive questions should eclipse the procedural and constitutional ones. A third reason would relate to Alexis de Tocqueville's observation that it is in the nature of the democratic mind to be impatient with "forms" and to want to go directly to the "substance" of things.[5] One of the key themes of this dissertation, however, is that the forms of liberal democracy are just as important as the substance of government policy. It matters greatly not just what government does, but also how it does it, by

[4] I cannot possibly cite the voluminous literature on ideological and partisan "sorting," and on the culture/class shifts within the Democratic and Republican coalitions. For a good discussion of how LGBT issues have become a key upper-class (and Democratic) concern, see Darel Paul, *From Tolerance to Equality: How Elites Brought American to Same-Sex Marriage* (Waco: Baylor University Press, 2019).
[5] Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago: The University of Chicago Press, 2000), p. 542, 669.

what authority, and subject to what constraints. Indeed, these latter questions are not, in the end, themselves formalistic, but draw on classical liberal ideas about natural rights, including the right to be governed by consent. And as we shall see, when government avoids using procedures like "notice and comment" rulemaking, it closes itself off to substantive arguments and forecloses any chance of recognizing deeper problems in the assumptions behind its chosen policies. In any event, the hope is that by the end of this dissertation the reader will have come to appreciate that the distinction between substance and form is not so easily maintained.

One of the most striking features of the transgender rights story, and a major motivation for the present study, is the extent to which federal regulators have offered virtually no explanation for why it is a violation of a one's civil and constitutional rights to be treated in accordance with the sex one was designated at birth. As the following chapters demonstrate, the expectation among transgender advocates in and out of government is that the analogies they draw to race, women's rights, and to some extent gay rights, will carry most, if not all, the explanatory weight. This is perhaps not surprising: legal development in common law systems utilizes reasoning by abstraction and analogy. But when abstraction and analogy take the place of serious and careful analysis on such questions as the makeup of our nature as sexed beings or the conditions of knowledge, errors and confusions are bound to occur.

The existing literature on transgender regulation is, with rare exception, unsatisfying. In simple terms, it does not do an adequate job of tying together the four levels of debate we outlined above. The law reviews, where transgender rights advocacy has become something of a cottage industry, rarely descend into the difficult questions surrounding human ontology. Instead, they presuppose that because transgender people are authentic and courageous, their claims about reality ought to receive deference from social institutions under penalty of legal action. But

why should authenticity matter in this way? What is the relationship between knowledge and sincerity? And how can social institutions reasonably gauge sincerity and distinguish it from bad faith? When such questions are avoided, as usually they are, the law review articles become vulnerable to the charge of question begging.

As we will discuss in depth in Chapter 2, scholarship on transgender regulation almost always draws on an interesting phenomenon known as intersex to argue that biological sex is a social construct, hence a "stereotype." Yet this argument is riddled with philosophical and methodological difficulties, and its most fundamental flaw is revealed once its original expounders are consulted. Because law review articles on transgender rights frequently cite one another for scholarly credibility, the legal literature appears to have the character of idea laundering.

Similarly, as we shall argue in Chapter 3, much of the scholarship discussed in Chapter 2 that is used to debunk "biological sex" also, and for the same reason, debunks the idea that humans can have an innate, authentic and socially valuable identity of gender. Yet courts and agencies repeatedly make both arguments, as if they support rather than contradict one another. Feminists and gay rights advocates have pointed out repeatedly over recent years that the civil rights state's reconstruction of "sex" as gender identity invariably and inevitably relies on the very generalizations that government regulators with to banish from public institutions. Until now, however, no effort has been made to examine in depth and in detail what regulators have said and evidence they have used to advance their argument in support of gender identity.

In a way that should be obvious but is not, the question of how society should respond to and accommodate transgender people is secondary to the question of what, if anything, makes humans sexed beings. A disposition of compassion for transgender people, who no doubt face

myriad hardships and inequities, cannot reasonably exist independent of—let alone dispense with a need for—a serious effort to examine and understand these deeper questions of ontology and meaning.[6] Regardless, since I engage with some of the key works in the field in subsequent chapters, I have decided not to conduct a review of the literature at present.

Chapter 1 sets the tone for the rest of the dissertation by placing one of the most important court rulings on transgender regulation, *G.G. v. Gloucester County School Board*,[7] within a broader constitutional context. Officially, *Gloucester* turned not on the substantive question of whether male and female are matters of biology or identity, but on who has the authority to decide such a question and why. Unofficially, however, the court's decision to defer to the Department of Education's preference of defining sex as gender identity was made possible by the court's prior assumption that sex is not (or not chiefly) anchored in reproductive biology. Yet the court gave no explanation, other than a single reference to sex as being a "lived fact." *Gloucester* is a useful launching point for the remainder of this study because it raises the regime question. Administrative government is premised on the idea that democracy needs the guidance of scientific expertise, but in America there has always been a desire to temper administrative government with legalism. The tension reflects the age old question of whether it is best to be governed by a wise and just ruler or by impartial and general laws. *Gloucester* demonstrates how matters of substantive expertise can blend imperceptibly into legal disputes over judicial deference and statutory interpretation, and how, once the distinction between legal

[6] This is the argument of one controversial book that is critical of the transgender movement, Ryan T. Anderson, *When Harry Became Sally: Responding to the Transgender Moment* (New York: Encounter Books, 2018). In simple terms, Anderson's argument is that whether pro-transgender regulations really are compassionate and good depends on whether the transgender movement's claims about the human person are true (and he thinks they are not). One can disagree with Anderson's conclusion, but it seems to me that his premise—the priority of the ontological questions to the legal, political and clinical ones—is entirely accurate. As this study will demonstrate, one of the crucial (if not always consciously intended) functions of the argument about "stereotypes" is to sideline the philosophical questions, as if they are merely a matter of private conviction.

[7] *G.G. v. Gloucester County Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).

and substantive questions is blurred, government can regulate without providing satisfying analysis on either score. The chapter gives a snapshot at how government regulates today.

Chapter 2 and 3 examine the deeper premises behind some of the key transgender rights decisions in recent years. I distinguish between and treat separately two fundamental assumptions that shape the transgender movement's view of the human being. The first is that "biological sex" is a social construct, and consequently that what society has always taken to be a recognition or discernment of natural fact is really an "assignment." Hence the term "sex assigned at birth," which has come to replace "biological sex." The second argument is that human beings have an innate and immutable sense or knowledge of their gender, which may be rooted in the brain or, alternatively,[8] in "lived experience." Our goal is to understand how these arguments are intended to work, and what their deeper difficulties are. I shall argue that there is one understanding of transgender that, if not compelling, is at least internally consistent, but it is not the one proposed by courts and agencies. In very simple terms, regulators have embraced two conflicting views of sex, and what has caused them to do so is a mixture of philosophical confusions, institutional incentives, and professional cues.

The next two chapters trace the evolution of the sex stereotype theory of law from its origins in 1960's feminism to the transgender regulations of late. Even more so than its feminist forerunner, transgender rights has been what I describe as a silent revolution, one that happens through piecemeal legal and political activity among policy elites in specialized "issue networks." If only because of their tiny numbers, transgender people have had to rely upon elite mobilization and public interest politics. Public views on transgender issues are thus largely shaped by the incentives that policy leaders in issue networks face in framing their claims. That

[8] I show that this argument is, in fact, an alternative to "brain sex," even though it is often asserted alongside "brain sex."

is one reason why most people today think of gender identity, in stark distinction to what prominent gender theorists have said for years, as a fixed, innate, immutable, and indeed natural, property of persons. It is a key part of the explanation for how the word "gender," once taken to be a critique of "essential" characteristics, behaviors and desires, has come to be thought of as innate and natural, while "sex," once understood to refer to biological—if socially irrelevant, according to feminists—attributes, has come to be described as socially constructed.

As a number of studies in the interest group formation and political mobilization literature have shown,[9] essential to the success of the transgender rights movement has been the patronage of gay rights advocacy groups and the liberal donors and foundations who fund them. Prior to 2007 or so, influential gay rights groups like the Human Rights Campaign were opposed to the inclusion of transgender issues under the cause of "equality." Their fear was that the radical nature of transgender claims would alienate mainstream liberals and make the gay rights movement's assimilationist strategy impracticable. As soon as the marriage issue, which by the 1990's had become the litmus test for gay acceptance, was resolved in the courts, a well-organized, well-funded, and battle-tested world of advocacy groups staffed with ambitious and talented lawyers suddenly found itself looking for new venues for its ambitions. Transgender rights is as good an example as any of the importance of institutional inertia.

Chapters 4 and 5 examine in considerable detail the legal and constitutional foundations for what has in effect become the transgender rights strategy. Chapter 4 covers the development of stereotype theory in the legal feminism of the 1960's, emphasizing the work of then-advocate and professor Ruth Bader Ginsburg. I call this chapter "*Brown* in Reverse" because unlike with

[9] See e.g. Jami K. Taylor and Donald P. Haider-Markel ed., *Transgender Rights and Politics: Groups, Issue Framing, and Policy Adoption* (Ann Arbor: University of Michigan Press, 2014); Anthony J. Nownes, *Organizing for Transgender Rights: Collective Action, Group Development, and the Rise of a New Social Movement* (Albany: State University of New York Press, 2019).

race, the constitutional revolution on sex began in statutory interpretation (Title VII) and only then fed into constitutional interpretation. The deeper purposes of this chapter are to introduce the reader to the anti-stereotype argument, to illustrate the fact that the anti-stereotype thesis was part of a broader argument between women's advocates, to underscore that courts have *never* offered a definition of what they mean by "stereotype," and to relate the stereotype theory of law with one of the more important trends of recent decades, the decline of institutionalism. All of these features play a role in the sudden rise of transgender regulation.

Chapter 5 puts the spotlight on how transgender litigants have tried to make use of legal and constitutional tools honed by legal feminism. It divides the history of transgender rights into three phases or "waves." In the first wave, courts refused to acknowledge transgender discrimination on the ground that there was no statutory or constitutional warrant for such claims. In the second wave, courts warmed up to the idea, but only on the grounds—and this is crucial—that transgender people are *not* who they say they are, but are rather gender-nonconforming members of their biological sex. In the third wave, courts redefined "sex" in a way that rejects "biological sex" as a stereotype, but they did so, I show, while insisting that they were merely applying the legal rationales of wave two. In effect, this chapters provides an in depth look at a claim recently made by R. Shep Melnick about "institutional leapfrogging." By this Melnick understand a process whereby courts and agencies take incremental steps beyond each other to expand regulation while denying that they are doing anything new.[10] My goal is to shed light on how the abstraction "stereotype" elides some of the most difficult and crucial questions that divide wave two and wave three.

[10] Melnick, *The Transformation of Title IX*, p. 15.

A persistent theme of the transgender rights strategy is that prohibiting employers and schools from relying on biological or birth sex has always been implicit in American antidiscrimination and constitutional law. Congress "intended" to prohibit all manner of sex stereotypes when it passed the major civil rights bills of the 1960's and 1970's. Hence, the argument concludes, there is no need for substantive explanation or for clearing the normal procedural hurdles for new regulations.

On its face, this claim is plainly and demonstrably false. The word "transgender" was hardly known until the 1990's. There is strong evidence not only that "sex" in the 1960's and 1970's meant biological sex, but also that opponents of "stereotyping," including the godmother of the sex stereotype theory herself, Justice Ruth Bader Ginsburg, viewed sex equality as *requiring* recognition of the anatomical differences between men and women. Still, the argument that Congress "intended" to empower courts and agencies to define and obliterate stereotypes is more plausible than a strict textualism might suggest, and it is the task of Chapter 6 to gain clarity on the jurisprudential debate over transgender regulation. The main legal thinker discussed in this chapter is Ronald Dworkin. In contrast to other accounts of Title IX, which stress a "dynamic" reading of the statute beyond or against its original purpose, Dworkin's layers-of-intent jurisprudence seems a better fit for how transgender advocates inside and outside of government have thought about legal interpretation. Dworkin is famous for championing broad "standards" as opposed to "rules," and for his contention that at the heart of the American legal order is a "breathtakingly" abstract right to "equal concern and respect." Both strands are fundamental to transgender regulation, though in ways that raise deeper questions about the prospects of liberalism itself.

A reader looking for yet another treatise on why transgender rights are good or bad, necessary or frivolous, will not find it here. The following pages do something that is at once more modest and more ambitious. They attempt, on the one hand, to peel back the surface layers of the transgender movement's rights strategy in order to scrutinize its arguments. At the same time, by working through these arguments, the chapters ahead inevitably point beyond present concerns to the deeper problems of modern politics. The transgender movement professes an understanding of the relationship between individual and society, one that is premised on a set of claims about the radically subjective or experiential nature of knowledge related to sex. The movement has also—or rather for similar reasons—managed to raise urgent questions about the nature of political authority, i.e. about who should decide, how, by what means, and under what constraints. Put another way, the "bathroom question" is not primarily about bathrooms.

It would be helpful, I think, to state up front a number of guiding themes in the study that follows. First, and to reemphasize what I have just said, if only because of the intellectual sophistication required to understand transgender issues, transgender rights is anything but a matter of "simple justice."[11] There is far more at stake in the transgender debate than whether a small number of teenagers should be able to use the bathrooms at the school without stigma or harassment, or whether people should simply be allowed to be who the always knew they were. According to one transgender scholar, what is ultimately at issue here is "what counts as legitimate knowledge" (see Chapter 3). As we will see, it is impossible to gain clarity on the transgender question without touching on some of the deepest fault lines in modern thought and politics. Entering the transgender debate requires that we appreciate, on the one side, that transgender people deserve to be treated with respect and compassion and often are not, but on

[11] A reference, of course, to Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Vintage Books, 1975).

the other side, that the transgender movement's philosophical claims about the human nature, the content of the human good, and the conditions of human knowledge, are enduring themes of Western political thought from the time of Socrates, and cannot be "solved" by invoking compassion.

Another persistent, if not always explicit, theme of this work, is that male and female are at bottom teleological concepts; that is, they draw their deepest meaning from their relation to each other and, ultimately, from their orientation toward a particular end or function or *telos*. This is crucial, since a major thrust of contemporary liberalism—to say nothing of modern science—has been to banish such (rational) consideration of ends from public life, or more precisely, to repackage them as mere preferences, no one better in principle than any other. We will encounter this argument in Chapter 6 when we review the writings of Ronald Dworkin and his philosophic lodestar, John Rawls, but it is implicit in earlier chapters as well. Although I do not treat this theme on its own terms, running throughout my analysis is an appreciation of the fact that the question of the human good is unavoidable, and that trying to resolve it with a soft relativism of ends results in self-contradiction. In fact, the transgender rights movement supposes that authentic self-expression is the human good, or at least a condition of the good, and that whatever holds back that expression is consequently bad. Feminists who criticize the transgender movement have met this argument on its own terms, arguing that gender identity is most inauthentic, indeed part of a broader system of oppression. My deeper reservations here are about whether modern science and liberalism can avoid teleological thinking in a *non*-postmodernist sense. Male and female seem to draw their ultimate meaning from ends beyond the self and higher than authenticity, be it human generation and family, a Platonic notion of eros, or some religious ideal of unity "in one flesh." It is precisely in view of *this* kind of teleology—in view,

that is, of the inherent connection between the two meanings of "sex," and of the implications for human incompleteness and interdependence—that radical thinkers have argued that genuine human liberation requires the total evisceration of male and female as categories of human existence. While I doubt that their solution is a good one, they at least seem to appreciate the problem.

Third, I am skeptical about the theory of progress that appears to motivate a great deal of transgender regulation. This theory places individual self-expression and autonomy above respect for institutions *as a matter of principle*. It understands the expressive self as the locus of goodness and social institutions as presumptively repressive and bad. While I see no reason to dismiss authenticity as a positive good *a priori*, this lack of institutional perspective seems unhealthy for American public life. Although transgender rights is probably more a consequence than a cause of the decline in institutionalism, one doesn't have to schooled in the philosophy of Edmund Burke to appreciate the problems that the decline in faith in institutions—including schools—can bring. We are seeing it around us today. Given America's history of racial injustice, civil rights advocates have good reason to be suspicious of institutions. But the pendulum can always swing too far in the opposite direction.

No less important, the theory of progress that underwrites the regulations discussed here seems to conceive of the law, and hence of the legal profession, as the chief instrument of moral and social progress. I am skeptical of the idea that lawyers are uniquely endowed with the capacity to intuit the direction of progress, and that they should consequently have vast scope to specify which beliefs about human life are true and valuable and which are "stereotypes." As we shall see, some lawyers and judges are also skeptical about this proposition, which is why they try, convincingly or not, to restrain the ambition of their peers in the name of the common good.

As I hope the reader will come to appreciate through our discussion of the complexities of the transgender issue, one can harbor such deeper, philosophical reservations about progress and still agree that transgender people have legitimate grievances that have yet to find a better social response.

Chapter 1

G.G. v. Gloucester and the Problem of Administrative Government

In December, 2014, the American Civil Liberties Union filed a complaint with the federal government over the treatment of a high school student, Gavin Grimm, at the hands of the Gloucester County Public School system in Virginia.[12] A dispute had arisen as to whether Grimm was eligible to use the boys' facilities at the school. Grimm identified as male but was designated (or in the language of the transgender movement, "assigned") female at birth.[13] He initially used a unisex facility but found the experience to be "isolating and stigmatizing."[14] A few months earlier, the student and the administration had reached an understanding according to which Grimm would be allowed to use the boys' room. Shortly thereafter the school received complaints from parents, and Grimm was told he could no longer do so. The county school board passed a resolution declaring that students must use the facilities that accord with their "biological gender." At that point the ACLU decided to intervene.

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[12] ACLU Complaint to the Department of Justice, December 18, 2014, https://www.clearinghouse.net/chDocs/public/ED-VA-0002-0004.pdf.

[13] Because the transgender movement's ultimate goal is to forge a new common sense, i.e. a new spontaneous and prescientific understanding of the social world, language forms a key part of its politics. The transgender movement argues that there are two, and only two, possible sources of gender status: one's own authentic "identity," and a gender label (male or female) one is assigned at birth based on conventional criteria, including physical anatomy and chromosomes. The former must always triumph over the latter when the two are in conflict.

Transgender advocates also insist that the language of gender politics is "evolving." See e.g. Paisley Currah, "Introduction," *Transgender Rights* (Minneapolis: The University of Minnesota Press, 2006). I should note here that I am familiar with the basics of transgender discourse and have made a conscious decision not to prejudice the discussion by resorting uncritically to transgender semantics. Some might take this as a sign of disrespect; I take it as a matter of philosophic integrity and academic rigor. That is why I refer to sex *designated* at birth rather than sex *assigned* at birth, the difference being that the former is neutral toward the reason for that assignment, whether it is recognition of natural fact or an artificial imposition of (oppressive) culture. Likewise, I use the terms biological sex, gender identity, and gender nonconformity without scare quotes, unless I am citing the use of these specific terms by some other source (e.g. a Dear Colleague Letter). Also, I will be referring to the transgender people discussed in these chapters in the pronouns that appear in the original court and agency documents.

[14] ACLU Complaint, p. 1.

Just about the same time the complaint was filed, Emily Prince, a lawyer and self-described "Sworn Knight of the Transsexual Empire"[15] who had been following the controversy at Gloucester public schools, sent an electronic enquiry to the Department of Education asking for a clarification of its position on the ongoing dispute.[16] In the three years prior to the Gloucester events, ED had sent guidance letters to schools informing them that it might consider incidents of bullying based on "gender identity" violations of Title IX.[17] ED had also announced that schools must allow students to attend single-sex classes (sex education) in accordance with their gender identity.[18] Perhaps recognizing the Obama administration's desire to rebuild the Democratic coalition on a new, socially progressive base,[19] Prince strategically copied on her email an acquaintance who was a regular contributor to National Public Radio. She concluded her email with a promise to "share [ED's] response" with two additional friends, reporters at the Buzzfeed and MetroWeekly, an LGBTQ-focused magazine based out of Washington, D.C.[20]

The reply came quickly. It took the form of a private letter sent to Prince by the acting deputy assistant secretary for policy at the Department of Education's Office for Civil Rights (OCR), James Ferg-Cadima. Citing his department's prior guidance documents or "Dear Colleague Letters," Ferg-Cadima informed Prince that Title IX prohibits schools from discriminating "on the basis of sex," which, he said, "includ[es] gender identity and failure to conform to stereotypical notions of masculinity or femininity." Is there not, however, a

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[15] According to her Twitter handle: https://twitter.com/emily_esque?lang= en.
[16] Emily Prince to Department of Education: Questions Concerning Transgender Students and Access to Restrooms, December 15, 2014, http://www.emily-esque.com/wp/wp-content/uploads/2014/12/2014-12-14-Questions-Concerning-Transgender-Students-and-Access-to-Restrooms.pdf.
[17] Dear Colleague Letter, "Harassment and Bullying," October 26, 2010, p. 8.
[18] Office for Civil Rights, "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities," December 1, 2014.
[19] Kenneth Lowande and Sidney Milkis, "'We Can't Wait'": Barack Obama, Partisan Polarization and the Administrative Presidency," *The Forum* 2014, 12(1): 3–27.
[20] Prince, *supra* note 5.

difference between "conforming" in one's behavior and "conforming" in one's very physical makeup? All Ferg-Cadima said on this score was that schools "generally must treat transgender students consistent with their gender identity."[21] He thus implicitly denied that the question of access to restrooms and changing rooms and the question of attending single-sex classes and being protected from harassment raised fundamentally different regulatory concerns.

Gloucester public schools refused to yield. In June 2015 Grimm's lawyers petitioned Virginia's Eastern District court for injunctive relief, arguing that he was likely to succeed on the merits and that barring him from the boys' facilities caused immediate and significant harm.[22] The school board countered by pointing to a regulation (Section 86.33) issued by OCR pursuant to Title IX in 1975. That regulation explicitly permits schools to maintain separate facilities by "sex," provided they are of comparable quality.[23] The district judge found it "significant" that Grimm's lawyers did not contest the validity of Section 86.33, but only whether its mention of "sex" must be interpreted to mean *biological* sex.[24] Grimm's lawyers were not necessarily asking the court to interpret Title IX *de novo*, but only to defer to ED's interpretation of "sex" in the Ferg-Cadima letter on the grounds that "sex" is an ambiguous term. In 1997 the Supreme Court had held in *Auer v. Robbins* that an agency's interpretation of its own ambiguous rule was entitled to deference by the courts.[25]

The district court rejected Grimm's argument. For that argument to succeed, the court said, it was necessary to construe "sex" to mean *only* gender identity, and this could not be

[21] James Ferg-Cadima to Emily Prince, January 7, 2015, http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf.
[22] Motion for Preliminary Injunction, ECF No. 11, *Grimm v. Gloucester County School Board*, (E.D. Va), June 11, 2015.
[23] 40 *Federal Register* 24141 (June 4, 1975), section 86.33.
[24] *G.G. v. Gloucester County Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015) at 744 (ff6).
[25] *Auer v. Robbins*, 519 US 452 (1997).

squared with the language or history of the 1975 regulation. The separation of male and female restrooms is due to "privacy concerns," and these are inherently linked to the body.[26] While Section 86.33 may *permit* schools to allow students to access accommodations according to gender identity, it certainly does not *require* them to do so.[27]

Grimm appealed to the Fourth Circuit and won injunctive relief. This time, the court agreed that "sex" is an ambiguous word and that, pursuant to *Auer*, ED had the authority to interpret its own ambiguous regulation.[28] The court's 2-1 opinion did not try to reconstruct the legislative purpose of Title IX or discuss the context of the 1975 regulation. Instead, it cited a dictionary definition of "sex" from 1971 according to which sex refers to "typical" physical differences between men and women. Because the differences being merely "typical," the court said, they could not be thought universal or necessary, and therefore "sex" is ambiguous.[29] In the following chapter we discuss the philosophical importance of this juxtaposition of the typical and the exceptional. For now, suffice to say that the dictionary's use of "typical" was enough to cast doubt on an understanding of male and female that, the court conceded, must have been dominant when 86.33 was adopted.[30] Due to this ambiguity, the court agreed with Grimm and the Department of Education and deferred to the Ferg-Cadima letter's interpretation of Title IX.

The school district appealed the ruling to the Supreme Court, which agreed to hear the case. Meanwhile, however, the Trump administration assumed office and promptly rescinded OCR's guidelines on transgender students.[31] This made Grimm's argument about deference to ED self-defeating, and so the Court returned the case to the Fourth Circuit. In response to these

[26] *G.G. v. Gloucester County Sch. Bd.*, 132 F. Supp. 3d at 750.
[27] Ibid., at 746.
[28] *G.G. v. Gloucester County Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).
[29] Ibid., at 721-722.
[30] *Ibid*.
[31] Dear Colleague Letter, "Transgender Students," February 22, 2017.

developments, Grimm's lawyers now argued that deference to the executive branch was *not* warranted.[32]

Gloucester is as good an example as one can find nowadays of the problem of administrative government. The substantive question at the heart of this case is a simple one: Is Gavin Grimm really male? If so, to exclude him from the boys' facilities is to treat equals unequally. If not, his exclusion is legitimate and consistent with social practice and legal custom. But perhaps the more important question in this case, at least from a political science perspective, had to do with scope and limits of regulatory power. Who had the authority to decide whether Grimm is male or female? By what process and subject to what constraints?

In order to set the stage for our discussion of the sex stereotype theory of law, this chapter considers the constitutional or regime-level dimensions of the *Gloucester* lawsuit. Part I provides a very brief sketch of the origin and function of administrative law in the context of America's competing constitutional outlooks. As we suggest below, administrative law has become the dominant venue in which debates over the fundamental principles of our regime take place. Part II focuses on *Auer* deference, explaining the purpose of this doctrine and some of the arguments for and against it. Part III analyzes the arguments made by the judges in *Gloucester* for and against *Auer* deference. Ultimately, this chapter is concerned less with whether *Gloucester* was rightly or wrong decided (though the court's majority opinion leaves much to be desired) than with how questions regarding our nature as sexual beings have been absorbed by the logic of civil rights and distorted through what Mary Ann Glendon has called "rights talk."[33]

[32] Supplemental Brief of Plaintiff-Appellant, filed May 8, 2017, p. 34 (https://www.aclu.org/sites/default/files/field_document/gg_ca4_supp_br_-_filed.pdf).
[33] Mary Ann Glendon, *Right Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).

I: Administrative Government and the (Original) Constitution

It is likely that to most Americans who followed *Gloucester*, and certainly to advocates and opponents of the transgender movement itself, the most pressing issue in the lawsuit was whether Grimm is in fact a boy. Such a perspective, however, too easily overlooks the importance of constitutional forms, i.e. the "institutions or practices in which the manner of action is more important than the end achieved."[34] A form is a barrier that keeps some desired result at arm's length, forcing us to try and achieve that result in a particular manner—or not at all. Forms often evoke frustration and complaints about "mere formalism," but as Justice Antonin Scalia once put it, formalism is what ensures that you will receive a fair—that is, procedure-respecting—trial if you are charged with a serious crime, irrespective of the quality and amount of evidence against you.[35] Due process of law is formalism, but it is certainly not "mere" formalism. Thus, forms impose constraints on public action ultimately with a view to higher principles, in this case the right to liberty. Forms do so, moreover, while creating space for citizens to acquire the habits of self-government, as for instance when the defendant faces a jury of his peers. In sum, the procedural questions that arise in the *Gloucester* lawsuit are formalistic, to be sure, but they are not "merely" so.

Although impatience with forms is, as Alexis de Tocqueville observes, a permanent feature of the democratic character,[36] with the advent of progressivism that impatience congealed into an explicit and impassioned critique of the existing constitutional order. For Woodrow Wilson as for other progressives of his day, government now meant "administration,"[37] and the

[34] Harvey C. Mansfield Jr., "The Forms and Formalities of Liberty," *National Affairs* (Winter 1983).
[35] Antonin Scalia, "Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutman (Princeton: Princeton University Press, 1997), p. 25.
[36] Alexis de Tocqueville, *Democracy in America*, p. 669.
[37] Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 2 (1887), 197-222.

only forms that administration (in its purest sense) can live with are those that belong to the science of administration itself. Wilson's great nemesis was the form that lay at the heart of the founders' system of government, separation of powers.[38] A government of separated powers is designed not for rational and expedient administration of the people's affairs, but for inhibiting the exercise of power in order to render it safe from abuse. Yet, if government could be reformed in light of the science of administration, Wilson thought, its day-to-day activities could be insulated from politics. Government could be directed by reason rather than by prejudice, and the founders' worry that "enlightened statesmen [would] not always be at the helm" could safely be contextualized as an eighteenth-century problem. As Wilson's later successor Franklin D. Roosevelt would declare, "the day of enlightened administration ha[d] come."[39]

Whether or to what extent progressive reformers were successful in their effort to "update" American government is a matter of considerable dispute (see below). The American system of government today is an amalgam of Madisonian and Wilsonian elements. Administrative law—broadly defined as the effort to bring administrative discretion under a set of predictable rules and procedures enforced by the courts—is perhaps the clearest expression available of the fact that American politics operate between two conflicting constitutional visions.

The debate over the compatibility of administrative government and the 1789 Constitution divides into three broad camps. One argues that the two are simply inconsistent, and that the older, original Constitution is superior to the newer, administrative one. A second concedes that the two are at odds, but insists that this tension is a necessary consequence of

[38] Woodrow Wilson, *The New Freedom* (New York: Doubleday, Page and Company, 1913), 33-54. Excerpted in Ronald J. Pestritto and William J. Atto ed., *American Progressivism: A Reader* (Lanham: Rowman and Littlefield, 2008), pp. 50-51.
[39] FDR, "The Commonwealth Club Address," September 23, 1932

historical progress and that, consequently, the old Constitution ought to bow out—gradually perhaps[40]—in favor of the new. A third camp maintains that administrative government is not so much a repudiation of the original constitutional system as an outgrowth of it. Let us briefly consider each position in turn.

Philip Hamburger, a leading voice in the first camp, argues that, given their experience of oppressive monarchy, the founders recognized the danger of government as chiefly that of executive prerogative. They intended to create a system that severely limits executive prerogative through limitation, enumeration, and separation of powers. In Hamburger's view, administrative government reinstates executive prerogative, albeit through seemingly more benign means of minute rules and "public interest" regulations. For Hamburger, administrative government is both dangerous and unconstitutional.[41]

Another version of this position, articulated by Gary Lawson, maintains that we need not bury ourselves in historical study to see that administrative government is (or at least has become) unconstitutional. We have only to read the plain language of the Constitution and consider its words in light of what administrative agencies nowadays do. Lawson provides the following as a "typical" example of agency action:

> The [Federal Trade] Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Com- mission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission

[40] Both Woodrow Wilson and FDR recognized the importance of working within the forms of the original constitution in order to change it. This can be seen in Wilson's metaphor of a house at the end of this chapter "What is Progress?" in *The New Freedom*. "Now, the problem is to continue to live in the house and yet change it… What we have to undertake is to systematize the foundations of the house, then to thread all the old parts of the structure with the steel which will be laced together in modern fashion, accommodated to all the modern knowledge of structural strength and elasticity," etc. See Pestritto and Atto, *supra* ff. 27, p. 52. FDR arguably accomplished what Wilson could only theorize about. FDR's "four freedoms" in his 1941 State of the Union list two negative rights (freedom of speech and of worship) alongside to positive ones (freedom from want and from fear), thus creating an impression of continuity with the past.

[41] Philip Hamburger, *Is Administrative Law Unlawful* (Chicago: The University of Chicago Press, 2014).

> rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission. If the Commission ultimately finds a violation, then, and only then, the affected private party can appeal to an Article III court. But the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law.[42]

In addition to Hamburger and Lawson, the incompatibility thesis has been proposed by political scientists who are students of the progressive era.[43] For these scholars, it is enough to take seriously what progressive reformers themselves had to say about their own intentions. Progressive actors like Woodrow Wilson, Herbert Croly, and even FDR launched a root and branch critique of the 1789 Constitution, from its structures and institutions down to its core philosophical presuppositions. Turn-of-the-century progressives have an advantage over their modern-day legatees in that the former, having had to argue against a well-entrenched constitutional tradition, were more conscious of the tensions between administrative government and Madisonian government. Wilson, for example, observed that a system of separation of powers and checks and balances was "accountable to Newton," that is, to the seventeenth century's scientific paradigm that understood nature as a set of fixed forces that human beings could, with the new science of politics, channel in salutary directions.[44] This is consistent with what Publius says about the channeling of ambition in Federalist No. 51.[45]

This brings us to the second camp, which is the flip side of the first. This camp argues that administrative government is indeed at odds with the 1789 Constitution, but that administrative government *should* triumph over the old Constitution because constitutions must

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[42] Gary Lawson, "The Rise and Rise of the Administrative State," 107 *Harvard Law Review* 1231 (1994), pp. 1231-1254, 1248-1249.
[43] This is the position of Pestritto and Atto, "Introduction," in *American Progressivism*.
[44] Ibid., p. 50.
[45] Alexander Hamilton, Federalist Paper No. 51, February 8, 1788 (https://avalon.law.yale.edu/18th_century/fed51.asp).

"evolve" to keep up with the needs of society. The philosophical principle on which this view tends to rely is historicism, i.e. the notion that all human thought, and hence the thought that went in to the original Constitution, is a product of its time and place and as such cannot claim to have arrived at eternal truths. The founders' Constitution is based precisely on such claims about fixed and enduring truths. "The Declaration of Independence," Woodrow Wilson wrote, "did not mention the questions of our day… It is eminently a practical document… not a thesis for philosophers, but a whip for tyrants; not a theory of government, but a program of action."[46] A more recent statement of this view can be found in a speech delivered by Justice William Brennan at Georgetown University in 1985. In Brennan's reading, the Constitution's "majestic generalities and ennobling pronouncements" are designed to guarantee human dignity. Since the "demands of human dignity will never cease to evolve,"[47] it follows that neither will the Constitution.

The third camp in the debate over compatibility maintains that administrative government is an organic—if late-stage—outgrowth of the 1789 Constitution. There is a danger, argues Adrian Vermeule, a chief proponent of this position,[48] in adhering too rigidly to what the founders said about structure while losing sight of the ultimate goal of that structure, which was to secure the sovereignty of the people. As social conditions changed in the late nineteenth century, the chief threat to the people's sovereignty was no longer government itself, but the "special interests" that dominated representative institutions and turned a popular system of government into an oligarchy that merely appeared democratic. Consequently, the people, acting

[46] Pestritto and Atto, *American Progressivism*, p. 51.
[47] William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," 27 *South Texas Law Review* 433 (1986).
[48] The following is a summary of Adrian Vermeule, *Law's Abnegation* (Cambridge: Harvard University Press, 2016), Ch. 1 and 2.

through their representatives in Congress, decided that the existing system was ill-equipped to deal with the new tyranny. And so, with the consent of the people, Congress created a system of administrative government to carry out the popular will.

Congress delegates power to administrative agencies when it needs help carrying out its programs. Executive agencies can more easily exercise discretion—a key condition in expertise—and act with dispatch, or as Publius puts it in Federalist No. 70, "energy." The difficulty of protecting people from predatory corporate practices, unsafe pharmaceuticals, or various forms of air and water pollution, makes necessary the cooperation between lawmakers, who articulate the aspirations of citizens, and experts, who apply specialized knowledge to translate those aspirations into realities. "To execute a law," Vermeule explains, "entails giving it additional specification, in the course of applying it to real problems and cases."[49] The argument, then, is not merely that administrative government is expedient--though it is that--but also that it is required by the very notion that executive and legislative functions should not coexist in the same branch. Were administrative agencies to be eliminated, this would either severely undermine popular sovereignty insofar as it would deny the people their right to use government to certain popularly approved ends, or it would make the pursuit of those ends the task of the legislature, a task for which it is neither suited nor one that it can pursue without encroaching unduly on the executive function.

Thus, Vermeule agrees neither with Wilson, who rejects separation of powers, nor with Hamburger or Lawson, who view agency rulemaking as too lawlike to be consistent with separation of powers. Modern administrative government is an outgrowth of separation of powers and in important ways respects some of its key principles. The legal constraints imposed

[49] *Ibid.*, p. 53.

on administrative agencies in conjunction with presidential elections every four years give the people adequate control over the bureaucratic machinery. Vermeule calls his approach "separation of powers without idolatry."

From this admittedly brief sketch of the debate over the compatibility of administrative government and the original Constitution we can infer that the problem of administrative government is the tension between representation and expertise. This marks a restatement on modern terms of Aristotle's question, whether it is better to be ruled by a wise and prudent king or by impartial laws.[50] The progressives thought this tension could be overcome by adopting a new model of executive leadership, a "rhetorical presidency."[51] This model assumes a division of labor between the popular branches of government, which, under the coordination of the president, would deal with matters of high principle, and the bureaucracy, whose expertise and a-political (or value-neutral) character would ensure that the people's will be executed with (technical) wisdom. Progressives' confidence in this theory, however, dampened during the 1960's, when demands on government increased just as trust in government institutions declined.

Notwithstanding Wilson's ideal of administration by experts insulated from "meddlesome" publics, in reality from the early days of the New Deal administrative discretion was viewed with suspicion and made subject to oversight by the courts. In 1946 Congress passed the Administrative Procedure Act (APA) as a compromise between the New Deal's progressive and conservative wings. Conservatives worried about an unhinged and unaccountable regulatory state and sought therefore to strengthen the rule of law norms and procedures that govern administrative agencies. This meant making agencies more formal and court-like when discharging their adjudicatory role. (It was only later in the century that informal rulemaking

[50] Aristotle, *Politics*, 1286a8-b36.
[51] Jeffrey Tulis, *The Rhetorical Presidency* (Princeton, NJ: Princeton University Press, 1987).

would eclipse agency adjudications of disputes between regulated parties and between the regulated and the regulators.) In return, the APA would cement the legitimacy of the New Deal state and its core regulatory functions, which is what progressives wanted especially with FDR no longer in control.[52]

The APA is widely considered the founding charter of administrative government and the cornerstone of administrative law, defined here as the body of rules and standards by which courts supervise administrative agencies. The APA is premised on the realization that the New Deal state exists in an uneasy relationship with the Constitution's basic structure and allocation of powers. With the post-1937 Supreme Court unwilling to uphold a strong non-delegation doctrine, which the Court had announced in 1928 in a unanimous opinion written by the conservative William Howard Taft,[53] and with Congress signaling its intent to delegate more and more authority to executive agencies, the stage was set for a constitutional crisis. By the 1970's, the APA's answer to this problem was to try to replicate within each agency the deliberative and representative processes that once took place in Congress. Political scientists called this approach "pluralism."[54]

Section 553 of the APA, "notice and comment," specifies three steps an agency must take before it can issue legally binding rules. It must first propose a rule in the Federal Register, then allow for a period of comment, then either make revisions or publish the original in the Federal Register, allowing at least thirty days before the rule goes into effect.[55] Over the years, Congress

[52] Martin Shapiro, "APA: Past, Present, Future," 72 *Virginia Law Review* 447 (1986), pp. 447-492, 452-453.
[53] *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). The Court made the argument that Vermeule defends, that the specificity required in translating a vague mandate into concrete action is essentially an executive power. The Court announced that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix [regulations] is directed to conform, such legislative action is not a forbidden delegation of legislative power." This has become known as the "intelligible principle" test.
[54] See Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* (New York: W. W. Norton & Company, 1979).
[55] 5 U.S. Code § 553.

and the courts came to view the APA's three steps as the "bare bones" of what agencies must do.[56] Congress included in many of its Great Society programs more detailed procedural requirements, deadlines, and regulatory goals. The task of courts would be to hold agencies to these statutory requirements as well as to the courts' own past rulings on rulemaking procedures. Title IX is a case in point. Recognizing that it was giving the Office for Civil Rights authority to regulate a controversial area of public life, Congress, as a way to ensure regulatory responsibility, included the requirement that no new rule shall go into effect without receiving the personal signature of the president.[57]

As the American public's expectations of government grew and its confidence in institutions shrank, Congress and the courts tried to make administrative government more accountable to citizen input. Congress included "citizen suit" provisions in its statutes and the courts expanded the rules of standing, defining ever more flexibly who had a legitimate stake in how agencies exercised their discretion.[58] An important result of this was the creation of a new form of liberalism, in which "public interest" groups could use the judiciary to compel bureaucrats to pursue ambitious goals. As Richard Stewart has observed, the idea was to "replicat[e] the process of legislation" in bureaucratic fora.[59] Courts beefed up the requirements of notice and comment by forcing agencies to demonstrate that they had read and given serious consideration to, if not all comments, then at least the most important ones. As Martin Shapiro has argued, the quest for "pluralism," or the theory that a regulatory decision is legitimate if it is the result of a sufficiently participatory and representative process, very soon gave way to "synopticism," or the

[56] Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens: The University of Georgia Press, 1988), pp. 39-41.
[57] 20 U.S. Code § 1682
[58] Shep Melnick, "Courts and Agencies," in Miller and Barnes ed., *Making Policy, Making Law: An Interbranch Perspective* (Washington, D.C.: Georgetown University Press, 2004), pp. 92-93.
[59] Richard Stewart, "The Reformation of Administrative Law," 88 *Harvard Law Review* 1667 (1975), p. 1712.

notion that a regulation is legitimate if it reflects (what judges believed were) substantively correct policy choices.[60] Arguments over procedure became stand-ins for arguments over substance.

Not surprisingly, opponents of regulation soon trained their sights on the courts. Policymaking, they argued, had moved from administrative agencies, which were at least nominally under presidential control, to a less accountable venue. The Supreme Court's 1984 decision *Chevron v. Natural Resources Defense Council* expressed the growing aversion to what Jeremy Rabkin around that time had called "judicial compulsions."[61] The Court unanimously ruled that if the intent of the legislature is not clear from the statute, judges should defer to an agency's interpretation of its own originating statute, so long, however, as its interpretation does not outright contradict the statutory language.[62] It was time, critics of judicial policymaking argued, for the executive to assert control over and take responsibility for the execution of the laws.

Twelve years after *Chevron*, in a case called *Auer v. Robbins,* the Court tried to restrain judicial meddling in administration yet further. Writing for a unanimous Court, Justice Scalia held that courts must defer to agencies' interpretations of their own ambiguous rules.[63] Two decades later, *Auer* would become the subject of controversy especially in the very legal and policy circles where Scalia was celebrated. One reason for this was a renewed appetite among progressives for bold administrative action, as can be seen in the contrast between the administrations of Bill Clinton and Barack Obama. Another was that the federal judiciary was no longer dominated by pro-regulation liberals.[64] Critics of administrative government were now demanding that courts rediscover and aggressively assert their responsibility as guardians of the rule of law.

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[60] Shapiro, *Who Guards the Guardians*, pp. 49-54.
[61] Jeremy Rabkin, *Judicial Compulsions: How Public Law Distorts Public Policy* (New York: Basic Books, 1989).
[62] *Chevron v. Natural Resources Defense Council*, 467 US 837 (1984).
[63] *Auer v. Robbins*, 519 US 452 (1997).
[64] Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008).

II: *Auer* Deference

The "core" of *Auer*, the Court explained in its 2019 decision *Kisor v. Wilkie*, in which it conceded that *Auer* has often been misunderstood or misapplied, is that a judge must defer to an agency's interpretation of its own rule only when that rule is genuinely ambiguous—that is, only once the tools of statutory construction have "run out, and a policy-laden choice is what is left over." To make a determination of ambiguity, the court must consider "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." Even if, after this inquiry, the regulation remains ambiguous, the agency's clarification of that regulation must be a "reasonable" one. And further, even if the interpretation is a reasonable one, the court ought to consider a number of additional factors before concluding that deference is due. First, the interpretation must be the agency's "official" and "authoritative" interpretation. Although this need not necessarily mean the agency's head, "[t]he interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context." Second, since the *raison d'etre* of Congressional delegation to an administrative agency in the first place is the latter's superior expertise in some domain of policy, "the agency's interpretation must in some way implicate its substantive expertise." Lastly, the interpretation should be the agency's "fair and considered judgment," not simply a convenient litigation position.[65] In short, *Auer* deference is permissible only when all of the following conditions obtain:

1. The regulation is genuinely ambiguous. To determine ambiguity, a court must:
    a. Exhaust all tools of legal construction and be left with a naked policy choice
    b. Consider the text, structure, history, and purpose of the underlying regulation
2. The interpretation of the regulation must be a reasonable one
3. The interpretation meets the following criteria:
    a. It is the agency's official and authoritative interpretation
    b. It falls within the subject-area expertise of the agency
    c. It is not adopted merely as a convenient litigation position

[65] *Kisor v. Wilkie*, 588 US__(2019), Opinion of the Court, pp. 13-18.

One can legitimately wonder whether the Court's effort to specify the *Auer* test in fact clears up those areas of ambiguity that generated criticism of the doctrine in the first place. Consider, again, the case of *Gloucester*. What to make of condition 1(b)? Defenders of *Gloucester* would argue—as the Fourth Circuit did—that the word "sex" in the relevant OCR regulation from 1975 is ambiguous, that the structure of the regulation in itself does not resolve this ambiguity, and that the purpose of the regulation is consistent with that of the originating statute: to guarantee non-discrimination on the basis of sex. Critics might counter that no lawmaker or bureaucrat in the Department of Health, Education and Welfare (then the home of OCR) at the time would have thought the regulation prohibits defining male and female by physiological features, and indeed that separating restrooms by anything other than a physical definition of sex makes no sense whatsoever (since the purpose of this separation is privacy).

Other questions can also be raised: Was the Ferg-Cadima letter to Emily Prince, to which the Fourth Circuit deferred, the Department of Education's "official and authoritative interpretation," given that Ferg-Cadima was an acting deputy assistant secretary for policy in one of ED's subdivisions? Did OCR not endorse the Ferg-Cadima correspondence in its later Dear Colleague Letter merely as a convenient litigation position? And perhaps most important of all, is the question of whether Grimm is male or female one that falls under the subject-area expertise of OCR? To read *Gloucester* in the light of *Kisor* is thus to be reminded rather than disabused of the difficult questions raised by the former. Recognizing this problem, Justice Gorsuch in his concurrence noted that the Court, under the guise of reducing ambiguity, is now merely "forc[ing] litigants and lower courts to jump through needless and perplexing new hoops."[66] Ultimately, for

[66] *Kisor v. Wilkie*, 588 US__(2019), J. Gorsuch Concurring in Judgment, p. 2.

Gorsuch, *Auer* is a precedent that the Court would do well to discard, given its implications for judicial abnegation.

To gain a better understanding of the constitutional dilemmas raised by *Auer*, it would be helpful first to consider the situations in which the doctrine is invoked. An agency's interpretation of its own purportedly ambiguous rule can come in a number of forms, including guidance documents (like OCR's Dear Colleague Letters), agency manuals, and internal memos. Technically, the APA exempts such "interpretive rules" from the notice and comment requirement, which is reserved for "legislative rules."[67] Interpretative statements like guidance documents are technically non-legally binding. Their purpose is to help regulated entities understand how agencies will enforce their regulations, usually in circumstances not foreseen when the rules were first drafted. By reducing legal uncertainty and increasing transparency, they diminish the likelihood of unnecessary friction between regulated entities and government.

In practice though, agencies have come to use guidance letters and other "interpretations" as a means of producing desired regulatory goals without going through rulemaking procedures. The use of this tool has proliferated sharply in recent decades. This is in part due to growing regulatory ambitions, in part as an unintended consequence of courts making the notice and comment process long and cumbersome, and in part because it is often more politically expedient to avoid public participation--especially in matters of a controversial nature like transgender bathrooms.

[67] The following overview, which is admittedly bare bones, is based on Hale Melnick, "Guidance Documents and Rules: Increasing Executive Accountability in the Regulatory World," 44 *Boston College Environmental Affairs Law Review* 357 (2017), pp. 357-389.

Courts have struggled to draw clear lines between legislative and non-legislative rules,[68] as the *Kisor* decision amply demonstrates. As Melnick shows in his recent study of Title IX, when OCR used Dear Colleague Letters to issue rules on sexual harassment, some of them relying on a clear misinterpretation of standards laid down by the Supreme Court, officials in the Obama administration were unable to give a consistent answer when asked whether these rules constituted "final agency action." In response to a question by Senator Lamar Alexander (R-TN) of the Senate Committee on Health, Education, Labor, and Pensions on whether the DCL's requirements were legally binding, OCR chief Catherine Lhamon said yes, and two of her deputies said no. The matter plainly turned on how one understood "the law" regarding sexual harassment. A central question examined in later chapters is whether Supreme Court (and other court) rulings on the meaning of discrimination "because of sex" should be taken at face value, or whether instead these should be read in light of some broader purpose, intent, or "evolving" conception of justice.

The use and abuse of guidance documents raises serious questions in regard to both rule of law and good government. First, misuse of guidance for regulatory purposes "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."[69] By creating a presumption in favor of an agency's construal of its own rule as opposed to a judge's interpretation of it, courts put their thumb on the scale in favor of the agency and against the complaining party. This undermines judicial impartiality and, ultimately, due process of law.

Moreover, regulation through guidance documents often precludes serious consideration of costs, unwanted consequences, and tradeoffs. For example, one cost of the Obama administration's Dear Colleague Letters on how schools must handle allegations of sexual violence

[68] David L. Franklin, "Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut," 120 *Yale Law Journal* 276 (2010).
[69] *Decker v. Northwest Environmental Defense Center*, 568 US 597, 621 (2013), J. Scalia dissenting.

was that OCR focused its very limited resources on systemic review of a relatively small number of presumably offending institutions. This came at the expense of its ability to respond promptly to as many allegations as it could. The administration's assumption was that systematic review would create powerful deterrents and incentives for all schools to take aggressive and proactive measures to prevent and respond to sexual misconduct. Still, for those whose complaints did not reach the preoccupied agency, justice delayed was justice denied.[70]

Finally, when rules of a legislative nature are promulgated through agency interpretation, the public is not given a fair chance to prepare for changes to the new regulations. Only those who were closely following legal developments in the Fourth Circuit, or who were aware of OCR's resolution agreements with a small handful of school districts in Illinois and California, or who knew of the private letter sent by an unknown OCR bureaucrat to a transgender advocate a few months prior, might have expected the DCL on transgender students on May 13, 2016. For everyone else, the policy announcement would have come completely out of the blue. At the very least, schools could reasonably have expected to prepare their student population for a significant change in school policy and culture. Given the tacit assumption of civil rights advocates that school communities were generally hostile to this change, one would think that a long forewarning is the reasonable thing to do.

In short, all of these problems are created or at least exacerbated by *Auer* due to the incentives it creates for agencies to work around the notice and comment procedure, or so critics of *Auer* argue. *Auer* thus potentially undermines good government practices as well as norms of separation of powers. These two goals, though conceptually distinct, are nevertheless related. In

[70] According to the Department of Education's website, in 2017 and 2018 OCR resolved an average of 16,000 complaints per year, in contrast with the Obama administration OCR's 6,200 (https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students). There are arguments for and against each approach.

the Federalist Papers we learn that separation of powers anticipates unenlightened statesman, and one thing that unenlightened statesmen do is administer government poorly. Similarly, it is Publius' opinion that citizens "attach" themselves to government that is closest to them, unless another government is better administered.[71]

What, then, are the arguments in favor of *Auer* deference? Briefly, the first and probably most important is respect for separation of powers and rule of law. Recall Vermeule's claim that when Congress delegates rulemaking authority to agencies, it does so on the assumption that expertise is needed in translating its mandates into specific rules. To execute a law means to give it specification, and if this holds true with regard to *Chevron*, where agencies are specifying statutory language, it holds true all the more in cases where agencies clarify their own rules. Crucially, then, resolving ambiguities is a matter of policy choice, albeit within a reasonable range of options delineated by the statute's authorization. To have courts supervise and approve or disapprove of these choices is to invite judges into public policy, to force experts to answer to non-experts. Agencies, or at least executive agencies, more easily than courts can be held accountable to the people through the mechanism of presidential elections.

A second argument is majoritarianism. Due in part to the requirements courts have heaped upon agencies over the years, the notice and comment process can take months, even years, before a proposed rule goes into effect. This gives well organized factions a chance to obstruct agencies from carrying out their mandates and contravenes the legitimacy of a system that is fundamentally (though not purely) democratic. While it is true that the American system has many veto points by design, these can swing too far toward anti-majoritarianism.

[71] Alexander Hamilton, Federalist Paper No. 17, December 4, 1787 (https://avalon.law.yale.edu/18th_century/fed17.asp).

A third argument is efficiency. It is simply unreasonable to expect every agency regulation to anticipate all possible applications and consequences. In a dynamic, sprawling, and diverse society characterized by rapid and unpredictable technological change, agencies must be able to respond quickly and flexibly to circumstances as they evolve. To this effect, agencies must be able to utilize regulatory tools such as guidance letters.

The reader of the Fourth Circuit's opinion in *Gloucester* can very easily lose sight of the deeper constitutional questions implicated in the seemingly technical dispute over deference to the Ferg-Cadima letter. Administrative law, Joseph Postell aptly notes, "is not simply a forum in which bureaucracies defend their decisions before judicial tribunals. Administrative law is now the forum in which the principles of American constitutionalism are repeatedly tested, formulated and applied."[72]

III: Analyzing the Argument for Deference in *Gloucester*

When an agency asks a court to defer to its interpretation of its own previous regulation, that court's first step is to determine whether the regulation in question is in fact ambiguous. In 1975, OCR issued a series of regulations under Title IX. This was the first and, until very recently, last time OCR utilized the notice and comment process and had its regulations signed by the president.

Section 86.33 of the 1975 regulations explicitly permits schools to maintain separate "toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex."[73] Grimm an the Department of Education argued that "sex" could mean either biological sex or gender identity, and that it was not clear from the text of the regulation itself which of these two meanings

[72] Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government* (Columbia: The University of Missouri Press, 2017), p. 318.
[73] 40 *Federal Register* 24141 (June 4, 1975), section 86.33.

was controlling. The school board's argument was, in essence, that interpreting "sex" in 86.33 as ambiguous would render absurd the practice of separating restrooms in the first place, since this practice rested on assumptions about physical privacy connected to anatomy. Because this assumption was certainly in the minds of regulators in the 1970's, there is simply no way to read 86.33 as prohibiting schools from using a physical definition of sex. Thus, even if "sex" is ambiguous, OCR's interpretation resolved that ambiguity in a way that was flatly inconsistent with the plain language and intent of the regulation.

The district court agreed with the school board, but the Fourth Circuit Court reversed. The appellate court held that the regulation indisputably recognizes two sexes, male and female (not a trivial fact, as we will see in later chapters); that it permits schools to exclude males from female facilities and vice versa (again, not insignificant); but that it is silent as to whether sex means biological sex or gender identity. It grounded that finding in Webster's Third Dictionary definition of "sex" from 1971, which reads: "the sum of the morphological, physiological, and behavioral peculiarities that subserves biparental reproduction with its concomitant genetic segregation… that in its typical dichotomous occurrence is usually genetically controlled and associated with special sex chromosomes and that is typically manifested as maleness and femaleness."[74] For Judge Henry Floyd, the fact that anatomical differences are "typical" means that they that are "universally descriptive."[75]

There are a number of problems with the majority's approach. First was the majority's half-hearted attempt at original public meaning jurisprudence, an approach it tacitly endorsed when it chose to cite dictionary definitions from the 1970's. Judge Paul Niemeyer, who wrote the dissent, managed to cite five dictionary definitions from that decade that point unambiguously to

[74] *G.G. v. Gloucester County Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016).
[75] Ibid.

the physical-reproductive element of maleness and femaleness.[76] To be sure, textualists are not locked in war of dictionary counting, but even so, the majority's appeal to a single dictionary source seemed like judicial window-dressing. It is significant, moreover, that at oral argument Judge Andre Davis, one of the two judges in the majority, expressly denied that the original public meaning of "sex" should control the outcome of the case. Davis noted the advancement of scientific knowledge on the etiology of gender identity (or as he called it, "psychological sex") since the 1970's. What this case comes down to, he insisted, was "the meaning of sex *in 2016*."[77]

Even supposing, however, that Floyd was right that anatomy is not essential to maleness and femaleness because merely "typical," it certainly does not follow that *gender identity* (a term largely unknown in the 1970's) is the determinant of sex. The Webster definition in no way requires that atypical males be considered females or vice versa, and given Floyd's recognition that *some* restriction on sex-separated facilities is permissible, it is that extra step that must be taken for Floyd's argument about ambiguity to work. As we will see in the following chapters, atypical sex could just as well refer to intersex phenomena (where the external sex anatomy is ambiguous or unambiguous external genitalia coexist with internal, and thus concealed, gonads of the opposite sex). And it has also been the basis of theorists' denial that human beings have a true sex at all. So Floyd's assumption does not necessarily support his conclusion.

Niemeyer's argument, however, is not strictly textualist. How do we know that biological sex alone was the meaning of "sex" when the 1975 regulations were issued? Because, Niemeyer suggests, nothing *but* an anatomical understanding of sex *would* make sense, for otherwise there would be no need for regulation in the first place. The majority's interpretation of "sex" is plainly

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[76] Ibid., at 736.
[77] Ibid., Oral arguments, at 27:30 (audio recording). "*G.G. v. Gloucester County, Virginia, School Board* Oral Argument," CSPAN, Jan. 27, 2016, https://www.c-span.org/video/?404134-1/gg-v-gloucester-county-virginia-school-board-oral-argument.

inconsistent with the core and irreducible purposes behind separating public accommodations by male and female, privacy and safety. Likewise, separation of sports teams by male and female presuppose average differences in physicality and aggression between males and females. Insofar as the majority and the plaintiff accept that separation of facilities and athletics by male and female constitute a legitimate social practice, which they do without question, their interpretation of 86.33 makes this practice utterly inexplicable. A policy of exclusion based on gender identity would make just as much sense as a policy that excluded women with red hair from the women's room or left-handed men from the men's room. Such exclusions would be the very definition of arbitrary. In Niemeyer's view, the "privacy concerns animating" 86.33 seem especially important in constructing a legal text.[78]

Floyd's answer to the privacy argument and the legal precedents cited in support of that argument would become the blueprint for how some courts would handle such claims. In true lawyerly fashion, Floyd insisted that the precedents did not deal with the specific circumstances in this case. Floyd is technically correct: one of the cases involved the videotaping of students undressing,[79] the second dealt with indiscriminate strip searching,[80] and the third involved a male parole officer who forcibly entered a bathroom stall to watch a woman provide a urine sample.[81] In Gloucester School Board's view, these precedents spoke to the broader privacy concern underlying the separation of certain spaces by sex. But for Floyd, the argument had abstracted too far from the context of the cases. At no point did Floyd directly address the question of whether the presence of people with "typical" male anatomy in the girls' room and of people with "typical" female anatomy in the boys' room are *as such* violations of privacy.

[78] *G.G. v. Gloucester County Sch. Bd.*, 822 F.3d 709, 721, 737 (4th Cir. 2016).
[79] *Brannum v. Overton Cnty. Sch. Bd.,* 516 F.3d 489 (6th Cir. 2008)
[80] *Beard v. Whitmore Lake Sch. Dist.,* 402 F.3d 598 (6th Cir. 2005)
[81] *Sepulveda v. Ramirez,* 967 F.2d 1413 (9th Cir. 1992)

According to Niemeyer, there is yet another problem with the majority's reasoning. Reading ambiguity into "sex" renders the 1975 regulation "unworkable and illogical."[82] The government's interpretation of "sex" as gender identity places schools in an impossible situation in which the only way to comply with their obligation not to discriminate on the basis of gender identity is to discriminate on the basis of gender identity. "Basing restroom access on gender identity," Niemeyer pointed out, "would require schools to assume gender identity based on appearances, social expectations, or explicitly declarations of identity,"[83] all of which the government itself considers unlawful "stereotypes." As critics of the transgender movement (mainly from the left) have pointed out, this problem runs to the heart of the debate over the concept of gender identity, a concept they believe refers to nothing more than a person's desire to conform to gender stereotypes (see Chapter 3).

Floyd's response to this problem, once again, anticipates some of the pronouncements that would feature in later transgender litigation. Rather than address head-on Niemeyer's argument about schools resorting to stereotyping in order to avoid stereotyping, Floyd left it at pointing out that schools could not *anyway* consistently enforce a policy based on "biological sex." The reason being, presumably, that when schools do what they have always done, they put their implicit faith in the conformity of students to gender norms. After all, "no one is suggesting mandatory verification of the 'correct' genitalia before admittance to a restroom." Thus, the Department of Education's policy "presents no greater... problem" than what schools have always faced.

Expertise

[82] *G.G. v. Gloucester County Sch. Bd.*, 822 F.3d 709, 731 (4th Cir. 2016).
[83] Ibid., at 738.

In *Kisor*, the Court provided a Vermuelian explanation for why judicial deference to agencies is in some situations appropriate:

> Agencies (unlike courts) have unique expertise, often of a scientific or technical nature, relevant to applying a regulation to complex or changing circumstances. Agencies (unlike courts) can conduct factual investigations, can consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory program. And agencies (again unlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public. It is because of those features that Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. And so too, when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar.[84]

As an empirical account of why Congress "assigns rulemaking power to an agency," Kagan's argument is, to put it mildly, questionable. Congress often passes what Christopher DeMuth has called "velleities" (i.e. vaguely worded and uncontroversial aspirations like "protect public health") rather than actual laws, thus passing on to regulatory agencies the difficult and politically risky task of translating broad and uncontroversial wishes into concrete and controversial policy choices.[85]

Nevertheless, if Kagan is right, ED's policy on transgender students during the Obama years raises interesting questions about congressional delegation and the nature of expertise. To begin with, although *Gloucester* technically involved *Auer* deference, the scenario could just as well have been addressed through the *Chevron* framework. The term in dispute in the 1975 regulations ("sex") is exactly the same term used in the originating statute; indeed, the 1975 regulations were an effort to clarify what discrimination "on the basis of sex" does and does not

[84] *Kisor v. Wilkie*, 588 US__(2019), Opinion of the Court, p. 10 (internal quotations and citations omitted).
[85] Christopher DeMuth, "The Regulatory State," *National Affairs* (Summer, 2012), p. 72.

mean. In the typical *Auer* situation, and indeed in the *Auer* case itself, the statutory term and the regulatory term are different.[86]

To consider this point from another angle, consider the Occupational Safety and Health Act of 1970, in which Congress delegated to the Occupational Safety and Health Administration (OSHA), a subdivision of the Department of Labor, the task of regulating "toxic materials." The statute reads as follows:

> The Secretary [of Labor], in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.[87]

What does it mean to ensure "the highest degree of health and safety protection"? Surely, the absolute "highest degree" would entail closing down the factory. As Martin Shapiro has pointed out, regulators often face the problem of "regulation at the margin." He gives this example:

> Let us suppose a textile mill that has been putting eight hundred parts of cotton dust per million parts of air into its work space, an amount that is clearly unhealthy for its workers. It may be able to reduce the dust from eight hundred parts to one hundred parts at a cost of half a million dollars worth of fans and filtering equipment. That cost might be easily justified in terms of the improved health of the workers. There might be little or no observable health benefits in a further reduction from one hundred parts to ten parts of dust per million parts of air. And such a further reduction might be enormously costly, far more costly than the reduction from eight hundred to one hundred. The very biggest fans and finest filters [might not be enough]. It might be necessary to build a whole new factory with totally redesigned machinery in order to get this last increment of dust reduction. In this situation, costs are rising dramatically *at the margin*… The cost of removing the particle of dust we choose to remove may be thousands of times higher than the cost of

[86] The Fair Labor Standards Act of 1938 exempts from overtime compensation employees who operate in "a bona fide executive, administrative, or professional capacity," the assumption being that these employees typically earn significantly more than minimum wage and receive other employment benefits such as strong job security. The Act delegates to the Department of Labor the authority to define who counts in this category of exemption, which it did by positing a "salary basis" rule, which in turn was conditioned on the employee not being subject to "disciplinary deductions." But when these regulations were issued, the context was private sector employees, and the plaintiffs in *Auer* were police officers. The question was whether the court should defer to the Department's interpretation of how own overtime compensation requirements should be applied to law enforcement personnel. *Auer v. Robbins*, 519 U.S. 452 (1997).

[87] 29 U.S. Code 655 (1977), § 6 (b)(5).

> removing the first particle…[A]fter a certain point observable benefits at the margin tend to drop very sharply as costs rise very sharply.[88]

Shapiro's point is that the tradeoff between the marginal gain to health and the costs involved in that gain is a policy choice, not a legal one. And to recall, in *Kisor* Justice Kagan emphasizes that *Auer* deference is required when the regular tools of statutory construction have "run out, and a policy-laden choice is what is left over." Here, OSHA is uniquely situated to make that choice because of two facts: first, it can draw on scientific expertise in a way that courts cannot, and second, if it makes a "bad" decision (say, by overzealously adopting a zero-risk policy) the most effective redress is political, through presidential election and corrective appointments.

Is the assumption of agency expertise the same in both scenarios (Title IX on the one hand, FLSA and OSHA on the other)? There is good reason to believe that it is not. In the FLSA/OSHA scenario, the principle contained in the original act is fairly easy for the average citizen to understand. Employees with good salaries, generous benefits, and strong job security should be exempt from requirements regarding minimum wage and overtime compensation; workers should not have to endure unnecessary safety risks as a condition of employment. Yet when it comes to translating this principle into practice, it seems equally evident that the knowledge required is of the kind that the average citizen is unlikely to have. In the FLSA case, regulation requires highly specialized knowledge of the variety of labor conditions across the workforce. For this reason, one can fairly easily apply the framework used by Kagan and Vermeule, which assumes that agencies are needed to compensate for specialized knowledge that lawmakers do not and cannot have. Can the same be said of Title IX? When Congress delegated to HEW the task of promulgating regulations to ensure equal opportunity "on the basis of sex," was its assumption that this endeavor

[88] Shapiro, *Who Guards the Guardians?,* pp. 101-2.

would require expert knowledge of what it is that makes human beings male or female in the first place?

The answer to this question would seem to be a resounding "no"—unless, that is, one adopts the sex stereotype theory of law. For, according to that theory, when Congress enacted the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, it "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotype."[89] And since discovering that "entire spectrum" entails specialized knowledge not available to the average citizen, it follows that Congress delegated to the Office for Civil Rights the authority to identify and work to eliminate all possible manifestations of "stereotyping" as it relates to "sex." If this theory is right, then the knowledge gap that exists, say, between an air quality scientist at OSHA and the average citizen is of the same scope as the knowledge gap that exists between the latter and a lawyer in OCR. Whether this juxtaposition is sound is one of the deeper questions explored in the context of these chapters.

Conclusion

At this point our discussion of expertise in the transgender context must turn to the actual debate over the meaning of sex. In this chapter we have raised the constitutional dimension of civil rights regulation. As we tried to show, defenders of administrative government from the early twentieth century until today argue that the exigencies of modern life require ongoing management by experts of various kinds. As public confidence in bureaucratic expertise waned and the demand to constrain bureaucratic discretion grew louder, the public looked to the courts as the guardians of the "public interest." But as judicial intervention in the process of rulemaking became harder and

[89] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

harder to distinguish from judicial rulemaking, constitutional conservatives urged a revival of agency discretion on the theory that it was a more responsible and accountable alternative. To be sure, the forces behind these changes were political. Progressives argued for discretion when regulators furthered progressive causes and judicial supervision when fear of hostile appointments or regulatory capture set in. Conservatives argued for judicial restraint when judges pushed for liberal regulations, and judicial vigilance when agencies came under the control of a progressive and activist administration.

Perhaps because of the dramatic nature of its verdict, *Gloucester* helped to reignite the debate over the supervisory role of courts in an age of administrative government. Underneath the legal technicalities of deference is the substantive question of what makes human beings male or female. Plainly, this is not a legal question but a scientific or even philosophical one. There would seem to be no obvious reason why it should fall under the expertise either of OCR or the courts. Yet, by subsuming the substantive question under the abstraction "stereotype," the civil rights state had turned one of the oldest and most enduring of human questions into a matter of legal "rights."

After the Fourth Circuit handed down its decision, the Obama administration promulgated a Dear Colleague Letter instructing schools that they must defer to students' subjective sense of their own gender.[90] The Letter claimed *Gloucester* as one of the legal precedents for its guidance document,[91] thus implying that because the guidelines were nothing new, it did not have to go through rulemaking procedures. Shortly thereafter, the Department of Justice intervened in an ongoing dispute in North Carolina over an ordinance that would restrict access to public restrooms by biological sex. In response to both of these developments, eleven states filed a lawsuit against the administration, and on August 21, 2016 the District Court for the Northern District of Texas

[90] OCR, "Dear Colleague Letter on Transgender Students," May 13, 2016.
[91] Ibid., p. 6, ff. 5.

issued a nationwide injunction to the effect that the Department of Education was not entitled to deference in its interpretation of Title IX.[92]

[92] *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016).

Chapter 2
Against the Binary

The word "transgender" is relatively new. Although it has appeared in a handful of manifestos since the 1960's,[93] it was not used in legal, medical or even most activist circles until the mid-1990's.[94] Until recently, people whose internal sense of gender conflicted with the sex they were designated to be at birth were referred to as "transsexuals." This word is the dominant one used, for example, in most federal court cases until 2010 or so. At least one reason for the linguistic shift was that people should be able to change their gender—or as the transgender movement would later say, affirm who they really always were—without having to undergo risky and expensive medical procedures.

Over the past decade "transgender" has emerged as a catch-all term for all manners of nonconformity to social expectations regarding maleness and femaleness. Yet, as Rogers Brubaker has shown, as an umbrella term "transgender" actually conceals crucial differences between the various subgroups and identities that march under it. Brubaker distinguishes between two meanings of "trans": moving *between* established categories of gender, and moving *beyond* gender categories altogether. The two are not merely different, but in tension with one another. While trans-as-beyond aims to obliterate gender categories, trans-as-between "reinforce[s] [them] by subscribing to stories about unalterable, inborn identities."[95] The problem has not escaped the notice of Paisley Currah, a transgender scholar who calls transgender,

[93] Most famous among them is probably Leslie Feinberg, *Transgender Liberation: A Movement Whose Time Has Come* (New York: World View Forum, 1992).
[94] Susan Stryker, *Transgender History: The Roots of Today's Revolution* (New York: Seal Press, 2017), pp. 153-4.
[95] Rogers Brubaker, *Trans: Gender and Race in an Age of Unsettled Identities* (Princeton: Princeton University Press, 2016), p. 17.

somewhat euphemistically, "an expansive and complicated social category" whose subgroups are "in much generational or philosophical tension" with each other.[96]

What, then, binds the sub-groups under the transgender umbrella? One option, suggested by scholars like David Cruz,[97] M. Dru Levasseur,[98] and Chai Feldblum, is a general right to gender autonomy, or as Feldblum has called it (borrowing from Justice Anthony Kennedy)[99] "the right to define one's own concept of existence."[100] But even a moment's reflection exposes the inadequacy of this approach. After all, who or what exactly is the self whose autonomy is in question? Is that self a gendered entity, as the mainstream narrative of "X trapped in the body of a Y" seems to suggest? Or is the self an entity that exists prior to gender, and for whom gender is a constraint, rather than a possible expression, of autonomy? We will revist this debate in the next chapter when we consider Judith Butler and other supporters of "trans as beyond."[101] Because Butler believes that gender is "performative"—that is, something that one *does*, rather than something that one *is*—it follows for her that "the postulation of a true gender identity [is] a regulatory fiction."[102] Social movements that insist on an authentic sexed self that somehow precedes gender "discourses" are, for someone of Butler's persuasion, laboring under a false consciousness. Although the identities these movements demand recognition for are on some level subversive and nonconforming, they are hyper-conformist in a deeper sense and perhaps for

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[96] Paisley Currah, "Gender Pluralisms Under the Transgender Umbrella," in Currah et al ed., *Transgender Rights* (Minneapolis: University of Minnesota Press, 2006), p. xv.
[97] David Cruz, "Transgender Rights After Obergefell," 84 *University of Missouri Kansas City Law Review* 693 (2016)
[98] M. Dru Levasseur, "Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights," 39 *Vermont Law Review* 943 (2015).
[99] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).
[100] Chai Feldblum, "The Right to Define One's Own Concept of Existence: What Lawrence Can Mean for Intersex and Transgender People," 7 *Georgetown Journal on Gender and Law* 115 (2006).
[101] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).
[102] Judith Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory," *Theatre Journal*, Vol. 40, No. 4 (Dec., 1988), pp. 519-531.

that reason all the more "problematic." The example of Caitlyn Jenner is instructive. In an effort to prove her credentials as a "true" woman, Jenner routinely puts on the most stereotypical displays of femininity.

In short, "gender autonomy" might be a useful concept in legal activism, where (as we shall see) attention to philosophical nuance is often sorely lacking, or in political activism, where building policy coalitions often requires the art of abstracting away from issues that would splinter those coalition. But it is of little use for those who seek clarity on just what it might mean to *be* transgender.

Perhaps a better way to explain how "transgender" has come to encompass incompatible identities is by stressing what they oppose. In recent years the transgender movement has settled on a name for its archenemy: "cisnormativity." The term refers to the widely held assumption that it is normal to identify with the sex one was "assigned at birth," and that society can and should subject those who do not conform to a wide range of social, economic, and political penalties. "Cis" is Latin for "on this side of", and so cisgendered means someone whose gender identity is on what society deems the right side of the male-female sex binary.

Yet, this effort to find a common denominator is no less vulnerable to the difficulties raised in regard to "gender autonomy." Indeed, it is vulnerable to the very same problem: the question of whether the deep self is a sexed (or gendered) entity. Consider, for example, M. Dru Levasseur's claim that the "key to transgender rights" is "updating the law" to reflect the growing consensus within "modern medical science" that gender identity is "in the brain."[103] Presumably, only a society whose scientific consensus has been so "updated" can be free of the label "cisnormative." But where does that leave the queer questioning of gender as radically

[103] Levasseur, "Gender Identity Defines Sex," p. 955.

historical and performative? Is it not the case that precisely by inscribing gender identity as biological and immutable, society further commits itself to "discourses" of normalcy and deviation? Opposition to cisnormativity, like support for gender autonomy, is thus wide but shallow—it relies on (self-imposed) limitations in how far one should go in questioning the ultimate basis of reality.

For now, let us define transgender at the more abstract level as *an incongruity between a person's internal sense of who or what they are ("gender identity") and the sex they were designated to be at birth.* If the transgender movement agrees about anything, it is that when these two possible sources of gender definition come into conflict, the former should always prevail.

As this definition suggests, the argument for defining male and female as a matter of gender identity is really an amalgam of two distinct claims. The first is that the conventional understanding of sex as a unity of natural, biological traits oriented toward reproduction is just that: a convention. "Sex," one legal scholar writes, "is not a natural, coherent category, whether one considers chromosomes, gonads, genitals or reproductive ability. Instead, it is a category-type that ratifies, perpetuates and is fundamentally constituted by invidious, archaic, and overbroad stereotypes."[104] One can trace this critique of "sex" back to the writings of Michel Foucault, who argued that what we think of as sex is really an "artificial unity" of various anatomical features, biological functions and desires into one supposedly coherent, and supposedly natural, whole.[105]

[104] Chinyere Ezie, "Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination - The Need for Strict Scrutiny," 20 *Columbia Journal of Gender and Law* 141 (2011), pp. 141-199.
[105] Michel Foucault, *The History of Sexuality, Volume I: An Introduction*, trans. Robert Hurley (New York: Pantheon Books, 1978), p. 154.

The second claim is that while "biological sex" (the scare quotes are apparently essential) is a mere convention, gender identity is not. It is a reality, perhaps even a natural fact, and by forcing its suppression society fails to respect human dignity. To many people this may seem confusing, since Anglo-American feminists introduced the word "gender" into common parlance precisely in order to expose as constructed and arbitrary what society had traditionally thought natural and meaningful. While sex is a reality of the body, gender is a consequence of oppressive historical forces. According to Sheila Jeffreys, gender *is* "an oppressive social system."[106] How, then, can gender acquire the status of something authentic and venerable, merely by being an "identity"? In what way might be a locus of human dignity? Put simply, how does the word "identity" modify the word "gender" in "gender identity"?

It is crucial to emphasize that these two claims—that "biological sex" is a social construct, and that gender identity is not—operate independently of each other; one in no way entails the other. Indeed, as we shall see in throughout the remainder of this chapter, theorists who first historicized and debunked "biological sex" did so precisely by arguing that there is nothing essential or natural about human sex categories. There is no gendered self in reference to which a social "assignment" of sex might be experienced as inauthentic and damaging. The early literature on this theme was in the spirit of "trans as beyond."

The remainder of this chapter takes a deeper look at that project, which originated in the works of Michel Foucault and was later taken up by a handful of feminist and legal scholars in the 1990's. I refer to this argument as "the argument from intersex," because the phenomenon that these scholars have looked to as evidence of the historicity of "biological sex" is intersexuality. The purpose of the discussion below is threefold: to show some examples of the

[106] Sheila Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (New York: Routledge, 2014), p. 2.

argument from intersex at work in civil rights regulation, to clarify its philosophical assumptions, and to highlight the shortcomings with empirical research on intersex. The following chapter takes up the concept of gender identity with a similar emphasis on its legal, philosophical and empirical dimensions.

While it may seem somewhat artificial to separate the discussion in this way, there is actually a good reason to do so. In the context of American antidiscrimination law, claims about a person's internal sense of gender were made before and independent of attacks on the idea of biological sex. When transgender plaintiffs first successfully challenged employment decisions taken against them, they did not have to argue that biological sex is a "stereotype," but on the contrary, courts granted them relief on the assumption that sex is biological. Only when the policy issue turned to restrooms and sports teams—in other words, when the question of what it means to discriminate "on the basis of sex" turned on the question "who is male/female"—did the argument from intersex begin to appear in court and agency deliberations. We will trace the development of transgender rights in detail in Chapter 5. For now, let us focus on the arguments put forward about human nature and see how successful courts and agencies have been at making sense of them.

I: The Argument from Intersex in Recent Civil Rights Rulings

Doubts over the naturalness of human sexual dimorphism underwrite most of the court and agency decisions on transgender rights in recent years. In *Mathis v. Fountain-Fort*,[107] the first case to apply a civil rights framework to the question of whether biological sex is a

[107] *Determination* in *Mathis v. Fountain-Fort Carson Sch. Dist. No. 8*, No. P20130034X (Colo. Civ. Rights Div. 2013).

legitimate basis for restroom separation, the Colorado Division of Civil Rights (CDCR) held that a school may not deny a six-year-old transgender girl access to the girls' restroom. The legal background to the case resembled what would follow at the federal level three years later. Colorado civil rights law recognizes sexual orientation as a protected status and transgender as a subset of sexual orientation (incidentally, a framing that transgender advocates vehemently reject).[108] Schools in Colorado are permitted to maintain separate facilities for male and female students, but a regulation issued in 2008 pursuant to the state's civil rights code instructs schools to treat students consistently with their gender identity.[109] The plaintiff in *Mathis* was born in Texas, which had issued her a birth certificate identifying her as male. After moving to Colorado and beginning her transition, she was given new documents recognizing her as female. Faced with the task of deciding which official documents were controlling, the CDCR sided with Colorado on the grounds that birth certificates may not accurately reflect a person's true sex.

Recognizing that each set of documents used a different definition of sex, the CDCR appealed to "independent research in an effort to clarify the inconsistencies." It cited a study by Anne-Fausto Sterling, a professor of gender and biology at Brown University, "which revealed that 1 in 100 children are born with 'subtle forms of sex anatomy variations' that deviate from the standard male or female anatomy." Sex determinations at birth take into account the visible, external organs of the infant. However, in a small subset of births the external reproductive organs are either ambiguous or conceal the presence of opposite gonads within the body. This phenomenon is known as *intersex*. According to the CDCR, it follows that "sex assignments given at birth do not accurately reflect the sex of the child." While the plaintiff in *Mathis* was not

[108] Colo. Rev. Stat. Ann. § 24-34-601(2), (7).
[109] Colo. Code Regs. § 708-1:81.11(B).

herself intersex, the agency held that "birth certificates may no longer constitute conclusive evidence of a child's sex."[110]

The school countered that sex refers to biological makeup whereas gender refers to "the characteristics of a particular sex."[111] The Division technically agreed, but again cited "a law review article" that argues that courts now treat sex and gender as synonymous for purposes of law.[112] From this the Division drew the conclusion that the state regulation's mention of "sex-segregated facilities" is, for all practical purposes, synonymous with "gender-segregated facilities."[113] Since there was no dispute that the plaintiff's *gender* (as evidenced by her self-identification and the Colorado certificate) is female, the Division reasoned, her school would have to allow her to use the girls' room just like it would any other female (identified) student.

The precise definition of intersex is hotly contested. Provisionally, let us define it as *a range of situations in which the biological features that together make up a person's status as male or female are either misaligned or too ambiguous to be classified one way or another*. The CDCR's argument rests on the assumption that the conventional way of classifying human beings as male or female is inaccurate because sex cannot be gleaned merely by looking at an infant's genitals—in other words, conventional sex designation looks arbitrarily and unjustifiable at only one among several factors of "sex". Thus, a method of government documentation that relies on such an approach cannot be accurate. Sex, therefore, is "assigned" at birth rather than recognized, the implication being that those who do the assigning seem unaware of the arbitrary nature of their activity. To rely on birth certificates, the Colorado administrative judge declared,

[110] *Determination* in *Mathis*, p. 6.
[111] Ibid., p. 7.
[112] The article in question is Julie Greenberg, "Defining Male and Female: Intersexuality and the Collision Between Law and Biology," 41 *Arizona Law Review* 265 (1999).
[113] *Determination* in *Mathis*, p. 7.

is to deny a transgender girl use of the girls' restroom based on the unquestioned assumption "that boys have male genitalia and girls female genitalia." However, "considering the number of children who, as research indicates, are born with biological variations, the Division cannot make the same presumption."[114]

Mathis is the first successful use of the intersex argument under American civil rights law in the context of access to sex-segregated accommodations in schools. Subsequent courts have followed suit. A good example is an exchange between Judge Paul Niemeyer and Judge Henry Floyd in *G.G. v. Gloucester*, which we discussed in the previous chapter. To recall, Niemeyer pointed out in his dissent that the Department of Education's interpretation of "sex" as "gender identity" is unenforceable. Under the new rule schools would be forced to rely on gender stereotypes to confirm students' identity, and in so doing schools would run afoul of the same prohibition against stereotyping in whose name the Department of Education had decided to intervene in the first place.[115] Floyd did not dispute Niemeyer's observation, but instead was content to question whether the status quo was an enforceable alternative. Alluding to intersexuality, Floyd asked: "Which restroom would a transgender individual who had undergone sex reassignment surgery use [under the school's "biological gender" policy]? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident?"[116]

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[114] Ibid., p. 10.
[115] *G.G. v. Gloucester County Sch. Bd.*, 822 F.3d 709, 738 (4th Cir. 2016).
[116] The last in this series of questions is plain silly, and the reasons why will become apparent as the discussion proceeds. Having lost one's penis in an accident is no more evidence against the naturalness of binary sex categories than losing one's leg is a refutation of the naturalness of human bipedality. Nor is it reasonable to think that schools recognize the sex of their students by nothing other than their concealed genitalia. Regardless, opponents of the transgender movement do not claim that the mere possession of an external organ determines sex. If that were the case, they would agree that sex could be "reassigned" through plastic surgery (which they do not).

A similar appeal to intersexuality was heard at oral arguments in the Seventh Circuit case *Whitaker v. Kenosha*. The defendant argued that Title IX permits schools to rely on birth certificates, but the court's three judges found this argument unsatisfactory. "Suppose somebody's birth certificate said 'female,'" one judge pointed out, "but genetic testing revealed that this was an XY person, which is the case for people with complete androgen insensitivity syndrome. Which bathroom [would they use]?"[117] The majority opinion in *Whitaker* ended up wondering whether "the sex marker on a birth certificate can even be used as a true proxy for an individual's biological sex," given that in some cases a person's "chromosomal makeup, which is also a key component of biological sex," is different from their genitals, and in others there are "external genitalia of two sexes" or "genitalia that is ambiguous in nature."[118]

Doe v. Boyertown represents a third and even more interesting example of the use of the argument from intersex. *Boyertown* was a reverse-discrimination lawsuit filed by students against their school when the latter voluntarily adopted a pro-transgender restroom policy. Among other things, the plaintiffs argued that gender identity-based policies are unworkable because they force schools to arbitrate between gender identities, determining which are authentic and which are false. The school could not exclude any student from any of the bathrooms without making assumptions about what constitutes a "legitimate" male or female identity, and this, the students argued, inevitably means excluding those whose gender identities fall outside stereotypes that happen to be held by school administrators.

Although the district court ruled against the plaintiffs, it conceded their point about enforceability. There are not two but many gender identities, the court agreed, which meant that

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[117] Oral Arguments, at 3:20 (audio recording). "*Whitaker v. Kenosha Unified School District*," Court Listener, March 29th, 2017, https://www.courtlistener.com/audio/29237/ashton-whitaker-v-kenosha-unified-school-distri/.
[118] *Whitaker* by *Whitaker v. Kenosha Unified School District Board of Education*, 858 F.3d 1034, 1053 (7th Cir. 2017).

the school's gender-identity policy was indeed arbitrary in excluding all but two such identities, and even in violation of the anti-stereotyping principle. But rather than search deeper into the school's rationale, the court was content to point out that "dividing privacy facilities based on biological sex" does not "cover[] the entire spectrum of biological sex assignments" either, given the existence of intersexed conditions. Since no one was arguing that the school should stop dividing its facilities by male and female, it would be guilty of stereotyping no matter what it did. Luckily, wrote Judge Edward Smith, we are "not faced with having to determine the wisdom of the School District's practice or whether it is unworkable in this case."[119] On appeal, the Third Circuit affirmed.[120]

The obvious implication of the argument from intersex in *Mathis*, *Whitaker* and *Boyertown* is that no school has *ever* enforced a biological sex-based access policy. Surely, this is what schools *thought* they were doing, but they were simply under an illusion created by their ignorance of intersexuality, and thus of the true nature of human sexuality.

Even where the argument from intersex is not explicitly made, its central conclusion--that the conventional view of male and female is a social construct rather than a description of natural fact--is implicitly embraced. The Office for Civil Rights' Dear Colleague Letter on Transgender Students from 2016 opens by defining four key terms: "gender identity," "sex assigned at birth," "transgender," and "gender transition."[121] Absent, of course, is biological sex. The implication is that the only two possible sources of sex determination are self-identification and social ascription or "assignment." The DCL does not explain why it omits biological sex, but given its approving citation of *Gloucester*, it is plausible that the reason is intersex.

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[119] *Doe v. Boyertown Area School District*, 276 F.3d 324, 376 ff. 44 (E.D. Penn. 2017). My emphasis.
[120] *Doe v. Boyertown Area School District*, 893 F.3d 179 (3rd Cir. 2018).
[121] Dear Colleague Letter, "Transgender Students," May 13, 2016, pp. 1-2.

II: What is Intersex?

Until recently, the argument from intersex appeared primarily in the fringes of the academy and in some activist circles. Lately, as the above examples demonstrate, it has begun to underwrite the actions of the civil rights state. This section explores the philosophical assumptions behind the argument from intersex.

As noted above, the definition of intersex is contested territory. One of the most widely cited intersex scholars in the legal literature is Anne Fausto-Sterling. With expertise in biology and gender, Fausto-Sterling's work on intersexuality has tried to fuse together insights from postmodernist theories of gender constructionism and the study of biological processes of human development. One would think the two enterprises radically at odds with one another, given postmodernism's deep suspicion of modern science. In Fausto-Sterling's view, however, the insights of a theorist like Michel Foucault, his own protestations against modern science to the contrary notwithstanding, can be used to attain a better scientific understanding of human sexuality.

In her 1993 article "The Five Sexes: Why Male and Female Are Not Enough,"[122] Fausto-Sterling claims that Western society's "two-party sexual system… [is] in defiance of nature." From a biological perspective, she writes, there are at least three additional "sexes" between the typical male and the typical female. These are: "the true hermaphrodite" (who have one of each gonad), "the male pseudohermaphrodite" (male gonads and chromosomes but female external genitalia) and "the female pseudohermaphrodite" (female gonads and chromosomes but male external genitalia). In Fausto-Sterling's judgment, "sex" does not refer to the binary division of

[122] Anne Fausto-Sterling, "The Five Sexes: Why Male and Female Are Not Enough," *The Sciences*, Vol. 33, No. 2 (1993), pp. 20-25.

human beings in accordance with reproductive function. Rather, sex "is a vast, infinitely malleable continuum that defies the constraints of even five categories."[123]

The idea that sex is a spectrum rather than a binary has caught on widely and with astonishing speed in advocacy circles and public policy venues. Advocacy groups now routinely include it in their curricula, teacher and administration training manuals, and legal briefs.[124] The spectrum hypothesis has begun to appear in law and public policy, as well. In *Carcano v. McCrory*, the litigation against North Carolina's controversial "bathroom bill," a pediatric endocrinologist explained to the court that "external genitalia do not account for the full spectrum of sex-related characteristics nor do they 'determine' one's sex."[125] The *Boyertown* court, to recall, held that "dividing privacy facilities based on biological sex" does not "cover[] the entire spectrum of biological sex assignments."

In developing her sex-as-spectrum thesis, Fausto-Sterling pays homage to Foucault's concept of "biopower."[126] She agrees, for instance, that the conventional wisdom about sex is a product, not of the scientific study of an objective reality called nature, but of nineteenth century "discourses" that appealed to the authority of nature and hence of science inasmuch as it claims to be the authoritative understanding of nature. "The "scientific" division of humans into two distinct and typical sexes, Fausto-Sterling insists, was an undertaking of a particular cultural outlook, one that is not itself scientific. And it is "during this century [that] the medical

[123] Ibid., p. 21.
[124] See e.g. Asaf Orr and Joel Baum, "Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools," 2015, p. 5; and PFLAG, "Our Trans Loved Ones: Questions and Answers for Parents, Families and Friends of People Who Are Transgender and Gender Expansive," 2015, p. 2, 19. 30.
[125] Declaration of Deanna Adkins, M.D., U.S. District Court, Middle District of North Carolina, Case 1:16-cv-00236-TDS-JEP, §36.
[126] Fausto-Sterling, "The Five Sexes," p. 24. In very broad terms, Foucault uses "biopower" to refer to a distinctly modern form of domination, specifically "an explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations." See Foucault, *The History of Sexuality (I)*, p. 140.

community has completed what the legal world began."[127] Our understanding of human sexuality, then, is nothing more than Victorian society's prejudices couched in pseudo-scientific language. Echoing Foucault, Fausto-Sterling insists that fields of medical knowledge like endocrinology and psychology were part of a wider effort to "discipline" and regulate human life in the name of Victorian moral ideals. "Hermaphrodites have unruly bodies," and the social imperative to correct them reflects "a cultural need to maintain clear distinctions between the sexes" in order to protect beliefs about "sexual difference,"[128] and especially in order to regulate sexuality toward reproductive ends. "Ironically," the nineteenth century's "more sophisticated knowledge of the complexity of sexual systems ha[d] led to the repression of [sexual] intricacy."[129]

Yet, Fausto-Sterling is unwilling to follow Foucault and other historicists to their ultimate conclusion that science, an enterprise that draws its authority from its opposition to culture, is itself merely culture. Her article is a call for the "scientific community" to overcome conventional prejudices and more rigorously understand its subject matter (nature). The benefit of doing so, she insists, would be not only to those whose biological makeup is different from what society conventionally calls male and female, but also to the rest of us inasmuch as we too are repressed by the sex binary. For Fausto-Sterling, cooperation between scientific researchers and their intersexed subjects points the way toward sexual "utopia."[130]

Fausto-Sterling's position is certainly Foucauldian in exhibiting a central concern with the concept of normal (or "normativity"). What society takes to be "natural" is *ipso facto* what it takes to be "normal," and by extension everything that is not normal is unnatural. Normativity is

[127] Fausto-Sterling, "The Five Sexes," p. 23.
[128] Ibid., p. 24.
[129] Ibid., p. 23.
[130] Ibid., p. 24.

a mechanism of social discipline. Once a phenomenon is labeled abnormal, it becomes a legitimate subject of "disciplinary power."

The theme of anti-normativity finds powerful reverberations in 1960's queer politics, whose purpose was not to win accommodation from society or even respect but rather to transform society's most fundamental beliefs about reality. Sexual politics on the left during the 1970's saw a rift between those in the accommodationist camp who sought to create a politics of gay identity that mainstream culture could, with minor modification, embrace, and a radical call for transforming society in light of the liberated human personality. Foucault himself thought that it was not possible to get beyond normalizing discourses, but his legatees in the academy imagine a world in which everything is natural and hence normal. The distinction is subtle yet important; it can be roughly recast as that between a radical historicist or postmodernist view, and "naturalism," or the belief that nature consists in singularities that are all equally good. Fausto-Sterling's approach is hard to pin down because she wavers between these two positions, or rather, she uses one as a support for the other. Somehow, the postmodernist's radical critique of the possibility of objective knowledge yields to an objective appreciation of "diversity." What Fausto-Sterling ultimately wants is for "human sexual variation to be considered socially normal, albeit infrequent."[131]

Fausto-Sterling's desire to embrace Foucault's critique of sex but not his radical historicism proves, however, to be the source of her argument's undoing. This is a complicated point to understand. It requires deeper examination of both the research on intersex and the philosophical assumptions behind Foucault's position.

[131] Anne Fausto-Sterling, "Response," in "Letter to the Editor, How Sexually Dimorphic Are We? Review and Synthesis," *American Journal of Human Biology* 15, 1 (2003), p. 116.

One way to broach this topic is by asking just how common intersexuality is. Plainly though, how one answers this question depends on how one defines *intersex*. And how one defines intersex depends, in turn, on how one defines *sex*, for *inter*sex is the condition of being *between* the sexes. Acknowledging that we have already entered into a rich tradition of philosophizing that goes back at least to Socrates, let us keep things relatively simple by positing that *intersex* assumes the existence of two sexes. Let us call these sexes male and female. Admittedly, we seem to have taken a circuitous route to arrive at a pretty obvious and straightforward point. But as we shall see, laying out this set of assumptions imposes profound difficulties for the argument from intersex.

For the sake of clarity, let us distinguish between three things: (a) the activity of human sexual reproduction; (b) the biological or physiological traits that participate in this activity; and (c) the behaviors and social norms associated with these physical traits, whether naturally by some internal logic or as arbitrary expectations imposed on us by society. The first two categories are normally what we mean when we speak of "sex," and the third is what we mean when we speak of "gender." Obviously, these categories are not sealed off from one another; indeed, that is where all the trouble starts. For example, if it is true women on average exhibit more compassion and tenderness than men, is this purely a consequence of social condition or is also to some extent a natural consequence of biological tendencies?

Fausto-Sterling's argument about there being a "spectrum" of sex seems to sever (a) from (b), inasmuch as one's role in reproduction does not determine which category (male or female) one falls under. If it did, then the sexual statuses on her "spectrum" would not constitute independent categories of sex, but would instead be variations within the dual categories of male and female. For example, a male pseudo-hermaphrodite would be a variation of male. But this

clearly will not do for Fausto-Sterling. For if what qualifies a person as male is that person's reproductive capacity, then a misalignment of traits that participate in that capacity would technically be an abnormality. In other words, by linking the two meanings of sex together, a hierarchy is necessarily created between "typical" males (or female) at the top and "atypical" males (or females) at the bottom.

One of the chief difficulties in Fausto-Sterling's position, however, is that it is not clear how the two meanings of "sex" can be severed from each other, or indeed to what extent these can be severed from "gender." Consider how Fausto-Sterling's definition of intersex assumes atypical combinations of particular physical properties. How does she know which properties to look for in order to classify an intersex condition? Why ovaries, for instance, and not skin pigmentation? Is not her ability to discriminate between sex-related properties and sex-irrelevant properties predicated upon her making assumptions about what happens in the typical (or "normal") course of affairs? If the division of properties into sex-related and sex-irrelevant depends ultimately on reproduction, it follows by the same logic that reproduction gives structure and intelligibility to certain behavioral traits as gendered and others as not.

An alternative view to that of Fausto-Sterling situates all three levels of sex—reproduction, physical traits and behaviors—in a natural causal link, though one that is admittedly open to considerable influence from society. "To be male or female," writes Leon Kass, "derives its deepest meaning only in relation to the other, and therewith in the gender-mated prospects for generation through union."[132] If we take seriously the radical detachment of reproduction from physical traits, and of these from behavior, it makes no sense to continue

[132] Leon Kass, *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics* (San Francisco: Encounter Books, 2002), p. 101.

using the terms "male" and "female." These are by definition relative and complementary terms that "derive their meaning" from an end, or *telos*—say, reproduction.

One way to try to resolve the tension in Fausto-Sterling's position is by ditching her effort to reground intersex as "natural." One could, in other words, take the position of radical constructivists like Foucault and Judith Butler, who used intersexuality to illustrate that, certainly when it comes to human sexuality and perhaps in all other areas as well, there simply is no such thing as "nature." All reality is socially constructed, all human knowledge a product of "discourses of power."

Michel Foucault was the first to vest intersexuality—or as he referred to his, hermaphroditism—with great theoretical importance. Challenging the ethos of sexual freedom that was beginning to take shape in his day, Foucault provocatively suggests that Western society's disavowal of Victorian sexual mores did not result in greater human liberation, but merely replaced one form of domination for another. The relationship between sex and power cannot be summed up in a simplistic repression/non-repression duality. What passes for sexual liberation—the rejection of repression—turns out to be merely another form of "discipline" that structures the way we think and feel about sexuality.[133]

If there is an overarching purpose behind Foucault's thought, it is to push back against the enlightenment conceit that science, and particularly medical science, is the source of humanity's salvation. Far from delivering us to the secular promised land, the scientific endeavor, at least from the eighteenth century on, has been a project of limiting human autonomy by inducing conformity and disciplining those who are different. In contrast to older forms of power, which manifested typically through physical punishment, modern power leaves the body

[133] Michel Foucault, "Introduction" to *Herculine Barbin* (New York: Pantheon, 1980).

alone in order to more effectively control the spirit. To take the example of sexuality, pre-scientific power would discipline sexuality through legal prohibitions on sexual conduct backed, often, by physical sanction; modern science disciplines sexuality by "incorporation of perversions and a new specification of the individual." Thus, "in the nineteenth century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology."[134] So conceived, the homosexual—now a distinct type of person—becomes the subject of medical and therapeutic sciences. Inasmuch as these scientific discourses utilize the dichotomies of natural/unnatural, healthy/unhealthy, normal/deviant, they in turn serve to discipline and regulate the sexuality of everybody else.

Victorian society spoke of sex in moralistic terms, if it spoke about sex at all. It generally subordinated sexuality to reproduction, confining legitimate sexuality to the conjugal bedroom while hypocritically allowing deviant forms of sexuality to exist at the margins (e.g. brothels and mental hospitals), provided however that these supported the social and economic system of the day. From our vantage point, Foucault concedes, all this seems quite repressive and outdated. But Foucault cautions against a false pride in our superiority. The new sexual morality is the consequence of two powerful and enduring currents of Western thought. One is the confessional act, which in the Christian imagination is coterminous with truth-telling and self-purification. The other is the Romantic notion that humans have a good inner nature that must be expressed against custom and conformity. Foucault's thesis is that precisely the discourse that we engage in when we pride ourselves on our superior liberation, tolerance and compassion, constitutes a new form of discipline. What we think of as "sex" is not something given and natural, a stratum of

[134] Foucault, *History of Sexuality (I)*, pp. 42-44.

existence that lies deep within the self and that must, in the name of authenticity and health, be recovered and expressed. Rather, the idea that humans have a "true sex" serves and sustains a vast apparatus of disciplinary institutions and practices. It is, in short, a "truth regime." At the heart of this regime, Foucault insists, are two basic assumptions: "that we must not deceive ourselves about our sex, and that our sex harbors what is most true about ourselves."[135]

A few years after publishing *The History of Sexuality*, Foucault penned an introduction to the memoirs of a nineteenth century hermaphrodite by the name of Herculine Barbin in which he summarized but also sharpened his critique of the relationship between sex and truth. Hermaphroditism poses a fascinating point of contrast between Victorian society and our own. The former did not try to get to the bottom—to the ontological truth, so to speak—of the hermaphrodite's sexual identity. It only demanded that once that identity was chosen by the hermaphrodite, it must not be changed, for to change one's sexual identity would open the door to various forms of sexual deviancy that society deemed threatening to its bourgeois code. But with the rise of the sexual "truth regime" and its assumption that "[a]t the bottom of sex, there is truth,"[136] hermaphroditism came to be regarded as a problem that had to be solved at its ontological—that is, biological-deterministic—roots. Thus, "Biological theories of sexuality, juridical conceptions of the individual, forms of administrative control in modern nations, led little by little to rejecting the idea of a mixture of the two sexes in a single body, and consequently to limiting the free choice of indeterminate individuals. Henceforth, everybody was to have one and only one sex."[137] The task of enforcing this truth regime was entrusted, through

[135] Foucault, "Introduction," pp. x-xi.
[136] Ibid.
[137] Ibid., p. viii.

scientific discourses, to therapists, psychoanalysts, medical doctors, and a vast array of disciplining social institutions.

The inescapable emphasis in Foucault's writing is that humans cannot appeal to nature to verify or validate their sex. The assumption common in our day that every human has a true sex underneath the layers of conformity and socialization is a belief deployed by nineteenth century scientific discourses for the purposes of regulating and disciplining deviant sexuality. Since modern science derives its epistemic authority from the study of a materialistic and unchanging nature, the discourse of sex likewise posits a biological-material cause to sexual phenomena. "The notion of sex made it possible to group together, in an artificial unity, anatomical elements, biological functions, conducts, sensations, and pleasures, and it enabled one to make use of this fictitious unity as a causal principle, an omnipresent meaning, a secret to be discovered everywhere."[138]

Foucault's critique of modern sex discourses was later picked by Judith Butler in her theory of "gender performativity." In a nutshell, Butler's position is that male and female are social constructs all the way down. In other words, all sex is gender, and gender is not something with any ontological reality to it, but instead something that we do or "perform."

According to Butler, "to be sexed… is to be subjected to a set of social regulations." Consequently, "any analysis that makes [the category of sex] presuppositional uncritically extends and further legitimates that regulative strategy as a power/knowledge regime."[139] Butler is thus sympathetic to Foucault's use of the hermaphrodite or intersex body as a vehicle to "problematize" that the sexual "truth regime." Yet, Butler believes that Foucault's reading of Herculine Barbin's memoirs suffers from a fatal blind spot. In Foucault's view, Barbin at one

[138] Foucault, *History of Sexuality (I)*, p. 154.
[139] Butler, *Gender Trouble*, p. 122.

point in her life, prior to acquiring her status as a sexed subjected, is able to occupy a "happy limbo of non-identity,"[140] by which Foucault presumably means that Barbin had yet to become (fully) the subject of discipline that would impose an identity on her. And in this space, Foucault understands Barbin to be "a female homosexual."[141] Yet, according to Butler, one cannot speak of a *female* homosexual without presupposing sex as an ontological category that exists outside of social convention. Implicit in Foucault's position is that being female is "non-identity," i.e. a status that somehow preexists power. Thus, for Butler, Foucault is guilty of the same intellectual error that his critique of sexuality wants to expose. *Gender Trouble* is largely an effort to correct that flaw. Butler claims to possess a more radical, because philosophically consistent, application of Foucault's own principle. The latter's focus on *sexuality*, though important, is superficial because it does not take into account how the category of *gender*, which sexuality presupposes, is itself historically constructed.

Like Foucault, Butler is a nominalist. She is committed, that is, to the thesis that: the real is the individual; science is inherently universalizing; universalizing requires categories of being or species; any effort to place two singularities in a category involves abstraction; abstraction invites intellectual errors; consequently, science is an imposition of human meaning on otherwise meaningless phenomena. In the words of Carrie Hull, "knowledge of the natural world is so mediated, and perhaps even constituted, by thought, language, and culture that it is impossible to determine where their imprint leaves off and nature begins."[142] Among the most mysterious, though seemingly essential, tenets of Butler's thought is her conviction that the body itself is the product of "discourses." One way to understand this suggestion is that the body, as physical

[140] Foucault, "Introduction," p. xiii.
[141] Butler, *Gender Trouble*, p. 127.
[142] Carrie Hull, *The Ontology of Sex: A Critical Inquiry into the Deconstruction and Reconstruction of Categories* (New York: Routledge, 2006), p. 1.

material, becomes intelligible to us only through the mediation of historically bound, and thus arbitrary, categories of thought. It is for this reason that she too finds the case of intersexuality of vast theoretical importance, for intersexuality exposes as "problematic" the assumption that nature operates in ways that are regular and intelligible, an assumption that is vital for the possibility of science and hence for its authority in organizing human life. In Butler's telling, it is rather "the strange, the incoherent, that which falls 'outside,' [that] gives us a way of understanding the take-for-granted world of sexual categorization as a constructed one, indeed, as one that well might be constructed differently." And it is "only from a self-consciously denaturalized position," for instance that of the intersexed body, that "can we see how the appearance of naturalness is itself constructed."[143]

In short, the treatment of intersexuality by postmodernists like Foucault and Butler has two immediate purposes: to demonstrate that humans have no sex, at least not if by "sex" we mean an ontological reality of being male or female, and to insist that the belief in "true sex" undermines rather than facilitates human freedom. The theme of sex in the hands of Foucault and Butler also has the additional, and perhaps more important purpose, of calling into question our fundamental assumptions about knowledge itself by exposing the all-too-human origins of those elements of reality we take most for granted. As we will see in the next chapter, these conclusions are in direct tension with the argument made by civil rights groups about gender identity, which is that gender identity, unlike anatomy or chromosomes, *is* our "true sex." Butler, at least in her earlier writings, is unequivocal on this point: "the postulation of a true gender identity [is] a regulatory fiction."[144]

[143] Butler, *Gender Trouble*, 110.
[144] Butler, "Performative Acts," p. 528.

It must be emphasized, however, that Foucault's and Butler's belief that sex is a social construct derives from their broader epistemological commitments. Both deny that there is a fixed and intelligible reality called "nature," or at least that if there is such a reality, human beings can legitimately claim to know it. Humans cannot think without words and images, and these are fundamentally historical and contingent constructs.

To be sure, this is not the road that Fausto-Sterling wants to go down. Whether that is because she is a biologist (and cannot stomach the full implications of Foucauldian epistemics), or because she is trying to appeal to a mainstream audience, or because she has not thought through the deeper problems in her own position—remains unclear. Fausto-Sterling at any rate insists that the intersex conditions that occupy the middle ground of the spectrum between the "Platonic, idealized" notions of male and female are in an essential respect natural. Her claim is that the binary view of sex doesn't capture all of the rich diversity of nature, and in that sense is unscientific. Whereas for Butler and Foucault, the rare, the exceptional, the "strange and incoherent" lead us to question the very possibility of science, for Fausto-Sterling "[k]nowledge of biological variation allows us to conceptualize the less frequent middle spaces *as natural*, although statistically unusual."[145] According to Julie Greenberg, whose 1999 article "Defining Male and Female: Intersexuality and the Collision Between Law and Biology" draws on Fausto-Sterling's work and has become a bedrock of intersex legal scholarship, "intersexuality is a sex status in the same way that male and female are biological sex statuses."[146]

What scholars like Fausto-Sterling and Greenberg want to do is redefine the natural and by extension the normal in light of the rare and exceptional case. This is, in effect, what courts

[145] Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York: Perseus, 2000), p. 76.
[146] Greenberg, "Defining Male and Female," p. 324.

have done as well. In *Gloucester*, for example, the Fourth Circuit rejected the biological definition of male and female on the grounds that it was not "universally descriptive."[147] But the court affirmed that the distinction between male and female is in principle an intelligible one, and that separating restrooms and changings rooms by "sex" is legitimate. From this it follows that some other criterion for distinguishing male and female must be found. That criterion is gender identity. Unlike biological sex, gender identity is the least restrictive way to characterize maleness and femaleness. In other words, it is how one would define these terms if one were thinking about the matter from the perspective of the rare and unrepresentative case.

In truth, the idea that a scientific understanding of nature should take its bearings from the rare and extreme situation is one that goes back to the dawn of the enlightenment. The entirety of Hobbes' political science, to give just one example, is premised on an understanding of human nature derived from how humans would rationally behave in the absence of a common and effective authority. Seventeenth and eighteenth-century thinkers were fascinated by the anomalies in nature, or as these were called at the time, "monsters." Aberrations of known phenomena were thought to show the limitations of the old (Aristotelian) science, which speaks of natural forms, kinds or essences. Until that point, the appearance of "monsters" (e.g. deformed babies) confirmed, rather disrupted, man's confidence in the intelligibility of creation, since "monsters" were taken as signs of God's wrath. "Nature" was assumed to be "effectively transparent, a veil through which God's purposes could be discerned."[148] It was against this confidence that the philosophic founders of modern science rebelled.

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[147] *G.G. v. Gloucester County Sch. Bd.*, 822 F.3d 709, 721 (4th Cir. 2016).
[148] Katharine Park and Lorraine Daston, "Unnatural Conceptions: The Study of Monsters in Sixteenth- and Seventeenth-Century France and England," *Past and Present* 92 (1981), p. 41.

According to Francis Bacon, Aristotelian science's fundamental error is that it begins from common-sense apprehension of different kinds of beings or forms and then proceeds to make inferences about their essences. Such an approach fails to recognize, according to Bacon, is that there are "laws" of nature that cut across the forms, for instance the law of gravity. If for Aristotle the key scientific distinction is between different types of forms, for Bacon it is between forms and the more scientifically important "laws." Nature is a system of laws rather than of beings.[149] Indeed, Bacon appears to suggest that the laws of nature are themselves the true natural forms. It is better, according to him, to understand these laws first, and only then see how, if at all, they make up particular beings. This will allow human beings to make use of nature for their own benefit, rather than merely to contemplate it. Put another way, a being is no longer defined by its essence, i.e. by the kind of thing that it is. Instead, it is defined from the bottom up, empirically, as a collection of laws, or more precisely as the effects of nature's laws. In short, the exceptional and rare case in nature is theoretically unimportant to Aristotle, except perhaps in regard to human virtue, which is admirable precisely because it withstands the push and pull of human inclination. Aristotle insists that natural science must be concerned with what happens "always or for the most part." But for the founders of modern science, the exception is the site of scientific wonder and potentially also of technological salvation.

The argument from intersex is thus in line with a tendency deep within the structure of modern thought. As we saw above, Foucault and Butler make a great deal out of the exceptional case, or as Butler puts it, "the strange, the incoherent, that which falls outside." Intersex scholars identify departures from the natural process of cause and effect by which the "layers" of sex develop (chromosomes, gonads, external genitals, etc.) as conclusive evidence that male and

[149] Richard Kennington, *On Modern Origins: Essays in Modern Philosophy*, ed. Pamela Krause and Frank Hunt (Lanham: Lexington Book, 2004), pp. 256-258.

female are not natural kinds or forms. Sex-related properties are instead subject to causal laws that cut across individuals and that operate on individuals in diverse and atypical ways. As we noted in the previous chapter, the court's entire argument for deference under *Auer* to the Department of Education turns on what it makes of the word "typical." The dictionary definition from 1971 that the majority opinion cites defines "sex" as "the sum of the morphological, physiological, and behavioral peculiarities that subserves biparental reproduction with its concomitant genetic segregation… that in its typical dichotomous occurrence is usually genetically controlled and associated with special sex chromosomes and that is typically manifested as maleness and femaleness."[150] Floyd understands "typical" as indicating that these traits are not "universally descriptive," and—here is the leap—thus not scientific.

This raises a question about how modern science understands the notion of causation. Fausto-Sterling explains sexual phenomena in terms of their etiology. She seems concerned with the biological process that produce certain phenomena and how these processes interact with societal influences (which are presumably not "natural" in the same way). But this is not the only way to understand natural causality. Aristotle, for instance, recognizes four types of causes: material, efficient, formal and final.[151] Think of a mug: its material cause is ceramic; its efficient cause is the process by which the material was given shape, the molding of material in a machine; its formal cause is the idea of that shape, an idea that the designers and workers necessarily had when setting about to create the mug; its final cause is the purpose for which the mug is created, drinking. In Aristotle's science, all four causes help to explain change in the world, but formal causes are more important than material and efficient causes, and final causes are the most important of the four. It is only in light of its purposes—drinking hot beverages—

[150] *G.G. v. Gloucester County Sch. Bd.*, 721.
[151] Aristotle, *Physics*, 194b23-195a3.

that the idea of the mug becomes intelligible, and without the idea of the mug the process by which it is created could not have occurred.

The philosophers who laid the foundations for modern science did so in battle with the Aristotelian dispensation. Progress in human knowledge would be made possible only if humanity would cease to think of nature as purposive, and instead conceive of it in mechanistic and materialistic terms. As Leon Kass has pointed out, however, modern science fails give to a coherent account of its own activity when it concentrates too narrowly on material and efficient causes. DNA, for example, "*is* a material molecule, but the *information* it carries as the *genetic* material is no more material than are the meaning of word carried by visible letters."[152] Medical science cannot do without concepts like organization, health, abnormality, pathology, and disorder—all of them teleological. Nor is it possible to argue for a "spectrum" of "natural" sex statuses without making assumptions about function, purpose and form.

Consider, for example, the claim that the conventional method of sex designation is an "assignment" rather than a discernment—even if not always accurate—of what happens in nature. At issue is the status of appearances, and by extension, of our common sense experience of the world. In its common usage, the word *form* typically means the shape of a thing. Having form means having some internal, intangible principle of organization as well as a distinct and recognizable shape. The word for form in Greek, *eidos*, means appearance. The Latin equivalent, *specio* (a thing seen) is where we get the word "species."[153] In Aristotelian science, there is a deep connection between sight, which is part of our common sense experience of the world, and the underlying structure of being or beings. These beings (or species), having a common

[152] Leon Kass, *The Hungry Soul*: *Eating and the Perfecting of Our Nature* (Chicago: University of Chicago Press, 1994), p. 43.
[153] Ibid., p. 36.

underlying causal structure, manifest always or for the most part in particular ways. That is why we can encounter another human being on the street and know that they belong to a particular species—our own—without conducting molecular-level analysis of their genetic composition. Modern science owes its astonishing achievements to its suspicion toward common sense, but in ways that scientists are often not willing to concede, science depends on common sense as well.[154]

For the Aristotelian, the looks of a thing provide an important clue as to its essence, its inner principle of unity. That things in nature recur with relative stability and predictability suggests, even if it does not prove with mathematic certainty, the presence of a formal cause. None of this means that looks cannot deceive; but it does mean that the appearance of a thing is an important first clue, and perhaps a crucial touchstone for any scientific classification. When a doctor looks at an infant's genitals and declare "it's a boy," she is not assigning to that child an identity based purely on arbitrary cultural constructs. This is true even if the infant turns out to have ovaries inside his body cavity. Unlike Baconian laws of nature, Aristotelian forms do not always manifest themselves in nature.

At least from an Aristotelian perspective, then, intersex conditions are natural in one sense (material and efficient causes) but unnatural in the other, and perhaps more important sense (formal and final causes). They are disorders, not necessarily in the modern, pathologizing sense of the word, but in the literal sense of "thrown out of order." It is understandable why this conclusion would be unsettling to intersex advocates like Fausto-Sterling, but it bears mention that the pathological language with which modern science often describes human variance is not Aristotle's. In her important work on intersex medicine, Alice Dreger has found that the medical

[154] See Harvey Mansfield's instructive discussion in Mansfield, *Manliness* (New Haven: Yale University Press, 2006), Ch. 2.

establishment has been too quick to intervene in the otherwise healthy bodies of intersexed individuals.[155] There is indeed more than a whiff of Victorian mores in the treatment of intersexed people at the hands of the American medical establishment, and Dreger is surely right that the autonomy and bodily integrity of patients—many of them young children—have for too long been overridden in the name of "cleaning up nature's little indiscretions." But it does not automatically follow that a more scientific approach would replace the distinction between normal and abnormal conditions of sex development with an appreciation of "diversity."

III: Defining the Term, Disputing the Evidence

Why the exact frequency of intersex births should matter to our understanding of nature is not altogether clear. If the problem with the conventional definition of sex is that it falls short of perfect accuracy, then technically even a single case of atypical sexuality is enough for one to be able to make the argument from intersex. The very fact that intersex advocates like Fausto-Sterling insist on their numbers suggests a weakness in their own position. If the prevalence of a phenomenon provides a window into its naturalness, then surely what occurs on average and for the most part is more natural than what happens rarely or only on occasion. The problem, in other words, is that Fausto-Sterling is using "natural" in two different senses of that word: that which occurs spontaneously, and "normal."

Be that as it may, scholars do debate the numbers, and we saw in the cases discussed in Section I, courts and agencies of the civil rights state do seem to vest quite a lot of importance in these numbers. For instance, the Colorado Division of Civil Rights in *Mathis* emphasized that 1 in 100 children are born intersexed, and said that "considering the number of children who, as

[155] Alice Dreger, *Galileo's Middle Finger: Heretics, Activists, and the Search for Justice in Science* (New York: Penguin, 2015).

research indicates, are born with biological variations, the Division cannot make the… presumption" that "boys have male genitalia and girls female genitalia."

Fausto-Sterling initially suggested that up to 4 percent of the population may be born with intersex variations, a number she credits to the work of the famous sexologist John Money.[156] Yet even Alice Dreger, a pioneer in the field of intersex research and activism, has conceded that "Money's categories tend to be exceptionally broad and poorly defined, and not representative of what most medical professionals today would consider to be 'intersexuality.'"[157] In Dreger's view, up to one percent of the population may be intersexed, depending on how broadly one defines intersex, which in turn depends on how subtle a variation in biological characteristics one counts.[158] In 2000, after conducting further research, Fausto-Sterling downgraded her initial 4 percent estimate to a "ballpark estimate" of 1.7 percent of the population.[159]

But even this, argue some, is far too generous. In 2002, Leonard Sax, a clinical psychologist and researcher of gender development, penned a rebuttal to Fausto-Sterling, whose empirical findings, he claimed, had unjustly received "wide attention in both the scholarly press and the popular media."[160] Sax rejects Fausto-Sterling's statistical assessment because, like Dreger, he believes that her definition of intersex is far too inclusive. Fausto-Sterling defines intersex as anything that deviates from the "idealized, Platonic, biological mold" of "a perfectly

[156] Fausto-Sterling, "The Five Sexes," p. 21.
[157] Alice Dreger, *Hermaphrodites and the Medical Invention of Sex* (Cambridge: Harvard University Press, 1998), p. 211 ff. 79.
[158] Dreger, *Galileo's Middle Finger*, p. 21.
[159] Fausto-Sterling, "The Five Sexes, Revisited," *The Sciences* 40 (2000), p. 20.
[160] Leonard Sax, "How Common is Intersex? A Response to Anne Fausto-Sterling," *The Journal of Sex Research* 39 (2002), p. 174.

dimorphic species."[161] By setting the Platonic ideal as the norm, Sax points out, Fausto-Sterling can then dramatically inflate the number of people who deviate from the norm.

Because he is a clinical psychologist, what troubles Sax most about Fausto-Sterling's approach is her failure to explain what is of ultimate concern to medical practice, namely the distinction between genuine intersex conditions and disorders of sexual development (DSD). Only the latter require medical treatment. Fausto-Sterling's definition lumps together under one umbrella pathological as well as non-pathological conditions, all in an effort to "normalize" what otherwise happens through natural processes but in Sax's view should properly be seen as pathological. Sax thinks that a more rigorous and useful definition of intersex would be "those conditions in which a) the phenotype is not classifiable as either male or female, or b) chromosomal sex is inconsistent with phenotypical sex."[162]

Two examples of conditions that fall under Fausto-Sterling's definition but not Sax's illustrate the point. These are Late-Onset Congenital Adrenal Hyperplasia (LO-CAH) and Klinefelter Syndrome. LO-CAH, as its name implies, is a delayed version of CAH. "Regular" CAH, which Sax classifies as a genuine intersex condition, occurs when hormonal production structures are defected already *in utero*, causing the fetus' anatomical development to be impaired by the overproduction of male hormones. Practically speaking, this means that a female (XX chromosomes) will be born with what may appear to be male-like genitals, leading to a possible misdiagnosis of her sex, which in turn can have significant medical implications later on. In Late-Onset CAH, however, hormonal malfunction occurs much later in life, typically around age 24 in females and later still in males, after the anatomical structures have had a

[161] Fausto-Sterling, "Revisited," p. 19.
[162] Sax, "How Common," p. 175.

chance to develop.[163] A female with LO-CAH may, but need not necessarily, exhibit an enlarged clitoris, acne, or infertility--none of which, however, would alter the basic structure of her anatomy.

Klinefelter Syndrome is a chromosomal abnormality in which males are born with an additional X chromosomes (i.e. XXY). Boys with this condition have typical male anatomy. While secondary sex characteristics are more or less consistent with male development, people with this condition often exhibit small testes, larger-than-average breast tissue, lower muscle mass, and infertility. Indeed, such people seem (to themselves and to others) so typically male that it is only when problems with fertility arise later on in life that the syndrome is detected. Many will go their entire lives without knowing they have it.[164]

These conditions are not hermaphoriditic. They represent disorders of otherwise typical sex development that can cause serious problems for those who have them. They also do not usually make a person appear ambiguous in their sexual makeup. And yet, as Sax notes, LO-CAH and Klinefelter Syndrome are the first and third most common conditions on Fausto-Sterling's list. Together they account for a whopping 94 percent of all the cases that make up her 1.7 percent figure.[165]

Sax goes on to discuss additional non-intersexed conditions included in Fausto-Sterling's definition, including Turner Syndrome, a chromosomal anomaly that leads to short stature and infertility in women. People with Turner "do not have ambiguous external genitalia, nor do they typically experience confusion regarding their sexual identity."[166] Since Sax is concerned with defining intersex in a way that is helpful to clinicians and patients, he considers important the

[163] Ibid., p. 176.
[164] Ibid.
[165] Ibid., p. 175.
[166] Ibid., p. 176.

fact that the vast majority of people who fall under Fausto-Sterling's definition of intersex are "phenotypically indistinguishable from normal."[167] When LO-CAH, Klinefelter, Turner and two other conditions Sax discusses are purged from the definition of intersex, the statistical prevalence of intersex births drops to 0.018 percent or 18 out of every 100,000 births, a figure roughly one hundred times lower than Fausto-Sterling's more "modest" assessment of 1.7 percent.[168] Driving Fausto-Sterling's work, Sax concludes, is an "extreme social constructionism" that holds that medical science's classifications of sexual anatomy are "prejudices which can and should be set aside by an enlightened intelligentsia."[169]

Carrie Hull has also taken Fausto-Sterling to task for ideologically driven scholarship. Hull, a feminist thinker who confesses to have once relied on the 4 percent statistic "without much thought,"[170] decided to examine Fausto-Sterling's methodology more closely. What she found was a series of flaws, some of them minor, some significant. For example, a number of Fausto-Sterling's data sets contained errors in decimal point placement. In a few cases, when she found no cases of a particular intersexed condition in a population sample, she simply omitted the category altogether from the data set rather than marked it zero (which would have lowered the frequency of intersex). Furthermore, some of the studies in Fausto-Sterling's research involved "non-random samples of high-risk populations," which no doubt skewed the results. It is important to point out that Hull does not second-guess Fausto-Sterling's broad definition of intersex. Rather, she accepts *arguendo* that that definition is reasonable and tries to "correct [Fausto-Sterling's] math" and to incorporate more "representative studies" within that framework. Using this approach, Hull puts intersex births at 0.373 percent at the very highest end

[167] Ibid., p. 175.
[168] Ibid., p. 177.
[169] Ibid.
[170] Hull, *Ontology of Sex*, p. 67.

of the range of possibilities, making even Fausto-Sterling's conservative estimate of 1.7 percent a "dramatic overstatement."[171]

In response to these criticisms, Fausto-Sterling has acknowledged "mistakes in interpretation and imperfect judgment." But instead of officially revising her estimations of intersex frequency, she has insisted on the priority of the inquiry to its results. As she writes,

> I am not invested in a particular final estimate, only that there *be* an estimate and that in making an estimate we can see where the available data are poor or completely absent. Perhaps our article and Dr. Hull's response will even stimulate medical geneticists and others who actually work directly in the field of intersex diagnosis and treatment to analyze the frequency question. Beyond getting the numbers right, however, our article suggests a different approach to conceptualizing sexual difference, one that allows for human sexual variation to be considered socially normal, albeit infrequent. It is my hope that debate about this theoretical framework will also continue and that open discussion will lead to more open minds, particularly among those physicians who treat and counsel nondimorphic individuals.[172]

What ultimately matters, in other words, is not the fine points of what the data say, but the political conclusion of these data, which, Fausto-Sterling is convinced, is that atypical sexual variations are natural (i.e. normal) and abundant. Her hope that those who "actually work in the field of intersex diagnosis and treatment [will] analyze the frequency question" apparently does not extend to clinician-researchers like Leonard Sax. A few years after this exchange with Hull, in an interview on the meaning of human sexuality, Fausto-Sterling stated in an interview to the *New York Times* that "maybe 1 1/2 to 2 percent of all births do not fall strictly within the tight definition of all-male or all-female."[173]

Hull is disheartened to find "many feminist and activists [who] unquestioningly cite" Fausto-Sterling "while ignoring the lower estimates in other studies" such as Sax's.[174] A glance

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[171] Ibid., pp. 67-68.
[172] Fausto-Sterling, "Response," p. 116.
[173] Claudia Dreifus, "A Conversation with Anne Fausto-Sterling: Exploring What Makes Us Male or Female," *The New York Times*, Jan. 2, 2001 (https://www.nytimes.com/2001/01/02/science/a-conversation-with-anne-fausto-sterling-exploring-what-makes-us-male-or-female.html)
[174] Hull, *Ontology of Sex*, p. 68.

at the law reviews confirms Hull's point. In one recent and illustrative example, the author notes that statistical assessments of intersex range from 0.0018 percent to 4 percent. After calling the 4 percent figure "radical," she is able more credibly to label the 1.7 percent figure a "conservative estimate."[175] Julie Greenberg, whose 1999 article on the definition of male and female is probably the most influential within legal circles, has recently written that while it is "impossible to state with precision exactly how many people have an intersex condition… Most experts agree… that approximately 1-2 percent of people are born with sexual features that vary from the medically defined norm for male and female."[176] Her evidence? Fausto-Sterling's work from 2000.

Conclusion

Admittedly, we have only scratched the surface of what is undeniably a vastly more complicated issue. To resolve the philosophical debate over intersex would require going to the heart of the rift between modern and pre-modern science and wrestling with the deeper difficulties of each approach. Still, the discussion above goes far beyond anything that civil rights tribunals have said about these matters in their decisions.

It is important not to lose sight of the function of the argument from intersex in transgender civil rights litigation, which is to cast doubt on the conventional notion of "biological sex," and by extension on the ability of schools to regulate access to sex-specific facilities by conventional definitions of male and female. Standing alone, the argument from intersex would leave inexplicable the practice of separating restrooms by male and female. As the courts in *Gloucester*

[175] Maayan Sudai, "Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement's Path to De-Medicalization," 41 *Harvard Journal of Law and Gender* 1 (2018), p. 7 ff. 18.
[176] Julie Greenberg, *Intersexuality and the Law: Why Sex Matters* (New York: New York University Press, 2012), p. 2.

and *Boyertown* seemed to acknowledged, separation of facilities by any category of sex is arbitrary once one accepts the claim that sex is "a vast, infinitely malleable continuum that defies the constraints of even five categories." In the context of Title IX, then, the argument from intersex must work in tandem with another argument, one that does seem to insist on there being two—and only two—categories of sex, male and female. Since these cannot be linked to the body, or more precisely to the features that subtend the male and female form, they must be linked to something else, and presumably something more real. That something is gender identity.

Chapter 3
What is Gender Identity?

The concept of gender identity lies at the heart of contemporary transgender politics and is surely its most controversial feature. To some, gender identity is part of our immutable neurological makeup or an unassailable "lived experience." To others, gender identity is fundamentally a delusion, perhaps a miscast form of sexual desire, or worse, a powerful desire to conform to gender stereotypes. As we saw in the previous chapter, it is one thing to say that biological sex is an artificial construct, quite another to insist that the categories male and female do exist, though not in the way society conventionally them. The argument from intersex in no way proves that gender identity is the sole determinant of sex. Indeed, it in no way suggests that there is such a thing as gender identity at all.

Over the past decade, a growing number of courts and agencies have come to the conclusion that restricting access to sex-specific accommodations by anything other than gender identity constitutes a violation of civil rights. Critics have challenged this argument on three levels. They have challenged the concept *gender identity* as philosophically and scientifically indefensible; they have suggested that regulating schools in light of this concept is self-contradictory and produces bad consequences; and they have said that courts and agencies lack the authority to issue regulations under existing legal arrangements. We will delay our discussion of the third critique to later chapters; here we focus on the first two.

When civil rights regulators insist that gender identity is the proper determinant of "sex," they invariably run into a fundamental problem. The social custom of separating certain spaces and activities by male and female presupposes the physical differences between men and women. Likewise, maintaining separate teams for men and women presupposes that *male* and *female* are reasonable proxies for physical ability, such that to ignore these differences would effectively

end women's sports. In regard to spaces where concerns over privacy come up, civil rights regulators have simply refused to respond to the critique. At times their evasions rise to the level of art, as we shall see. As for sports, the Obama administration's Office for Civil Rights, for all its aggressive action on the transgender front, could not bring itself to instruct schools to defer to gender identity when it comes to athletic eligibility. As far as OCR was concerned, a student could legitimately be counted as female when changing into her soccer uniform and male when running out onto the field. To date, no civil rights tribunal has ever said that gender identity alone should determine who can participate on women's sports teams.

The possible tension between construing female as purely a matter of identity and the threat that this could mount to women's rights has been playing out in a number of arenas. In Canada, the clash was on vivid display when a transgender woman by the name of Jessica Yaniv filed a complaint over human rights violations against local, waxing salons after the immigrant women who worked in these salons refused to perform a Brazilian wax on Yaniv's genitals. Yaniv's argument was fully consistent with mainstream transgender advocacy: if being a woman is a matter of gender identity and has nothing to do with the body, then a salon that offers waxing for women discriminates when it refuses to accept people like Yaniv as their client. Would Canadian human rights law require the women to wax Yaniv's genitals or face steep penalties? The British Columbia Human Rights Tribunal found a creative solution to the problem. Clearly it was not going to force the women to wax Yaniv, but it also just as clearly wanted to avoid stating that Yaniv did not have "women's" genitals. And so, it said that Yaniv had acted in bad faith, and that the waxing specialists could anyway not be compelled to offer Yaniv their services because they were not "trained" on Yaniv's type of anatomy. The waxers, implied the court,

were trained only on *some* types of women's anatomy, and it was those types alone that they had meant when they advertised their services of "Brazilian waxing for women."[177]

In the United States, the clash between competing notions of sex equality under Title IX has come up in the context of athletics, where participation by transgender athletes in girls' sports (especially at the high school level) has raised questions about basic fairness and women's equal opportunity. In Connecticut, two transgender track runners came in at first and second place at the state championships for girls in 2018, drawing protests and complaints from parents. In response to this probably growing phenomenon, legal scholars with self-declared feminist credentials and concerns recently penned an article in which they argue that Title IX should compel schools to use gender identity for all aspects of school life except athletics, where biological sex should determine whether one is male or female. (The authors muster an impressive array of medical science demonstrating the apparently controversial claim that, on average, biological males are at a physical advantage over biological females in competitive sports.) The authors' solution may represent a reasonable political compromise, but it introduces a fundamental contradiction into federal law and creates a compliance headache for schools. At any rate, the question of whether the participation of transgender girls in girls' sports violates Title IX is now being litigated in the courts.[178]

Part I of this chapter examines in greater detail how courts and agencies in the civil rights state have grappled with the practical implications of defining sex as gender identity in recent Title IX cases. Part II looks more closely at how civil rights institutions have defined gender identity. As I will argue, courts and agencies either defer to gender self-identification on the grounds that it is sincere, but without explaining why sincerity validates identity, or they rely,

[177] *Yaniv v. Various Waxing Salons (No. 2*), 2019, BCHRT, 222, ¶¶ 31-39.
[178] *Hecox v. Little*, No. 1:2020cv00184 (D. Ohio 2020).

directly or indirectly, on the very things that courts have called gender stereotyping. Because the evidence for these difficulties is so compelling, Parts III-V will be devoted to a philosophical exploration of gender identity. What exactly *is* an identity of gender? What does the transgender movement mean by this term, and what are some of the difficulties with it in the eyes of the movement's critics?

I: Practical Implications of Gender Identity Regulations

In 2016, gender scholars Joel Sanders and Susan Stryker penned an article responding to the "moral panic" sweeping the nation over the bathroom issue.[179] A few months earlier, in a referendum in Houston, Texas, citizens rejected by a wide margin (61-39 percent) a measure that would have granted transgender people the legal right to use the public restrooms of their choice. In March, the North Carolina legislature passed the Public Facilities Privacy and Security Act (the so-called "bathroom bill"), which required people to use the facilities that accord with the sex listed on their birth certificate. In their article, Sanders and Stryker seek to "reframe the assumptions that undergird the necessity of sex-segregated toilets" in the first place.[180] The problem, as they see it, is that separation of facilities by male and female implies that "gender expression" is somehow related to "physicality."[181] The ideal restroom, the one that is consistent with the requirements of "social justice," would encourage people to "become aware of and accept multiple forms of gender expression by allowing them to mix freely with one another."[182] The present insistence on separate rooms for men and women "underscores our society's refusal

[179] Joel Sanders and Susan Stryker, "Stalled: Gender Neutral Public Bathrooms," *The South Atlantic Quarterly* 111 (2016), pp. 779-788.
[180] Ibid., p. 781.
[181] Ibid., p. 783.
[182] Ibid., p. 782.

to acknowledge the instability of gender itself as a social system for classifying and administering human lives according to a purportedly natural sex dichotomy."[183]

What Stryker and Sanders acknowledge between the lines is that there is really no justification for separating restrooms once we abandon the assumption that gender is "anchor[ed].. in our genitals and secondary sex characteristics."[184] Indeed, strongly implied in their argument is that interpreting sex as gender identity while leaving the custom of restroom separation in place is counterproductive. Thus, Stryker and Sanders agree with the assumption of critics of transgender regulations in recent years, who insist that restroom separation makes no sense if sex means gender identity.

Because civil rights advocates and officials have not been willing to dispute the legitimacy of separate accommodations for men and women, their arguments, unlike those of Sanders and Stryker on the one hand and critics of the transgender movement on the other, end up running into self-contradiction and various forms of question begging. A few months after the Trump administration rescinded its predecessor's Dear Colleague Letter, the Seventh Circuit Court in *Whitaker v. Kenosha* issued a *de novo* interpretation of Title IX on the question of sex-specific accommodations at school. The court unanimously sided with the transgender plaintiff, reasoning that the school's policy violated Title IX and most likely the student's constitutional right to equal protection of the laws.[185]

The court agreed that the interests in privacy and safety cited by the school were important, but it dismissed the idea that the privacy of the other students at Kenosha High School was compromised whenever the plaintiff entered the boys' room. According to Judge Ann Claire

[183] Ibid., p. 781.
[184] Ibid., p. 780.
[185] *Whitaker* by *Whitaker v. Kenosha Unified School District Board of Education*, 858 F.3d 1034 (7th Cir. 2017).

Williams pointed out, no official complaint about the transgender plaintiff's use of the boys' room had been made to the school authorities, or at least no such complaint had been submitted into the evidence at trial. No documented evidence was presented at trial showing that any student had ever confronted the plaintiff in order to express discomfort at sharing a restroom with someone of the opposite biological sex. Thus, Williams concluded, the school district's arguments were based on "sheer conjecture and abstraction."[186]

But even if such complaints had been filed and entered into the record, Judge Williams seemed to indicate that they would not have mattered. "A transgender student's presence in the restroom," she wrote, "provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions."[187] This was consistent with OCR's own position on the matter, which was that schools were to give no weight to complaints from non-transgender students about sharing facilities with their transgender peers.[188]

But if all this is true, why separate restrooms and changing rooms at all? Neither OCR nor the *Kenosha* court gave any explanation as to how their view of privacy might be reconciled to the social custom of separating certain spaces by male and female. In two reverse discrimination lawsuits involving students suing their schools for voluntarily adopted gender identity policies, the privacy argument was put front and center before the courts.[189] But in both

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[186] Ibid., 1052. Judges are typically constrained to deliberate on the basis of the evidence before them, but surely Judge Williams would have been aware that there may have been good reasons why no official complaint had been filed against the plaintiff, and no documented incident of students confronting him ever recorded. Perhaps students (and their parents) did not want to insult the plaintiff, or perhaps they were embarrassed to say something or feared being branded a bigot. The very fact that Kenosha School District fought the case all the way up to the appellate court suggests that at least some people in the school community felt uncomfortable with a gender identity policy.

[187] Ibid.

[188] DCL, "Transgender Students," p. 2, stating: "the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students."

[189] *Students and Parents for Privacy vs. U.S. Department of Education*, No. 16-cv-4945 (N.D. Ill. 2016); Doe *v. Boyertown Area School District*, 893 F.3d 179 (3rd Cir. 2018)

cases, it was dismissed partly on the grounds that there was no evidence of the plaintiffs seeing or having been seen in the nude, and partly by a strategic recasting of the right that the plaintiffs were asserting. The plaintiffs in both cases managed to cite precedents that recognized the right to privacy, its applicability to restrooms, and the relationship between the biological view of sex and the interest in privacy. The courts in both cases responded by recasting what in their opinion the plaintiffs were really asserting, which was a right "not to share restrooms or locker rooms with transgender students whose sex assigned at birth is different than theirs."[190] Unsurprisingly, the court found no precedent in the case law for *that* right.

To be sure, not all courts have argued that gender identity policies pose no unique privacy concerns or that there is no constitutional right "not to share restrooms and lockers with transgender students." The district court in *Gloucester*, citing a Fourth Circuit precedent that recognized that "differences between the genders demand a facility for each gender that is different," held that "[r]estrooms and locker rooms are designed differently because of the biological differences between the sexes."[191] The plaintiff's assertion that no violation of privacy occurred because he "never encountered any problems from other student" was, in the court's view, "inadmissible hearsay" and "self-serving."[192] And in *Johnston v. University of Pittsburgh*, a district court ruled that although "society's views of gender, gender identity, sex, and sexual orientation have significantly evolved in recent years," and even though the "legal landscape is transforming as it relates to gender identity,"[193] there is simply no way of squaring a definition of

[190] *Students*, at 6.
[191] *G.G. v. Gloucester County Sch. Bd.*, 132 F. Supp. 3d 736, 750 (E.D. Virg. 2015).
[192] Ibid., at 751.
[193] *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Penn. 2015).

sex as gender identity with the legitimate practice of separating restrooms by male and female without losing sight of the irreducible purpose behind this practice.

Almost all the civil rights suits filed in recent years under Title IX and the Constitution deal with the issue of restrooms and changing rooms, but even in the area of athletics one can find inconsistencies within transgender regulation. Most notable is the Obama administration's Dear Colleague Letter from 2016. The document begins with a series of definitions, which include *gender identity*, *sex assigned at birth*, *transgender* and *gender transition*, but makes no mention of biological or physical sex. According to the DCL, schools must defer to a student's gender identity in all aspects of school life where sex distinctions are permissible. When it comes to athletics, however, the DCL limits itself to saying only that schools may not "rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity)." Schools may take factors other than gender identity into account provided that these are "age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport."[194] According to the logic of the document's opening definitions, however, *any* requirements other than gender identity would by necessity constitute stereotyping. Setting aside the enforcement difficulty of schools tightly policing the boundaries of masculinity and femininity, it seemed perfectly consistent with OCR for a school to consider a student male for some school activities and female for others.

II: Stereotyping Against Stereotypes

[194] Dear Colleague Letter, "Transgender Students," May 13, 2016, p. 3.

Since a person is transgender precisely because his gender identification differs from the gender typically associated with his physical makeup, the "evidence" for gender status is necessarily concealed from the naked eye. From a regulatory perspective, this raises a host of difficulties. Must government institutions always be deferential to people who assert an incongruent gender identity? If not, how are schools and employers to distinguish gender identities asserted in good faith from those asserted for nefarious purposes, or in the case of children, identities that might reflect immaturity or even confusion? Let us call this the problem of sincerity. How do regulators define and address this problem?

One approach is to define a person's status as male or female in accordance with the sex that is listed on their official government documents (birth certificates, drivers' licenses, etc.). But it should be immediately clear why this approach is inadequate from the perspective of transgender advocates. It is just the assumptions on which these methods of documentation rest that civil rights advocates are challenging. Courts and agencies, then, must resort to criteria beyond government documentation (or to put if differently, beyond positive law).

Before any regulatory action can be required, and as a condition of that action's legitimacy, regulators must first ascertain whether a complainant is asserting a gender identity in good faith. To this end, the question of sincerity becomes paramount.

Sincerity concerns are familiar to American lawyers in the religious context, where individuals have challenged laws or asked for exemptions under the First Amendment's "free exercise" clause. The modern "free exercise" doctrine holds that if a plaintiff can show that a law "burdens" their exercise of religious faith, the onus is then on the government to demonstrate a compelling interest for the law and that the law's means of achieving that interest are the "least restrictive." If the government fails to do so, the law may be struck down, or (as is more common

today) the plaintiff may be given an exemption from compliance.[195] In this schema, sincerity is viewed as a necessary but not sufficient condition for the party alleging religious burden to prevail.

In order to avoid the dangers and the practical difficulties of arbitrating between sincere and insincere belief, courts tend to evaluate sincerity by using external or objective factors, thus treating sincerity as a "factual matter."[196] Courts will usually ask whether the claimant has some ulterior (and secular) motive behind his faith-based argument,[197] and then also whether the claimant's behavior conforms to his professed beliefs.[198]

Genuine problems arise, however, when courts try to use these same analytical tools in the transgender context. First, transgender advocates frequent warn that the questioning of a person's sincerity with regard to his or her identity is itself a devastating harm, or as advocates put it, "erasure". Indeed, it is the harm that civil rights regulation is said to be necessary in order to prevent. This poses a practical problem for school systems inasmuch as they must be able to distinguish genuine assertions of gender identity from disingenuous ones. OCR's position, which it clarified in a supplementary document to its Dear Colleague Letter, was that questioning a

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[195] Michael McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harvard Law Review* 1409 (1990), pp. 1416-1417.

[196] *U.S. v. Seeger*, 380 U.S. 163 (1965); *U.S. v. Meyers*, 95 F.3d 1475 (10th Cir. 1996).

[197] For example, the Court of Appeals for the Tenth Circuit dismissed plaintiffs' claim that they should be exempt from marijuana prohibitions because "they are the founding members of the Church of Cognizance, which teaches that marijuana is a deity and sacrament." The court reasoned that the plaintiffs were driven by "commercial or secular motives rather than sincere religious conviction." Although the presence of ulterior motives may not *prove* that the belief is not sincere, it does significantly cast doubt on whether the beliefs were adopted purely for religious reasons. *United States* v. *Quaintance*, 608 F.3d 717, 718, 722 (10th Cir. 2010).

[198] There are several caveats to this approach, and as we might expect, it is more controversial than the first approach given that no one is perfect and that especially in faiths that impose demanding behavioral norms occasional noncompliance is natural. See Ben Adams and Cynthia Barmore, "Questioning Sincerity: The Role of the Courts After Hobby Lobby," 67 *Stanford Law Review* 59 (2014). Still, in some cases courts may take consistent noncompliance as evidence of insincerity. The Ninth Circuit, for instance, expressed its "reservations" about the sincerity of a prison inmate's faith-based objection to having his blood drawn for a DNA test, given his history of getting tattoos and using injectable drugs. *United States v. Zimmerman*, 514 F. 3d 851 (9th Cir. 2007).

student's identity is a highly disfavored practice. "Although schools sometimes request some form of confirmation," OCR said, "they generally accept the student's asserted gender identity." It then proceeded to give three examples of favored practices, all involving schools that relied on self-expression without the need for external confirmation.[199]

This method has precedent at the state level. A regulation issued by Massachusetts' Board of Elementary and Secondary Education instructs public schools to defer to a student's self-identification in all aspects of school life.[200] According to the Massachusetts Department of Education's website, "The statute does not *require* consistent and uniform assertion of gender identity as long as there is 'other evidence that the gender-related identity is sincerely held as part of [the] person's core identity.'" What might such "other evidence" be? A school *may* rely on confirmatory statements made by parents, relatives, friends, clergy, or mental health professionals, but "[t]hese examples are intended to be illustrative rather than comprehensive." Indeed, "the only circumstance in which a school may question a student's asserted gender identity is where school personnel have a credible basis for believing that the student's gender-related identity is being asserted for some improper purpose."[201]

By placing the onus on schools to prove an identity is asserted in bad faith, and by strongly suggesting that questioning a student's identity is itself a profound violation of their rights, OCR in effect was telling schools to defer to students. Thus, regulators either implicitly deny that any student would ever fake an identity for illegitimate purposes, or in any case think this problem too insignificant to weigh against the interests of transgender students.

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[199] OCR, "Examples of Policies and Emerging Practices for Supporting Transgender Students," May 13, 2016, p. 1.
[200] Access to Equal Education Opportunity Regulations, 603 C.M.R 26.00 (June, 2012). The regulations are pursuant to Ch. 199 of An Act Relative to Gender Identity, Mass. Gen. Laws, November 23, 2011.
[201] Massachusetts Department of Elementary and Secondary Education, "Guidance for Massachusetts Public Schools Creating and Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity," accessed June 4, 2020 (http://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html#1).

As it happens, almost all of the complainants in the federal lawsuits and OCR investigations were diagnosed with gender dysphoria, and this is probably no accident. If courts are accustomed to treat sincerity as a "factual matter," what better way to do so than to rely on a diagnosis issued by a clinician practitioner? Yet here again, civil rights groups have emphasized that no student should ever have to produce such a diagnosis in order to have their self-identification taken seriously. In a joint statement entitled "Know Your Rights," the ACLU and GLSEN emphasize that students "are not required to get such a diagnosis," and if asked to produce one, should "contact the ACLU or GLSEN for support."[202] Part of the reason for opposing the diagnosis requirement is the unequal access to clinical resources. But part of it has to do with the uneasiness of transgender advocates over leaving gender identification to the management of the medical establishment, since this strengthens the perception that cross-gender identification is a mental disorder. Setting this practical difficult aside, however judicial deference to clinical diagnoses begs the question of what the clinicians themselves rely on when making their determinations. We will return to this question momentarily. For now, let us consider a theoretical problem, which is whether the usual tools of legal analysis for discerning sincerity in the religious context can apply to the transgender context as well.

First, there is the long-standing complaint that sincerity in cross-gender identification is itself evidence that gender—by which they mean a system of subordination that relies on beliefs and norms about masculinity and femininity—is inculcated in us at a very young age through a vast network of social institutions. A child who is designated male at birth but who identifies as female is, to be sure, expressing a gender different from the one that child is expected to express, and is in *that* sense defying gender norms. But to interpret such behavior as evidence that the

[202] ACLU and GLSEN, "Know Your Rights: A Guide for Transgender and Gender Nonconforming Students," July 2017, p. 6.

child *is* a girl is to assume that there is a set of behaviors or norms that femininity essentially consists of, a standard by which certain forms of human expression and behavior should be judged as more or less authentically female. The child in our example might be adopting the appearance, mannerisms, or other gender-related characteristics of a girl because he has been led to believe that there are right and wrong ways for male children to be boys. Thus, the very sincerity of gender identification can, if one follows the feminist logic, serve as a powerful reason to reject it.

A second theoretical difficulty, and one perhaps more fatal to how courts have interpreted sex discrimination law, is that the standards by which courts and clinicians evaluate and validate gender identity are precisely what judges have routinely deemed "stereotypes." In *Whitaker v. Kenosha*, the Seventh Circuit Court noted in passing the apparently significant fact that the plaintiff, a transgender boy, "cut his hair, began to wear more masculine clothing, and began to use the name Ashton and male pronouns."[203] Similar references to complainants' gender-typical behavior can be found in OCR's investigation of the Arcadia Unified School District,[204] and in *Mathis*.[205] But it is precisely the contention of the sex stereotyping theory of discrimination that there *are* no typical male or typical female behaviors, and that using conventional standards of behavior as a metric to gauge gender authenticity is something that employers and schools may *not* do.

Nor can judges avoid this problem when they decide, for obvious reasons, to rely on clinical diagnoses of gender dysphoria. One can, of course, question the unspoken assumption

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[203] *Kenosha*, at 1040.
[204] Letter of July 24, 2013, Anurima Bhargava (DOJ) and Arthur Zeidman (DOE) to Dr. Joel Shawn, P. 3 (https://www.clearinghouse.net/chDocs/public/ED-CA-0023-0001.pdf).
[205] *Determination* in *Mathis v. Fountain-Fort Carson Sch. Dist. No. 8*, No. P20130034X (Colo. Civ. Rights Div. 2013), P. 3.

here that the question of whether human beings are male or female is a psychological one in the first place.[206] Alternatively, one can concede that sex is a psychological matter, but that experts in the psychological fields disagree among themselves over the basis of male and female status.[207] But supposing, for the sake of argument, that psychology is in fact the branch of knowledge that speaks with most authority on this issue, it behooves us to consider just what criteria clinicians themselves utilize when making their diagnoses.

According to the DSM-V and the World Professional Association for Transgender Health (WPATH) Standards of Care, the two authoritative sources for clinicians who treat gender identity-related stress, in order to receive a diagnosis gender dysphoria a patient has to meet two requirements. There must be demonstrable incongruence between self-perceived gender and the sex recorded at birth, and the incongruence must be accompanied by clinically significant distress. In regard to the first requirement, the DSM and WPATH both list eight criteria, of which at least six must be met before a diagnosis of dysphoria is made.[208] The criteria are:

1. A strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one's assigned gender).
2. In boys (assigned gender), a strong preference for cross-dressing or simulating female attire; or in girls (assigned gender), a strong preference for wearing only typical masculine clothing and a strong resistance to the wearing of typical feminine clothing.
3. A strong preference for cross-gender roles in make-believe play or fantasy play.
4. A strong preference for the toys, games, or activities stereotypically used or engaged in by the other gender.
5. A strong preference for playmates of the other gender.
6. In boys (assigned gender), a strong rejection of typically masculine toys, games, and activities and a strong avoidance of rough-and-tumble play; or in girls (assigned gender), a strong rejection of typically feminine toys, games, and activities.
7. A strong dislike of one's sexual anatomy.
8. A strong desire for the primary and/or secondary sex characteristics that match one's experienced gender.

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[206] See Chapter 5, discussion of *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821 (N.D. Ill. 1984).
[207] Cf. American Psychological Association, "Guidelines for Psychological Practice with Transgender and Gender Nonconforming People," December, 2015, with Lawrence S. Mayer and Paul R. McHugh, "Sexuality and Gender: Findings from the Biological, Psychological and Social Sciences," *The New Atlantis* 50 (Fall, 2016).
[208] American Psychiatric Association, "Gender Dysphoria," *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (Arlington, Va.: American Psychiatric Publishing, 2013), pp. 451-452; WPATH, "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People" (v. 7), p. 5.

Note how the second, third, fourth, and sixth criteria all make use of stereotypes, some of them explicitly so. The same is true for the first criterion, inasmuch as "desire to be of the other gender" begs the question of what types of behaviors are those of the other gender. The seventh criterion rests on the assumption that the patient perceives a connection between his or her sexual anatomy and male or female status, which, according to civil rights officials, is a stereotype. The same goes for the last criterion, since the argument from intersex and the argument for gender identity both consider the association between primary and/or secondary sex characteristics and male or female status stereotyping. Indeed, even the fifth criterion seems to rely on the stereotype that children only want to play with other children of their own sex.

The conclusion seems inescapable: when judges rely on clinical diagnoses to determine who is male or female, they *ipso facto* incorporate stereotypes into their rulings. All this may not pose a problem for psychologists, whose job, after all, is first and foremost to help alleviate distress in the patient. But it certainly raises serious questions about the internal consistency of civil rights regulation.

A third theoretical difficulty that distinguishes sincerity in the transgender context from sincerity in the religious context has to do with the epistemological status of gender identity. In the case of religious exercise, courts are very careful to distinguish between the content of a belief and whether it is sincerely held. In the words of Justice William O. Douglas, "Heresy trials are foreign to our Constitution."[209] Religious burdening is of interest to the law primarily because the costs to an individual's integrity are sufficiently high to outweigh the relatively marginal costs to society in granting an exemption from complying with a particular law. The

[209] *United States v. Ballard*, 322 U.S. 78, 86 (1944).

point is that a finding of sincerity in free exercise challenges in no way implicates the truth status of the belief about which the believer is sincere.

The same, however, cannot easily be said of gender identity. It is common nowadays to hear gender identity referred to as "lived experience." We shall discuss this concept in greater depth momentarily, but for now, the whole point of "lived experience" is to deny the distinction between subjective experience and objective reality, or in other words, between the sincerity of a belief about reality and the content of that belief. In his memorandum opinion to *G.G. v. Gloucester*, Judge Andre Davis called gender a "lived fact."[210] Presumably, the difference between a fact and a lived fact is that the latter does *not* require verification beyond the subject's experience.

We are left, then, with this question: are these deeper difficulties a consequence of poor thinking, or do they reflect tensions within the concept of gender identity itself? To answer this question, we must delve deeper into the idea of gender identity. The two dominant explanations given by transgender advocates are that gender identity is "brain sex" and that it is a "lived experience." As we will see, these two explanations lie in tension with one another, though nowadays they are often simultaneously embraced. Another difficulty has to do with the two meanings of the prefix "trans," which are also in tension with one another.

III: Pulling the (Other) Race Card: The Unlikely Return of Essentialism

What exactly is gender identity? This question is easy to articulate but exceedingly difficult to answer, and not just because of the controversies it tends to elicit. Transgender advocates will typically characterize gender identity in one of two ways: as part of (or as an emanation of) the

[210] Order in *G.G. v. Gloucester County School Board*, #16-733, April 7, 2017, amended April 18, 2017 (www.ca4.uscourts.gov/Opinions/Published/161733R1.P.pdf).

physical brain, or as a middle ground between reason and feeling, which goes by the name of "lived experience." This section takes up each explanation in turn.

Criticism of gender identity comes from the left as well as the right. On the right, transgenderism is usually cast as the logical culmination of expressive individualism, especially as self-expression focused on the sexual realm after the 1960's. According to Patrick Deneen, the advent of transgenderism can actually be traced back further to deeper currents within classical liberalism. At the heart of the liberal creed, Deneen argues, "is the liberation from natural limitations on the achievement of our desires." The idea that one can medically alter "one's gender to accord with one's felt identity" may seem unique and unprecedented, but for thinkers like Deneen it is a prime example of liberalism's war against natural limitations in the name of desire.[211] Thinkers in the new natural law school have argued that transgenderism is a modern rendition of Gnosticism. According to the gnostic view, the self is not a composite of body and soul with natural or divine prescribed limitations, but rather, there is a self that exists independent of the body, which that self uses as a vehicle for its own purposes. As Robert George has argued, gender identity implies that "the material or bodily is inferior—if not a prison to escape, certainly a mere instrument to be manipulated to serve the goals of the 'person,' understood as the spirit or mind or psyche."[212]

Critics of gender identity on the left conceive of it as a type of confusion or male sexual desire, and argue that society's recognition of gender identity reinforces gender stereotypes. One of the first and most famous feminist critiques of transgenderism argued that it was vivid expression of patriarchy itself.[213] According to Sheila Jeffreys and other so-called "trans-

[211] Patrick Deneen, *Why Liberalism Failed* (New Haven: Yale University Press, 2018), pp. xix-xx.
[212] Robert George, "Gnostic Liberalism," *First Things*, December, 2016.
[213] Janice Raymond, *The Transsexual Empire: The Making of the She-Male* (Boston: Beacon Press, 1979).

exclusionary radical feminists" or TERFs, gender essentialism is at the heart of patriarchy, and transgenderism "cannot exist without an essential notion of gender."[214]

Prominent gay rights activist Andrew Sullivan has argued, along similar lines, that transgenderism relies on the very stereotypes that account for the marginalization of gays and lesbians. As understood by civil rights groups and officials, gender identity implies that boys with stereotypically female behaviors and inclinations may really be girls, rather than gender nonconforming boys. Transgenderism calls not for expansive and subversive gender expression, but for the policing of gender lines on a new basis. Proponents of gender identity take gender-typical *behavior* as (prima facie) evidence of a gendered *essence*, rather than as behaviors that individuals of either sex can engage in without gendered consequences. "[I]nstead of enlarging our understanding of gender expression… and allowing maximal freedom and variety within both sexes," complains Sullivan, "the concept of 'gender identity' actually narrows it, in more traditional and even regressive ways."[215] Indeed, studies have suggested that most children who experience gender dysphoria will eventually desist and come out as gay or lesbian (see below).

To be sure, criticism from the left tends to focus on one particular type of transgender identity, what Rogers Brubaker has called trans-as-between. "Those who seek to change their gender presentation and publicly recognized gender," explains Brubaker, "do not necessarily challenge the binary gender regime; they may even reinforce it by subscribing to stories about unalterable, inborn identities."[216] That is why the feminist critic Elinor Burkett took to the op-ed pages of the *New York Times* to Caitlyn Jenner (and those who celebrated her) for appearing on the cover of Vanity Fair in stereotypical, sexualized feminine attire, and (incarcerated

[214] Jeffreys, *Gender Hurts*, p. 3.
[215] Andrew Sullivan, "The Nature of Sex," *New York Magazine*, February 1, 2019.
[216] Brubaker, *Trans*, p. 3.

whistleblower) Chelsea Manning for explaining that now that she is a woman, she is "so much more aware of my emotions; much more sensitive emotionally (and physically)."[217] As we noted in the previous chapter, trans-as-between and trans-as-beyond are not merely different ways to conceive of transgenderism; they are in key respects contradictory.

It would not be an exaggeration to say that transgender rights has, in a very short period of time, managed to ascend to the heights of progressive policy priorities because of a change in how American elites have understood who or what a transgender person is. In the 1960's and 1970's, the heyday of the sexual revolution and a period Susan Stryker has described as "the most militant phase of the transgender movement for social change,"[218] the most visible and politically engaged trans activists were largely those who fall under the category trans-as-beyond. In this regard, there were deep commonalities between the causes of queer and gay liberationism, so much so that the two could plausibly be lumped into one liberationist creed. But then the gay movement splintered into a liberationist wing, which argued (along with queer liberationists) that acceptance depended on upending Western society's conceptions of normal and natural and the core social institutions structured around those ideas (especially the nuclear family), and a gay rights wing, which argued for a politics of recognition in which gay acceptance and self-respect would be won by integrating into mainstream institutions (with only minor adjustments to those institutions).[219] Same-sex marriage, powerfully rejected by liberationists not just as a cop-out but as something that would compound the oppression of non-normative identities,[220] soon became the face of gay rights; over time, it became a litmus test for

[217] Elinor Burkett, "What Makes a Woman?" *The New York Times*, June 6, 2015.
[218] Stryker, *Transgender History*, p. 64.
[219] See e.g. Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* (New York: Alfred Knopf, Inc., 1995).
[220] Michael Warner, "Beyond Gay Marriage," in Janet Halley and Wendy Brown ed., *Left Legalism/Left Critique* (Durham: Duke University Press, 2002), 257-288.

gay acceptance, especially, Darel Paul has found, because of its appeal to elites.[221] The emergence of gay rights and its triumph over gay liberationism coincided with—indeed depended on—the gay rights movement's outright rejection of a continued alliance with the liberationists.

Originally, trans advocates argued that it was necessary to challenge society's notions of the naturalness of binary sex categories. In one of the most important manifestos of the time, "Transgender Liberation: A Movement Whose Time Has Come," Leslie Feinberg argues that while transgender people have existed from the beginning of recorded history across human societies, what makes their existence in modern times unique—and uniquely "harsh"[222]—is the need to "pass" as either men or women. This, to recall, was also Michel Foucault's critique on modern notions of sexual identity. One must have a "true sex"; ambiguity (queerness) is against nature and hence a proper subject of "discipline" by scientific power/knowledge.

In short, the saga of normalization of homosexuality between the 1980's and 2010's provided a lurid example of how a marginalized group widely perceived as perverse could win acceptance from mainstream American society. The key was to frame their identity in a way that spoke to the deeper ethos of that society. What, then, was the reason for the eventual triumph of trans-as-between over trans-as-beyond in the public imagination?

The answer has to do with two key developments in American society since the 1960's. The first and perhaps most important is the advent of a "therapeutic culture" and its institutionalization in a "therapeutic state." In his prophetic 1966 book *The Triumph of the Therapeutic: Uses of Faith After Freud*, the social critic Philip Reiff described what he thought

[221] Darel Paul, *From Tolerance to Equality: How Elites Brought American to Same-Sex Marriage* (Waco: Baylor University Press, 2019).
[222] Feinberg, *Transgender Liberation*, p. 17.

was an emerging pseudo-Freudian sensibility. It was pseudo-Freudian because, unlike Freud himself, it lacked a sense of tragedy in regard to the irreconcilability of natural human inclination and the demands of civilization. For Freud the purpose of culture was essentially conciliatory, to tame passion through sublimation, lest it erode the fabric of the social order. The American "neo-Freudians," in contrast, seem to believe that repression was no longer necessary, and in fact was itself the problem. And so, argues Reiff, the neo-Freudians created a new culture--or rather an "anti-culture," since the essence of culture is tragic conciliation--in which *ex*pression would eclipse *re*pression, and the institutions of psychic and physical "health" would soon supplant the authority of priests, parents and politicians.[223] An impressive number of works appeared in the spirit of Reiff's diagnosis.[224] One of these, James Nolan's *The Therapeutic State*, shows in considerable detail how American institutions succumbed one after the other to the new "therapeutic ethos." Tort law, criminal law, public education, political campaigns—all were reconfigured around the notion of a "emotive" and "vulnerable" self.[225]

Paradoxically,[226] with therapeutic culture's image of the self as emotive and vulnerable came an uncompromising insistence on autonomy, authenticity and "self-actualization." The true self, the authentic self, was understood to be in a state of alienation from society. In tapping into one's authentic self, one found oneself in an antagonistic relationship with society. Freedom

[223] Philip Reiff, *The Triumph of the Therapeutic: Uses of Faith After Freud* (Chicago: University of Chicago Press, 1966).
[224] The literature is too large to survey here, but among the more notable titles are: Christopher Lasch, *The Culture of Narcissism* (New York: W.W. Norton & Co., 1978); Bernie Zilbergeld, *The Shrinking of America* (Boston: Little, Brown & Co., 1983); John Stedman Rice, *A Disease of One's Own: Psychotherapy, Addiction, and the Emergence of Co-Dependency* (New Brunswick: Transaction Publishers, 1996); James Davison Hunter, *The Death of Character: Moral Education in an Age Without Good or Evil* (New York: Perseus, 2000).
[225] James L. Nolan, Jr., *The Therapeutic State: Justifying Government at Century's End* (New York: New York University Press, 1998).
[226] Paradoxically, because one would think that the spiritual fortitude required to live autonomously and authentically lies in direct contradiction with the felt powerlessness of the vulnerable self. This is the dilemma that lies at the heart of the politics of recognition.

meant autonomy, autonomy meant authenticity, and authenticity meant nonconformity, i.e. defining oneself *against* existing institutions. But unlike the Nietzschean creator of values or the Rousseauan artist who lives on the fringes of society and whose struggle with alienation is essentially a solitary endeavor, the self under therapeutic culture finds a powerful aid in society's institutions themselves. The problem of the self in therapeutic culture plays out, concretely, as a tension between the therapeutic professions and the institutions dominated by these professions on the one hand, and those institutions not yet fully transformed by the ethos on the other. "[T]he self's overarching moral significance," writes John Stedman Rice, "expressed by the claim that every person has a right to autonomy from social and cultural proprieties, is liberation psychotherapy's central organizing principle."[227]

According to Nolan, "between 1968 and 1983 the number of clinical psychologists in America more than tripled," and the number of social workers grew from twenty-five thousand to eighty thousand. By the turn of the century, the United States had more psychiatrists per capita than any other country in the world. Of the ninety thousand licensed psychiatrists worldwide in 1983, fully one third practiced in America. In the same period of time, "[t]he number of annually conferred doctorates in psychology more than tripled while the number conferred in all fields only doubled." A similar trend appeared in the conferral of bachelor degrees in psychology and in the number of books published in that field. There are more therapists, observes Nolan, than there are "librarians, firefighters, or mail carriers, and twice as many therapists as dentists and pharmacists."[228] The social prestige of these professions has grown immensely, too, as has their influence within mainstream institutions in education, the military, healthcare, and, of course, the law profession. Perhaps most importantly, the rise of the therapeutic professions has significantly

[227] Rice, *A Disease of One's Own*, p. 29.
[228] Nolan, *Therapeutic State*, pp. 7-8.

shaped the way in which we talk, relate to our peers, and in general make sense of the world. Wrote Christopher Lasch: "The authority of parents, priests, and lawgivers, now condemned as representatives of discredited authoritarian modes of discipline" has given way to "medical and psychiatric authority."[229] One of the questions implicitly raised by this dissertation is whether the second stage of civil rights, in which regulators shifted their focus from overt and intentional discrimination to subtle, unintentional and "systemic" discrimination, is a consequence or a cause (or both) of the new therapeutic dispensation.

For the transgender movement, the rise of therapeutic culture was both a blessing and a curse. It was a curse because the stranglehold that the psychological outlook had had on society's understanding of gender nonconforming people since the eighteenth century now received a strong backwind. But it was a blessing inasmuch as a growing number of therapeutic experts began to argue that the problem facing transgender people was not some underlying psychopathology, but society's failure to understand and accept those with diverging identities. Transgenderism did not undergo a complete process of depathologization as homosexuality did by the time the American Psychological Association declassified it as a psychological disorder in 1980.[230] But the therapeutic establishment grew increasingly receptive to the idea that alleviating gender dysphoria necessitated changing social institutions and culture.

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[229] Lasch, *Haven in a Heartless World: The Family Besieged* (New York: W. W. Norton & Co., 1977), p. 100.

[230] In the waning decades of the twentieth century, just when homosexuality was undergoing depathologization, transsexualism was increasingly conceived as the behavioral expression of an underlying psychopathology called Gender Identity Disorder (GID). Inscribed for the first time in the DSM-III in 1980, GID as a classification took form under the auspices of an organization called the Harry Benjamin International Gender Dysphoria Association (HBIGDA), which later changed its name to the World Professional Association for Transgender Health (WPATH). HBIGDA brought together "medical, legal and psychotherapeutic professionals who worked with transgender populations, and its membership consisted primarily of the surgeons, endocrinologists, psychiatrists, and lawyers affiliated with the big university-based programs that provided transgender healthcare and conducted research into gender identity formation" (Stryker, *Transgender History*, Ch. 4). HBIGDA's mission was to devise protocols based on research for the treatment of "transsexual" people and to advocate for rules and procedures that take their medical and psychological needs into account in a variety of policy areas. In 1979 the organization published its first

Trans-as-between thus meshed with the emerging ethos of the deep self, one possessed of infinite goodness and wounded by its repression under present social conditions. "Transitions like [Caitlyn] Jenner's," Rogers Brubaker avows, "are more easily cast in a culturally consecrated narrative form. They can be narrated as stories of a tragic mismatch between an authentic personal identity, located in the deepest recesses of the self, and a social identity mistakenly assigned at birth—a mismatch overcome through an odyssey of self- awakening and self-transformation, culminating in the public validation of one's true self. It helps that these are framed as stories of individual alienation and redemption, not of systemic injustice, and that they are compatible with prevailing essentialist understandings of gender."[231]

The idea that gender identity is part of the "true self" and that this true self is given, essential, natural, and in some important respect unchosen, is of critical importance to the contemporary transgender movement. "The language of 'born that way,'" writes Brubaker, "has been deployed to legitimize claims to nonconforming gender and sexual identities… instead of a straightforward enlargement in the scope for choice and self- fashioning, we see a sharpened tension— evident in everyday identity talk, public discourse, and even academic analysis— between the language of choice, autonomy, subjectivity, and self- fashioning and that of

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Standards of Care, as well as diagnostic criteria for GID. The latter were subsequently adopted by the DSM-III. Pioneering the psychological and medical research of transsexuality was Johns Hopkins University School of Medicine, particularly its Sexual Behaviors Unit. Based on studies conducted during the 1950's and 1960's on the effects of sex change on gender dysphoric people, Hopkins was the hub of transsexual medicine and a leading provider of sex change surgical and hormonal intervention. In 1975, Dr. Paul McHugh was appointed psychiatrist-in-chief of Johns Hopkins Hospital and brought sex change surgery to a stop, having become convinced, based on his review of follow-up studies on post-operative transsexuals, that surgical intervention was medically unnecessary and probably damaging. He insisted--and continues to insist--that gender dysphoria is a psychological dysfunction, that it should be treated through counselling to the extent possible. The other two solutions--alterations of the body and changing society's conception of what makes us male or female--McHugh finds unjustifiable. McHugh stepped down from his role as chief psychiatrist in 2001, and Hopkins resumed its sex change procedures in 2017. The APA partially depathologized GID when, in publishing its DSM-V in 2013, it changed "gender identity disorder" to the more neutral "gender dysphoria."

[231] Brubaker, *Trans*, p. 18.

givenness, essence, objectivity, and nature."[232] This helps to explain how *gender*, a term that was originally deployed to mark off what is socially constructed from what is natural and essential, has become re-essentialized. "If subjective gender identity is today endowed with credibility and authority, this is in large part because it is widely understood to be grounded in a deep, stable, innate disposition. Thus while the sex-gender distinction allows gender identity to be disembodied and denaturalized, the 'born that way' story allows it to be re-embodied and renaturalized. It is this asserted objectivity of subjective identity that makes it possible to defend choice in the name of the unchosen and change in the name of the unchanging."[233] Put another way, although trans-as-beyond does have in place in public advocacy (recall the spectrum hypothesis discussed in the previous chapter), trans-as-between is particularly potent due to its appeal to a society transformed by the therapeutic ethos.

The second development since the 1960's that helped pave the way for transgender rights is, of course, the civil rights revolution itself. In order to address the horrors of Jim Crow, it was necessary to suspend fundamental constitutional norms that had persevered more or less intact for generations. The legal and bureaucratic infrastructure Congress created in order to deal a death blow to racial segregation was soon expanded to other groups, including linguistic minorities, women, and the disabled. As John Skrentny points out, a key feature of this expansion has been the ability of "meaning entrepreneurs" to draw an analogy between their client group and African-Americans.[234] Race remains the gold standard for new civil rights causes in search of political legitimacy. To the extent that groups are successful in showing a

[232] Ibid., p. 41.
[233] Ibid., p. 7.
[234] John Skrentny, *The Minority Rights Revolution* (Cambridge: Belknap Press, 2002).

plausible analogy to race, courts and civil rights agencies are likely to act in countermajoritarian ways.

These two background considerations—therapeutic culture and its valorization of a deep self, and the political potency of the racial analogy—help to explain why characterizing gender identity as an innate, fixed and immutable property of the body has become a cornerstone of transgender rights advocacy. "Separating gender identity from the core aspects of the body," argues transgender legal scholar M. Dru Levasseur, "is not only inaccurate, but frames it as a matter of preference or self-expression, rather than a core aspect of identity."[235] In his view, "all [experts] agree that gender identity or self-identity is biologically based and a core, immutable factor that should be given primacy for determining sex,"[236] and indeed that "[g]ender identity is also referred to as the 'brain sex' because it is hard-wired in the brain."[237] Maria Pogofsky argues explicitly that race provides a clear and appropriate analogy for understanding the rights of the transgendered to access sex-specific accommodations. "Similar to racial classifications, transgender persons might be able to argue that gender identity is an immutable trait. The results of ongoing research could provide considerable support for this argument."[238] (Whether Levasseur and Pogofsky are right about "all experts" and "ongoing research" depends, on course, on whom they consider experts and what research they find credible.) This position has recently made its way to the federal courts. In the lawsuit against North Carolina's "bathroom bill," Dr. Deanna Adkins, a pediatric endocrinologist at Duke University, testified that "brains of

[235] Levasseur, "Gender Identity Defines Sex," p. 982 ff. 225.
[236] Ibid., p. 981 ff. 214.
[237] Ibid., p. 955.
[238] Marisa Pogofsky, "Transgender Persons Have a Fundamental Right to Use Public Bathrooms Matching Their Gender Identity," 67 *DePaul Law Review* 733 (2018), p. 756.

individuals with gender dysphoria show that these individuals have brain structure, connectivity, and function that do not match their birth-assigned sex."[239]

The point is not that these claims are wrong (although they might be), but that the American political system creates powerful incentives for advocates to frame their claims in the categories of racial civil rights. Consider, as an example, the Court of Appeals for the Seventh Circuit's 2014 decision in *Baskin v. Bogan*, which anticipated the Supreme Court's ruling one year later in *Obergefell v. Hodges*. *Baskin* struck down marriage laws in Indiana and Wisconsin that recognized only male-female partnerships as lawful marriage on the grounds that homosexuality is "an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice" and thus one deserving of heightened judicial scrutiny. The court's opinion includes a lengthy discussion of current research on the biological and genetic basis of homosexuality, entertaining such hypotheses as that homosexuality is the human race's way of ensuring that at least some individuals, by virtue of being non-procreative, will be freed from the compulsions of nature to help care for the children of others.[240] Given the ubiquity with which transgender advocates make the racial analogy—one is reminded of Attorney General Loretta Lynch claiming, in the context of the "bathroom bill" controversy, that "it was not so very long ago that states, including North Carolina, had signs above restrooms, water fountains and on public accommodations keeping people out based upon a distinction without a difference"[241]—it is certainly plausible that the triumph of trans-as-between over trans-as-beyond is dictated by the logic of civil rights framing.

[239] Declaration of Deanna Adkins, M.D., U.S. District Court, Middle District of North Carolina, Case 1:16-cv-00236-TDS-JEP, §22.
[240] *Baskin v. Bogan*, 766 F. 3d 648, 657-658 (7th Cir. 2014)
[241] A.G. Lynch, Remarks on North Carolina, May 9, 2016.

Put another way, the contemporary transgender movement is hardly the image of wild 1960's antinomianism commonly painted by its critics. A telling example of this is Appendix D of "Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools."[242] Coauthored by the American Civil Liberties Union, the National Education Association, and three of the most influential LGBT advocacy groups in America (Human Rights Campaign, National Center for Lesbian Rights, and Gender Spectrum), the report is arguably the most authoritative guide for schools in dealing with gender nonconforming students. Appendix D includes templates for "Gender Support and Gender Transition Plans." The idea is to provide concrete guidelines and bureaucratic routines to help school staff predict, preempt, manage and respond to every conceivable aspect of a student's gender transition. (Parents are expected to be involved too, according to the pamphlet's authors, but if the parents are not "aware" or "supportive" of their child's transition, the school must have a "plan" in place to move ahead with the transition anyway.) The form calls for detailed specification of who in the school community should be notified and at what stage in the transition; which adults should be responsible to ensure the student's needs are met; what pronouns the student wishes to use and which point in time and how instances of mispronouncing are to be handled; how openly the student's identity should be recognized in a variety of school-related contexts, from standing in lunch-lines to hearing their name called on the PA system; what kind of staff and student training activities the school will undertake the ensure that the student's identity is either disclosed or concealed, but always respected; and so on.

Almost all advocacy organizations, school administrators and diversity trainers today operate on the assumption that gender identity is an innate property of the psyche over which the

[242] Orr and Baum, "Schools in Transition," Appendix D.

individual has little, if any, control. It is this assumption that dictates the obligation of social institutions to change in order to accommodate gender identity rather than the other way around.

There is, however, another way of thinking about gender identity, as "lived experience" or "lived fact." The term "lived experience" has exploded in popularity in recent years,[243] in no small part, one suspects, because of the transgender movement's sudden rise to visibility. People often use the term innocently, as if all it says is the inarguable point that different people have different experiences. But as we shall see, that it hardly what "lived experience" means. The concept stems from the German counter-enlightenment's critique of scientific universalism, and its compatibility with liberal democracy is far from a foregone conclusion.

IV: Gender Identity as "Lived Experience"

To state the problem in the simplest of terms, lived experienced tries to occupy a middle ground between reason and feeling. On the one hand, it wants to avoid the universalism of modern philosophy or science, which it criticizes for being imperialistic, ethno-centric, and oppressive. This means valorizing feeling or inner sentiment as a touchstone of knowledge over and against the purported objectivity of reason. On the other hand, it seeks to avoid the charge of being *merely* subjective, as that would leave others with no reason to place any value on lived experience. As we will see, this delicate line may ultimately prove impossible to walk, and so it may be better to think of lived experience as a rhetorical strategy designed to emphasize particularity or universality according to need.

To gain a more refined understanding of lived experience, it is best to begin with Friedrich Nietzsche's critique of philosophy. Nietzsche saw in scientific rationalism the triumph

[243] Jacob Hoerger, "Lived Experience vs. Experience," *Medium*, October 24, 2016 (https://medium.com/@jacobhoerger/lived-experience-vs-experience-2e467b6c2229).

of a slave revolt in morals that began centuries earlier in Athens, and a sure sign of cultural decadence. The solution to this decadence was to be found in the cultivation of a new critical consciousness, one that posited reason as itself a prejudice, and a slavish one at that. For Nietzsche, philosophy since Socrates had made the error of denying perspective, which is the condition of vitality or, as Nietzsche puts it, "life."[244] Nietzsche was the first to call rationalism itself a perspective and in so doing to relativize the claims made on behalf of reason and therefore of science. There are no facts, says Nietzsche, only interpretations.[245]

To say that Nietzsche was no egalitarian is a wild understatement. The various interpretations given to the world are not all equal in worth. They are result of perspectives that are themselves more or less life-enhancing, more or less "will to power." It all depends on the particular "needs," "drives and their For and Against," in short, "values," from which these perspectives stem.[246] Nietzsche was trying to inspire that rare breed of individual who could assert a new aristocratic perspective, if not to save mankind from the degradation of democratic decadence, then at least to keep the beacon of human striving aflame. He hoped for the assertion of the perspective of the strong few over the weak many. The former alone are the value-creators, those who, *pace* the democratic ethos of the day, see in the many not the possessors of some inherent dignity, but historical fodder to be used for demonstrations of their rare and superior qualities. If "the overall degeneration… and diminution of man into the perfect herd animal"[247] was to be avoided, what would have to be swept away is the levelling, anti-aristocratic claims made on behalf of universal reason.

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[244] See especially "Chapter 1: On the Prejudices of Philosophers" in Nietzsche, *Beyond Good and Evil*, trans. Walter Kaufmann (New York: Vintage Books, 1966).
[245] Nietzsche, *The Will to Power*, trans. Walter Kaufmann and R. J. Hollingdale (New York: Vintage Books, 1968), p. 267.
[246] Ibid.
[247] Nietzsche, *BGE*, p. 118.

Over the next half century, philosophers expounded and amended Nietzsche's doctrine of "perspectivism," applying it in a variety of contexts. These ranged from the avant-garde of French existentialism to the dark and ominous notes of German national socialism. In America, Nietzsche's historicist philosophy was merged with the very democratic ethos Nietzsche so powerfully detested. As Stephen Hicks and others have observed, the Anglo-American left embraced relativism less for philosophic insights than for its egalitarian politics and cultural potentialities.[248] The postmodern consciousness provided the left with a way to debunk knowledge structures on which Western capitalism, imperialism, patriarchy, and later on, heteronormativity and cisnormativity, depended. The result was the reinvigoration of a leftist style of social critique that had seen its vitality sapped by the political failure of classic (i.e. economic) Marxism. From this curious fusion of anti-rationalism and Marxist universalism sprung the method of inquiry now dominant in the universities called "critical theory."

It was the French existentialist philosopher Simone de Beauvoir, one of Nietzsche legatees through Martin Heidegger, who first deployed the term "lived experience." She used it as the title of the second part of her magnum opus, *The Second Sex*, a work that was to redefine the philosophical contours of the "woman question" and launch the so-called "second wave" of feminism. At the heart of de Beauvoir's book is claim that man is the human type, the reference point, the being capable of transcendence or freedom, while woman, a being whose essence is inferred as the negative or complementary of man, is the being of immanence and dependence. Woman is the perennial "other." While it is not obvious what de Beauvoir means in her famous

[248] Stephen R. C. Hicks, *Explaining Postmodernism: Skepticism and Socialism from Rousseau to Foucault* (Tempe: Scholargy Publishing, Inc., 2004); Allan Bloom, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (New York: Simon and Schuster, 1987).

dictum "one is not born, but rather becomes, woman,"[249] the statement seems to refer to her belief that woman becomes the "other" by understanding herself and her situation through the eyes of man—in other words, by adopting his perspective, his knowledge, his objectivity, his science. In contrast, says de Beauvoir, man's understanding of himself and his surroundings is "spontaneous."[250] This is not the natural state of things but a result of careful social conditioning. The process of socialization by which women acquire otherness used to depend on religious and theological arguments, but now marches under the banner of rationalist science and appeals to objective nature.[251] *The Second Sex* thus inaugurates a century-long polemic against modern science and its subject matter, nature, as the sum total of thoughts produced by and for men, to the detriment of women.

To show this more clearly, de Beauvoir gives the example of biological science. This field of supposedly objective and empirical knowledge teaches that the female sex is physically weak. But weakness is a relative term. Something is only a weakness in view of some assumed need or goal. The scientific insight is preceded and enabled by historically relative and non-scientific value-judgments (here is Nietzsche). Woman's condition will be called weak in a society in which physical domination is the implied basis of social order and hierarchy, which de Beauvoir believes is true of most societies, including our own. "[E]xistential, economic, and moral reference points are necessary to define the notion of weakness concretely."[252] Thus, biological "science" reasons from the vantage point of men.

[249] Simone de Beauvoir, *The Second Sex*, trans. Constance Borde and Sheila Molavany-Chevallier (New York: Vintage Books, 2011), p. 283.
[250] Ibid., p. 7.
[251] Ibid., pp. 10-12.
[252] Ibid., p. 46.

It follows that the key to women's freedom is rejection of that body of knowledge that has achieved the status of objectivity as subordinating. In its place must come a new body of knowledge, one that takes women's unique experiences into account. This knowledge, de Beauvoir hoped, would stem from women's "lived experience," and would mount a direct challenge to the enlightenment's epistemic pretensions to universalism. For de Beauvoir, there is no "human perspective," or at least if there, it is not that of modern science. Later in the century, feminists developed a school of thought known as "standpoint theory," which argues more explicitly that what you know depends on where in the social hierarchy you stand.[253]

Although all these iterations of lived experience technically evolve out of Nietzsche's critique of reason, they seem also to be dependent on, or at least aided by, the rise of therapeutic culture. Lived experience elevates feeling or subjectivity to the status of legitimate knowledge. Indeed, it denies the core premise of modern science that knowledge means that which can be universalized and grasped by human reason as such. Therapeutic culture places the emotive self not only at the center of its moral universe, but at the center of its epistemic universe as well. Knowledge claims become moral ones; oppression consists in failure to affirm the "lived experience" of the oppressed. "Epistemological concerns," writes the leading transgender scholar Susan Stryker, "lie at the heart of transgender critique, and motivate a great deal of the transgender struggle for social justice. Transgender phenomena point the way to a different understanding of what counts as legitimate knowledge."[254] The problem with the "male

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[253] See e.g. Sandra Harding, *The Science Question in Feminism* (Ithaca: Cornell University Press, 1986), especially Chapter 7. Third wave or intersectional feminism mounts a challenge to second wave standpoint feminism on its terms, insisting that that feminism is shot through with a white, Western, heterosexual, and upper-class perspective. See Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," 1 *University of Chicago Legal Forum* 139 (1989). Intersectionality intends to capture the distinct and equally (or more) dignified forms of knowing, and so speaks of knowledg*es*.

[254] Stryker, "(De)Subjugated Knowledges: An Introduction to Transgender Studies," in Stryker and Whittle ed., *The Transgender Studies Reader* (New York: Routledge, 2006), pp. 8-9.

academic establishment[],” writes another historicist, is its theoretical “separation of personal feelings and factual presentation.”[255] Transgender “rights,” insists another still, is really about “epistemic justice,” i.e. dispensing with the oppressive notion that feeling is distinct from knowledge in order that social institutions may respond favorably to the feelings of the marginalized.[256]

Lived experience, then, has its roots in relativistic philosophy and its elevation of subjectivity (feeling) over objectivity (reason). But for this very reason, it is far from clear why lived experience should support the proposition that some experiences, i.e. those of the oppressed, are epistemically superior to those of others. Transgender advocates who refer to lived experience are not merely stating that transgender people experience gender in a different way. They are saying that the experience of gender *is* a subjective one, and that claims to the contrary are false. This is a universalistic claim about the nature of gender and knowledge.

To get from relativism to the meaning of lived experience in the sense used by the transgender movement, then, it is necessary to find a universalistic ballast for knowledge claims. Critical theory finds that ballast in Marx, specifically his claim that the exploited class is the universal class. “The proletariat cannot become masters of the productive forces of society, except by abolishing their own previous mode of appropriation, and thereby also every other mode of appropriation.”[257] In other words, class antagonisms, the engine of historical determinism according to Marx, come to an end when the truly revolutionary class, the

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[255] Caroll Reddell, “Divided Sisterhood: A Critical Review of Janice Raymond’s *The Transsexual Empire*,” in ibid., p. 150.
[256] B. Lee Altman, “Epistemic Injustice and the Construction of Transgender Legal Subjects,” ***Wagadu: A Journal of Transnational Women's and Gender Studies*** 15 (2016), pp. 11-34. See also Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (New York: Oxford University Press, 2007).
[257] Karl Marx, “Manifesto of the Communist Party,” in Robert C. Tucker ed., *The Marx-Engels Reader, Second Edition* (New York: W. W. Norton & Company, Inc., 1978), p. 482.

exploited, do away with the very means of exploitation. Marx is here reworking the master-slave dialectic of his teacher, Hegel, into a philosophy of economic materialism.

Lived experience is, to be sure, in the spirit of cultural rather than classical Marxism. Cultural Marxism assumes that the basic unit of reality is not economic class but cultural entities such as "identities." Everything else, including economics, is epiphenomenal to these entities. A key concept for Marxist analysis (in both the classic and cultural varieties) is class consciousness. As Marx saw it, the overthrow of capitalism by the proletariat was preconditioned on the latter transforming from a "class in itself" to a "class for itself," which is to say, on the proletariat's gaining consciousness of the deeper roots of its miserable situation and its consequent ability to liberate itself from the "ideology" of capitalism and religion. When the proletariat achieves consciousness of a class for itself, its subjective consciousness will reflect the objective state of reality—hence a universal class. To get to that point of enlightenment, however, what is necessary is not, as previous philosophers had said, disinterested speculation, but political action. "The philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it."[258] Raising consciousness, then, is a political program or "praxis." It is the crucial precondition to communism, which comes about when self-alienation ends and genuine human freedom is achieved.

Just as the raising of consciousness is imperiled by the ideology of capitalism in the classical Marxist scheme, so in cultural Marxism it is imperiled by inclination of the oppressed to see themselves through the eyes of their oppressors. For de Beauvoir, lived experience is an invitation to women to describe, and by describing to create, a new reality, one that is not tainted by the male perspective. It alone can transform women from a class in itself to a class for itself.

[258] Marx, "Eleventh Thesis on Feuerbach," in ibid., p. 145.

And just as the proletariat cannot win its freedom without abolishing the means of exploitation, so too women's liberation means abolishing gender, the system of social subordination. Thus, existentialist feminism resides at the crossroads between the radical historicism of Nietzsche and the universalizing "praxis" of Marxism.

But can these two intellectual strands ultimately fit together? That is a question that cannot be answered adequately in the limited space of this study. What we can say is that the tension is real, and one gets a glimpse of it in the enduring feud between some second-wave feminists and transgender advocates. The former argue that the lived experiences of transgender women are really the expression of male desire and are as such inauthentic. Indeed, the argument goes, transgender lived experience is male supremacy parasitically exploiting the very concept that was invented to dismantle it.[259] For feminists like Janice Raymond, Germaine Greer and Sheila Jeffreys, the transgender movement is patriarchy at its peak. Unlike previous forms of patriarchy, it usurps a key feminist concept in order to grant men access to women's consciousness-raising "spaces," and in so doing poses a direct and powerful threat to feminist "praxis."

Crucially, this entire argument depends on the assumption that transgender women are not really women. One way to justify such an assumption is by reference to some essential attribute outside of subejctive experience, for instance chromosomal makeup or anatonical

[259] Janice Raymond argues that if a black person wants to be identified as white (transracial), or a rich person as poor (transeconomical), or an old person as young (transchronological), we would question the desire that produces the identification, but not so in the case of men who want to become women. The reason for this is that we conceive of transsexuality in medical/pathological terms, which precludes deeper probing into motives. "[I]t is only because transsexualism is widely accepted as a condition requiring psychiatric and medical intervention—in effect as a disease or diseaselike—that the social and political questions surrounding why a man might wish to be a woman are not primary." The institutionalization of transsexuality on the medical model, Raymond contends, is patriarchy's way of defending existing gender hierarchies. It is less costly for patriarchy to allow some men (and in Raymond's view most transsexuals are men) to cross over to the other side than it is to reduce its policing of gender norms. By "transsexual empire" Raymond means "a sociopolitical program that is undercutting the movement to eradicate sex-role stereotyping and oppression in this culture." Raymond, *Transsexual Empire*, pp. xv-xviii, xxi.

structure or reproductive capacity. But it is precisely such "essentialisms" that existentialist feminism seems to want to avoid. Recognizing the difficulty, transgender theorists have pushed back against this brand of feminisms, arguing—not implausibly—that it has no perch to stand on in its exclusion of transgender women from "praxis."

In her critique of transsexuality, Janice Raymond remarks that when she speaks of real women as distinguished from fake women, what she means by real women is people who have a "female reality" rather than a male "fantasy" about femininity. But what creates a female reality? In Raymond's view, transgender women are "men [who] have not had to live in a female body with all the history that entails. It is that history that is basic to female reality, and yes, history is based to a certain extent on female biology."[260] In other words, by giving rise to a particular and distinct type of physical appearance (dare we call it a *form*?), biology creates the necessary and sufficient conditions for gender oppression to take place. And besides, Raymond seems to ask, do transsexuals not, in their very choice to inject hormones and alter their bodies, implicitly agree that the body is essential to being female?

Yet, to repeat, Raymond's brand of feminism, which centers on the lived experience of women, has no epistemic perch to stand on when it criticizes the lived experience of transgender women. In one critique of *The Transsexual Empire*, transgender scholar Carroll Riddell argues that the core problem with Raymond's thesis is her methodology, which, Riddell insists, does not take into account the lived experiences of trans women but instead imposes Raymond's own interpretation of those experiences on the analysis of gender. "Actual experience has to be denied, distorted or ignored in order to fit in with the theory. Having started in this way, it is easy to present more and more arguments that seem to follow logically from the first. Each of them is

[260] Ibid., p. xx.

equally unchallengeable."[261] Fair enough, but Raymond's point is precisely that transgender lived experience is inauthentic. It is *that* claim that Riddell must refute but cannot given her prior intellectual commitments.

Here we have, in a nutshell, the central difficulty within postmodernist gender politics. Both transgender advocates and their feminist critics wish to defend a universalistic theory of knowledge and hence of justice on the basis of a radical anti-universalism. The enterprise proves illusory. Riddell is surely correct that Raymond's thesis on transsexuality "sets out to 'prove' something which it has already assumed,"[262] but the same problem afflicts Riddell's own opposition. Absent an objective criterion for knowledge of the kind supplied by philosophy or science, the clash of knowledge claims or "lived experiences" can only be resolved at the level of politics. Or to put it more bluntly, the solution must be found at the level of sheer assertion of competing wills. But here we must note an irony. We mentioned earlier that in America, as opposed to Europe, perspectivism merged with egalitarianism, indeed it became a central strategy for social reform in the spirit of "social justice." The politics of recognition is concerned with oppression and victimhood and with its rectification in the name of egalitarian justice. But this means that in the battle of wills described above, the side that will win out in law, politics, policy and even public opinion is likely to be the side that, through its command of superior economic, cultural and political resources, has made the more convincing case of being powerless and oppressed. In the standoff over how courts should interpret "sex" in Title VII and Title IX, groups like the Transgender Law Center face off against groups like Women's Liberation Front. The side that is more likely to win is, ironically, precisely the group that is *less* oppressed.

[261] Riddell, "Divided Sisterhood," p. 149.
[262] Ibid., p. 151.

V: The Gender Science Wars, Take 2

Setting these deeper philosophical issues to the side, let us conclude this chapter with a brief survey of the state of the medical science on gender identity formation and management. This entails a return, by and large, to the "brain sex" hypothesis considered earlier.

In her testimony in *Carcano v. McCrory*, Dr. Adkins noted that although the evidence strongly points in the direction that gender identity has a "strong biological basis," research on this question is "still ongoing."[263] But this qualification is an understatement. The consensus in the field of research on gender identity formation, at least for now, is that no proof exists for gender identity having any etiological basis in the physical brain. What the literature does show is that the brain *cannot be ruled out* as *one* of *several plausible* causes of gender identity. As the science writer Jesse Singal concluded in an investigative piece for *The Atlantic* in 2018, "Researchers still don't know what causes [gender identity]—[it] is generally viewed as a complicated weave of biological, psychological, and sociocultural factors."[264]

The "brain sex" hypothesis that underwrites much of transgender legal strategy is really an inference from behavior. Gender identity is presumed, that is, to have a biological-deterministic cause in the brain because of the persistence of cross-gender identification (especially in the face of adversity) and the apparent impossibility of suppressing identification through therapeutic interventions. To be sure, this would not be an unreasonable position to take in the absence of evidence to the contrary, and especially in light of the actual and undeniable difficulties endured by those with gender dysphoria.

[263] Declaration of Deanna Adkins, §21.
[264] Jesse Singal, "When Children Say They're Trans," *The Atlantic*, July/August, 2018.

But the behavioral immutability of gender identity is itself not established fact. So far, eleven longitudinal studies have been conducted on pre-pubescent teens with gender dysphoria. All eleven confirm that a large majority of them will desist from their dysphoria over time. According to one of the most frequently-cited studies, 77 to 94 percent of boys and 73 to 88 percent of girls with dysphoria will desist by early adulthood. Indeed, most will come out later as gay,[265] an unsurprising finding considering that many of the gender nonconforming behaviors that are now taken as evidence of gender identity are the ones that gay children often exhibit. The problem is known as neuroplasticity, the brain's malleability to psycho-social influence.

Anne Fausto-Sterling has come to a similar conclusion about gender identity being in part biologically and in part socially influenced in her review of the scientific literature (thus underscoring the independence of the argument about a spectrum of sex and the argument for gender identity). The sexologist John Money's failed effort to prove that gender identity is purely socially inscribed gave rise to two biological explanations for gender identity, explains Fausto-Sterling. According to the more "extreme" explanation, chromosomes generate gonads (internal reproductive glands), which in turn generate sex hormones, which in utero shape brain development in either a male or female direction, which then causes a male or female gender identity. A more moderate view holds that while hormones "strongly predispose" the brain toward a particular gender identity, ultimately that identity is malleable to external pressures. It may not ultimately be possible, Fausto-Sterling

[265] Jack Drescher and Jack Pula, "Ethical Issues Raised by the Treatment of Gender-Variant Prepubescent Children," *The Hastings Center Report* 44 (2014).

observes, to disentangle completely what is biological and what is socialized about gender identification.[266]

While the research on gender identity is remarkably consistent in its finding that nothing at present can be known with certainty about the etiology of gender identity, some professional associations and clinical practitioners, as well as most transgender advocacy groups, have drawn their own conclusions. One of the most telling examples is a 2018 report by the American Academy of Pediatrics (AAP) entitled "Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents."[267] The report aims to provide clinical practitioners with concrete guidelines and best practices.

At the heart of the AAP's report is this single recommendation: the *only* legitimate approach to treating gender dysphoric patients is "affirmation," meaning affirming children and adolescents in the gender that they claim to be. The other two approaches—"conversion therapy" and "watchful waiting"—are to be avoided. Conversion therapy is the practice of trying to get someone to stop a particular behavior on the theory that it is voluntary. It is an approach widely discredited for its (usually disastrous) application in the context of homosexuality. Watchful waiting is the approach taken by nearly all clinicians of gender dysphoria today. Its premise that, to the extent possible and consistent with the mental health needs of the patient, risky and irreversible medical interventions should be avoided until after the child has reached adulthood. According to the APA, watchful waiting is an "outdated approach" because it fails to deliver to children the "critical support" they need, because it rests on "binary notions of gender in which gender diversity and fluidity is pathologized," and because it assumes, against the evidence, that

[266] Fausto-Sterling, *Sex/Gender: Biology in a Social Word* (New York: Routledge, 2012), Ch. 5.
[267] Jason Rafferty, "Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents," *Pediatrics* 142 (2018).

"notions of gender become fixed at a certain age."[268] Put simply, there is no practical difference between watchful waiting and conversion therapy; failure to respond affirmatively is no different from trying to suppress a health gender expression. The APA insists that waiting for a particular age to assume sexual maturity is "arbitrary,"[269] or in the more revealing words of the World Professional Association for Transgender Health (which itself endorses watchful waiting), "Neither puberty suppression nor allowing puberty to occur is a neutral act."[270]

As to James Cantor, a professor of psychiatry and director at the Toronto Sexuality Centre, has shown in considerable detail, the AAP's recommendations are based on distortions and misrepresentations of the studies it cites, some of them so egregious as to raise serious doubts about the APA's independence from political pressures. First and perhaps most perplexingly, the report completely ignores those studies that show that most prepubescent children with dysphoria (and many adolescents) will eventually experience desistance. According to Cantor, "[t]he majority of children 'convert' to cisgender or 'desist' from transgender regardless of any attempt to change them." Homosexuality, in contrast, "never or nearly never spontaneously changes to heterosexuality."[271] In support of its claim that "conversion therapy" for gender dysphoria has "been proven to be not only unsuccessful but also deleterious,"[272] the AAP cites six empirical studies. After checking these references, Cantor finds that every single one of them pertains to homosexuality, which the AAP itself (and the broader

[268] Ibid., p. 4.
[269] Ibid..
[270] WPATH, "Standards of Care," p. 20. It is an odd view of nature that recommends human intervention in the biological processes of development but also refuses to recognize the reasons for that intervention as pathological conditions. By the logic of depathologization, gender therapies for children before the age of consent are strictly speaking elective procedures, raising all the more the question of whether their consent is not necessary.
[271] James M. Cantor, "Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy," *Journal of Sex & Marital Therapy* 46 (2020), pp. 308-309.
[272] Rafferty, "Ensuring Comprehensive Care," p. 4.

transgender movement) insists is distinct from gender identity.[273] To date no study on "conversion therapy" for gender identity has ever been conducted.[274] Thus, the AAP's argument for equating watchful waiting with conversion therapy fails to engage with the extant literature on gender identity formation. It is mostly an argument of guilt by association.

In another misrepresentation, the AAP asserts that "[m]ore robust and current research" demonstrates the need for gender affirmation,[275] and cites a study done by the American Academy of Child and Adolescent Psychiatry (AACAP). But the AACAP study actually says the exact opposite, according to Cantor. After noting "the lack of empirical evidence from randomized, controlled trials of the efficacy of treatment aimed at eliminating gender discordance, the potential risks of treatment, and longitudinal evidence that gender discordance persists in only a small minority of untreated cases arising in childhood," the AACAP article unambiguously concludes: "In general, it is desirable to help adolescents who may be experiencing gender distress and dysphoria to defer sex reassignment until adulthood"[276]—in other words, watchful waiting. There are several other errors, omissions and misrepresentations in the AAP report, but for our purposes Cantor's larger point is that the AAP (and other psychological associations that have come to similar conclusions) rests its recommendations on "political or personal values,"[277] not scientific evidence.

If scientific associations are able to paint a distorted picture of the research, one should expect to see a similar trend in the law reviews. In an article that argues that the law should be

[273] Ibid., p. 2.
[274] Cantor, "Fact-Checking," p. 308.
[275] Rafferty, "Ensuring Comprehensive Care," p. 4.
[276] Stewart L. Adelson, American Academy of Child and Adolescent Psychiatry (AACAP) Committee on Quality Issues (CQI), "Practice Parameter on Gay, Lesbian, or Bisexual Sexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents," *Journal of the American Academy of Child and Adolescent Psychiatry*, 51(9) (2012), p. 969.
[277] Cantor, "Fact-Checking," p. 310.

"updated" to "reflect modern medical science," M. Dru Levasseur assures his readers that the notion that gender identity is "hardwired into the brain" is the consensus view among scientific experts.[278] The sources he actually cites in support of this claim, however, say something quite different. One of them states that although a biological-deterministic explanation might be accepted as a working hypothesis on the "balance of probabilities," "there will be no conclusive 'scientific proof' of the causation of transsexualism until medical science can identify and ratify the sexual differentiation of the human brain and/or genetic identifiers for transsexualism in living human beings."[279] The other citation is to a single sentence—"the organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain"—taken from an article published two decades before Levasseur's by William Reiner, a medical doctor with expertise in child psychiatry and urology. Although Levasseur clearly means to imply that the sentence is a summary of Reiner's position, Reiner's argument in that article is the far more modest proposition that reproductive (genital) anatomy alone cannot account for gender identity development in humans. "[G]ender identity," he writes, "like sexual orientation, is a complex process in only the initial infancy of scientific understanding."[280] Although Reiner does say that "[i]n the end it is only the children themselves who can and must identify who and what they are," what he means by this is that following the child's cues means hewing to "*likeliest* psychosexual developmental pattern of the child," given that the "organ that *appears* to be critical to psychosexual development and adaptation is not the external genitalia, but the brain."[281] A little over a decade later Reiner clarified his position, probably in view of some of

[278] Levasseur, "Gender Identity Defines Sex," p. 981 ff. 214.
[279] Rachael Wallbank, "Re Kevin *in Perspective*," 9 *Deakin Law Review* 461, 476 (2004).
[280] William G. Reiner, "To be Male or Female —That Is the Question," 151 *Archives of Pediatric & Adolescent Medicine* 3, 224, 225 (1997).
[281] Ibid. My emphasis.

the developments in transgender politics. He now explicitly took issue with "the transgender community that gender dysphoric children do not experience a gender change but rather possess a brain that has always been his or her affirmed gender. While trans-friendly, and, in general, patient-friendly, evidence for such a statement is generally lacking. Indeed, it may be possible to be too patient friendly; that is, [clinicians'] faith in following 'the child's lead [as] paramount' could lead to misguided outcomes particularly if generalists treating such children are guided by [this] approach."[282] Given that Reiner made these comments a few years before Levasseur published his article, it is a wonder that the latter makes no mention of them.

Other examples of the politicization of gender identity science are not hard to come by. In December of 2015, for example, a prestigious gender identity clinic in Toronto was shut down and its leader, a world-renowned expert who helped devise the WPATH Standards of Care, was fired after refusing to switch from watchful waiting to a gender affirming-only approach.[283] Other gender identity treatment centers, including the one at Johns Hopkins, the first of its kind, have been under similar pressure from advocacy groups to do away with watchful waiting (which has been successfully relabeled "conversion therapy").

A recent report by Lawrence Mayer and Paul McHugh, both psychiatrists at Johns Hopkins with expertise in gender identity formation, summarizes some of the key studies conducted in recent years. Their conclusions, though hardly uncontested, are worth quoting in full:

> [I]t is now widely recognized among psychiatrists and neuroscientists who engage in brain imaging research that there are inherent and ineradicable methodological limitations of *any* neuroimaging study that

[282] William G. Reiner and Townsend Reiner, "Thoughts on the Nature of Identity: How Disorders of Sex Development Inform Clinical Research about Gender Identity Disorders," *Journal of Homosexuality* 59 (2012), p. 438.

[283] Jesse Singal, "How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired," *New York Magazine*, February 7, 2017. The story in question involves Dr. Kenneth Zucker, who led the Toronto-based Child Youth and Family Gender Identity Clinic and helped to write the WPATH "Standards of Care" and the DSM-V's update on gender identity.

> simply associates a particular trait, such as a certain behavior, with a particular brain morphology. (And when the trait in question is not a concrete behavior but something as elusive and vague as "gender identity," these methodological problems are even more serious.) These studies cannot provide statistical evidence nor show a plausible biological mechanism strong enough to support *causal connections* between a brain feature and the trait, behavior, or symptom in question. To support a conclusion of causality, even epidemiological causality, we need to conduct prospective longitudinal panel studies of a fixed set of individuals across the course of sexual development if not their lifespan.
>
> Studies like these would use serial brain images at birth, in childhood, and at other points along the developmental continuum, to see whether brain morphology findings were there from the beginning. Otherwise, we cannot establish whether certain brain features caused a trait, or whether the trait is innate and perhaps fixed. Studies like those discussed above of individuals who already exhibit the trait are incapable of distinguishing between *causes* and *consequences* of the trait. In most cases transgender individuals have been acting and thinking for years in ways that, through learned behavior and associated neuroplasticity, may have produced brain changes that could differentiate them from other members of their bio- logical or natal sex. The only definitive way to establish epidemiological causality between a brain feature and a trait (especially one as complex as gender identity) is to conduct prospective, longitudinal, preferably randomly sampled and population-based studies.
>
> In the absence of such prospective longitudinal studies, large representative population-based samples with adequate statistical controls for confounding factors may help narrow the possible causes of a behavioral trait and thereby increase the probability of identifying a neurological cause. However, because the studies conducted thus far use small convenience samples, none of them is especially helpful for narrowing down the options for causality. To obtain a better study sample, we would need to include neuroimaging in large-scale epidemiological studies. In fact, given the small number of transgender individuals in the general population, the studies would need to be prohibitively large to attain findings that would reach statistical significance.[284]

In other words, it is extremely difficult and, given ethical and sample-size constraints, perhaps impossible to undertake the type of research that could tell us definitively whether gender-typical brain structure and function are the *cause* of gender identification or its *effect*.

Advocacy organizations provide no additional clarity on the cause-or-effect dilemma pointed out by Mayer and McHugh. Consider this characterization of gender identity by the national advocacy group Gender Spectrum:

> This core aspect of one's identity comes from within each of us. Gender identity is an inherent aspect of a person's make-up. Individuals do not choose their gender, nor can they be made to change it. However, the words someone uses to communicate their gender identity may change over time; naming one's gender can be a complex and evolving matter. Because we are provided with limited language for gender, it may take a person quite some time to discover, or create, the language that best communicates their internal experience. Likewise, as language evolves, a person's name for their gender may also evolve. This does not mean their gender has changed, but rather that the words for it are shifting.[285]

[284] Mayer and McHugh, "Sexuality and Gender," p. 103.
[285] Gender Spectrum, "Understanding Gender" (https://www.genderspectrum.org/articles/understanding-gender), accessed June 5, 2020.

If it is true that one's core gender is unchosen and fixed but that the language one uses to express it changes, then by definition at *some* point one's language will inaccurately represent one's gender. Definitions such as these are an example of Brubaker's observation about the "objectivity of subjective identity."[286] To place itself beyond public questioning, gender identity must be at once involuntary and voluntary.

In 2005 the economist Larry Summers learned a lesson the hard way. In a conference on the underrepresentation of women in the STEM fields, Summers imprudently suggested that among several reasons (including discrimination) for women's underrepresentation was the uneven distribution of aptitude at the highest levels of intelligence. A wave of criticism ensued and Summers summarily resigned. Feminists denounced his use of outdated stereotypes about men's brains and women's brains. As Steven Rhoades observed just before the Summers ousting, the topic of neurological sex differences had become so taboo in academia that "researchers who study sex differences seem convinced that it is hard to get this work funded and the results published." Those who managed to chart a course through these troubled waters, Rhoades found, often found themselves isolated by their colleagues and subject to personal criticism at conferences.[287] Clearly, times have changed.

Conclusion: The Enduring Question of Forms

In 2018 the conservative commentator Sohrab Ahmari wrote a piece in *Commentary Magazine* in which he critically examined some of the transgender movement's core claims. Like most of us, Ahmari had not given much or any consideration to transgenderism prior to 2015 or so. What struck him as especially odd was the "disappearance of desire" in mainstream discussions of

[286] Brubaker, *Trans*, 7
[287] Steven E. Rhoads, *Taking Sex Differences Seriously* (San Francisco: Encounter Books, 2004), pp. 19-20.

transgender issues.[288] The question of *eros* had somehow been banished from enlightened circles. If there is one point over which the transgender movement will brook no disagreement, it is that gender identity and sexual attraction are separate and unrelated issues.

As the historian and intersex activist Alice Dreger has discovered,[289] there are few accounts of transgenderism more controversial today than the theory put forward by Ray Blanchard and expounded by J. Michael Bailey, both academics with expertise in sex development.[290] In brief, that theory holds that transgender women—that is, people who were designated male at birth but who have a female gender identity—fall into two categories. Some are hyper-feminine homosexual men who find living as a woman a reasonable way to cope with the societal pressures that come with nonconformity to masculine ideals, and who use cross-gender identification to attract men who might otherwise not find hyperfeminine men attractive. Others are autogynephiliacs, i.e. men who derive erotic pleasure from the thought of themselves as women, and who are often not sexually attracted to men. The implication of Blanchard's theory is that in either case, gender identity and sexual orientation are not independent, which means that transgender women are really men who misunderstand or misrepresent their own deeper motives. This plainly clashes with the core claim of the transgender movement, which is that transgender people are authentic and "know who they are."

Nevertheless, proponents of the Blanchard-Bailey hypothesis argue that it is supported by empirical findings. It is neither my purpose nor in my competence to say whether this is true; for

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[288] Sohrab Ahmari, "The Disappearance of Desire: The Transgender Movement's Missing Element," *Commentary Magazine*, April, 2018.
[289] Alice Dreger, *Galileo's Middle Finger: Heretics, Activists, and the Search for Justice in Science* (New York: Penguin, 2015).
[290] Ray Blanchard, "The Concept of Autogynephilia and Typology of Male Gender Dysphoria," *Journal of Nervous and Mental Disease*, 177 (1989); J. Michael Bailey, *The Man Who Would Be Queen: The Science of Gender-Bending and Transsexualism* (Washington, D.C.: Joseph Henry Press, 2003).

all I know, these studies may suffer from severe methodological flaws. What is more important for our purposes is the deeper point about the relationship between gender identification and erotic desire. Is it possible to treat chromosomal/anatomical sex, gender identification, and erotic desire as three separate and logically independent components of human nature? Is it true that, in whichever combination these features appear, they always form part of nature's "diversity"? Or, conversely, are these three components connected through some deeper causal structure? If the latter, what do we mean by "cause"?

There would seem to be two possible answers to this set of questions. According to one, the words *male* and *female* are inherently teleological inasmuch as they derive their deepest and irreducible meaning from human sexual generation. That is, humans are bifurcated into two distinct and complementary kinds from the chromosomal level, through the organs and functions produced by genetics, to the behaviors and mental life that conduce to reproduction. In this view, male and female are forms (in the Aristotelian sense) that shape, but due to occasional natural disorders do not always determine, human sexual development and function. According to the other view, there are no forms in the light of which the properties commonly associated with sex—including genetics, anatomy, behavior and consciousness—can be arranged in typical/normal or atypical/abnormal ways. The fact that certain properties (e.g. a penis and a male gender identity) align with each other in the vast majority of cases is, ultimately, an accident, one to which science can attach no meaning whatsoever.

As we have been suggesting, the latter view is internally inconsistent because or insofar as it insists that certain phenomena are nevertheless phenomena of sex. That is why theorists like Michel Foucault and Judith Butler, who understand the inherently teleological implications of male and female, seek to debunk these terms rather than widen their meaning. Put simply, trans-

as-between suffers from its reliance on terms that are fundamentally teleological and reproduction-related. The missing element of *eros* in mainstream transgender anthropology is arguably the most striking piece of evidence for this deeper problem.

An identity of *gender* presupposes the same kind of teleological reference point. It cannot help but make assumptions about what it is to be a real—or to use an Aristotelian term, a more perfected—woman or man. Feminist critics of the transgender movement seem to recognize this when they point out that transgender lived experience is somehow always expressed through feminine stereotypes. But even the "brain sex" hypothesis presupposes that there is a more and less perfected form of female, for otherwise it could not intelligibly claim that some people with masculine bodies have female brains. Clearly, there is a scale of brain structures ranging from the less to the more feminine.

The fact that the debate over transgenderism has largely taken place within the framework of "rights talk" is almost certainly why officials of the civil rights state have ignored or trivialized the tensions and difficulties this chapter discusses. No doubt, there are children and adults who endure genuine anguish due to a conflict between the internal sense of self and how society sees them. No doubt, finding ways to get social institutions to respond with compassion and understanding to these people is an important goal, especially in light of evidence of harassment, depression, and suicidality among gender dysphoric teens. Whether consciously or not, civil rights institutions seem to have adopted a "therapeutic jurisprudence" on trans issues. So compelling is the goal of alleviating feelings of alienation and distress in vulnerable children that questions of human nature are set aside to be addressed, if at all, at a later time. Yet, is it not precisely the therapeutic perspective that requires clarity on first principles? Is it possible for society to respond compassionately and with dignity to those who suffer without first

understanding the causes of suffering? If so, the civil rights framework for settling matters of identity seems woefully inadequate.

Ultimately, since civil rights officials and advocates are unable or unwilling to challenge the basic legitimacy of separating certain spaces and activities by male and female, they inevitably are forced to adopt a definition of male and female that is inconsistent with the core tenets of the sex stereotype theory of law, and that rests on a misinterpretation of current scientific findings. As the next two chapters will suggest, one of the reasons for these deeper confusions is that the American civil rights state has never really grappled with the meaning and limitations of the word *stereotype*.

Chapter 4
Brown in Reverse: The Origins and Implications of the Sex Stereotype Theory of Law

In 1975 a young ACLU advocate by the name of Ruth Bader Ginsburg took to the pages of the Washington Post to defend the Equal Rights Amendment. Critics alleged that the ERA would empower unaccountable judges to declare unconstitutional the widely supported practice of separating restrooms and changing rooms for men and women. "[E]mphatically not so," Ginsburg assured her readers, with a hint of mockery for the outlandishness of the imputation. "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy. Individual privacy, a right of constitutional dimension, is appropriately harmonized with the equality principle."[291] That same year, in an influential law review article entitled "Gender and the Constitution," Ginsburg said of "[c]hildbearing" that it is "the result of a biological potential that, more than any other characteristic, defines a person as a member of the female sex."[292]

Ginsburg would reiterate this view about the inherent connection between gender labels, physical makeup, and separate facilities as a Justice of the Supreme Court. In her widely celebrated opinion in *United States v. Virginia*, a ruling that brought to a dramatic peak a thirty-year campaign to purge the law and public institutions of "sex stereotypes," Ginsburg declared the male-only admission policy of the Virginia Military Institution to be in violation of the Fourteenth Amendment's Equal Protection Clause. VMI, a reputable institution that embodied a fading ideal of gentility and manliness, had objected to coeducation on the grounds that women were inherently unsuited for its highly demanding method of education. Ginsburg countered that at least *some* women could contend with the institution's harsh conditions, and in a 7-1 ruling the

[291] Ruth Bader Ginsburg, "The Fear of the Equal Rights Amendment," *Washington Post*, April 7, 1975, p. A21.
[292] Ruth Bader Ginsburg, "Gender and the Constitution," 44 *University of Cincinnati Law Review* 1 (1975), p. 35.

Court found that VMI had relied on "overbroad generalizations" about women's interests and abilities. Ginsburg was careful to emphasize, however, that because "[p]hysical differences between men and women… are enduring,"[293] the integration of women on equal terms "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs."[294]

In these statements, Ginsburg affirms with supreme clarity not only that recognizing men and women as physically distinct is not stereotyping, but to the contrary, that *failure* to account for these physical differences might itself be a violation of equal protection of the laws. Ginsburg, a figure whose credentials in legal feminism are second to none and who almost single-handedly introduced into American constitutional law the theory about stereotyping, is now, in retrospect, on record with having the same views as organizations like Alliance Defending Freedom in their effort to repeal transgender regulations.

The goal of these next chapters is to take stock of the sex stereotype theory of law. What does that theory say? What are its deeper assumptions? What was its purpose and has that purpose remained consistent over time? How has an argument about sex equality gone beyond and even against the express beliefs of one of its key authors? This chapter discusses the origins of that theory in 1960's feminism and its application over the subsequent three decades. The next chapter focuses on how, despite initial misfires in the courts, transgender litigants were ultimately able to apply the argument about stereotypes to their own circumstances and get judges to expand the meaning of discrimination "because of sex."

I: Uncertain Beginnings

[293] *United States v. Virginia*, 518 U.S. 515, 533 (1996).
[294] Ibid., 550 ff. 19.

The enduring dilemmas of defining what it means to discriminate "because of sex" were baked into the legal cake from the start. As the story goes, adding "sex" to Title VII of the Civil Rights Act of 1964 was a failed ploy by Virginia segregationist Rep. Howard Smith to sink the bill as a whole.[295] The amendment received very little debate on the floor (seven pages in the Congressional records), was not discussed at all at the committee stage, and had no interest groups backing it.[296] Smith's strategy backfired, and what emerged was a bill with two conflicting messages.

On the one hand, by placing both sex and race on a single, undifferentiated stream of protected characteristics, Sections 703(a)-(d) of Title VII seem to suggest that race and sex partake of the same notions of equality and fairness. As the Supreme Court would put it in a 1973 decision (regarding constitutional interpretation), "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, [and] the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility."[297] For some feminists, the analogy between sex and race was accurate and appropriate.[298] For example, Pauli Murray, a civil rights lawyer and member of President Kennedy's Commission on the Status of Women, famously called American society "Jane

[295] Some dispute this narrative. See e.g. Michael Evan Gold, "A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth," Duquesne Law Review 19, 453-477 (1981). According to Gold, Title VII "initially lacked a sex clause because there was no powerful organization like the AFL-CIO to lobby for the clause and because women were willing to put blacks' needs ahead of their own. But when it was moved that sex be added to Title VII, the merits of the motion were obvious, and it was swiftly adopted" (p. 457 and context). Moreover, Gold notes, even if it was not politically popular to advocate for the sex amendment, it would have been dangerous to vocally take up a position against it (ibid.).
[296] 110 *Congressional Record*, House of Representatives, February 8, 1964, pp. 2581-2. See also John Skrentny, *The Minority Rights Revolution*, p. 111.
[297] *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).
[298] For general discussion, see Serena Mayeri, "A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective," 110 *Yale Law Journal* 6 (2001).

Crow."[299] To be sure, the racial analogy was also politically convenient, for as feminists were keenly aware, the political clout of black civil rights supported legal and bureaucratic structures that suspended keystone constitutional norms regarding rights of private association, localism and judicial review. By lumping together of sex and race, women's advocates created the impression that Jim Crow and Jane Crow are sibling symptoms of the same disease: the reduction of the individual to his or her immutable yet socially irrelevant traits. As one legal scholar has put it, Title VII contains a "strong textual commitment" to equality understood as "sameness."[300]

On the other hand, recognizing that, in the words of one of the Civil Rights Act's chief sponsors, there are "biological differences between the sexes" in view of which a number of states have passed "laws favorable to women,"[301] Congress included in Title VII a qualification to the "sameness" of the sexes that did not apply to race. Section 703(e) of Title VII exempts employers from liability when sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[302] The BFOQ clause would become the subject of decades of litigation to clarify just when sex is a qualification "reasonably necessary" to the "normal operation" of a business. And it is through those litigation efforts, as Mary Ann Case has shown,[303] that an argument about stereotypes initially gained a foothold in the courts. Stereotype theory was necessary, it was argued, to convince judges that sex-specific employment policies that purported to be relevant were really pernicious.

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[299] Pauli Murray and Mary O. Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 *George Washington Law Review* 232 (1965).
[300] Mary Ann C. Case, "'The Very Stereotypes the Law Condemns': Constitutional Sex Discrimination Law as a Quest for Perfect Proxies," 85 *Cornell Law Review* 1447, 1451 (2000).
[301] *Congressional Record*, note 6 supra, pp. 2577-2578, Emanuel Celler (D-NY).
[302] 42 U.S.C. § 2000e-2(e).
[303] Mary Anne C. Case, "Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence," 105 *Yale Law Journal* 1 (1995), pp. 36-41.

Thus, to judge purely from the structure of Title VII, the basic idea seemed to be a rebuttable presumption that the legal tools developed for addressing racial discrimination should presumptively apply to sex as well. That surely marked a victory for "equality feminists" like Ginsburg, who believed that most if not all differential treatment of the sexes was rooted in overly broad or false and beliefs about women's interests and abilities. Over the following decade and a half, courts, aided by the argument about stereotypes, took an increasingly narrow view of when sex-respect employment policies could be defended under BFOQ. A rebuttable presumption became exceedingly hard to rebut.

The enforcement architecture of Title VII proved massively important to its regulatory potential. As Sean Farhang has pointed out, the expansion of employment regulation in the name of ending racial discrimination was due, ironically, to the victory of civil rights skeptics over civil rights advocates. The latter wanted an empowered EEOC with broad enforcement discretion, while the former opted for enforcement through private litigation, their assumption being that courts were more conservative and would give the Civil Rights Act a narrower interpretation. As part of the compromise leading to the Civil Rights Act's passage, the EEOC was initially given only the power to investigate complaints and to try to solve disputes through conciliation. If that did not work, it could seek the intervention of the attorney general.

Both sides in this debate were operating according to the New Deal paradigm that equated active government with bureaucratic power and restrained government with judicial pushback against administrative agencies. And both were wrong. With the incoming Nixon administration, executive agencies were enfeebled in their enforcement of civil rights, and soon courts began to impute to Congress regulatory intentions that went beyond and often even against the delicate compromises that produced the Civil Rights Act. As demonstrated by the

Supreme Court's 1971 ruling *Griggs v. Duke Power*,[304] which authorized "disparate impact" liability, judges moved from the standard of equal treatment to that of equal outcome in their understanding of what constitutes "discrimination."[305]

What Farhang says about race is more or less true of sex as well. Feminists at first found the EEOC to be unresponsive, if not downright hostile, to claims about sex discrimination in the labor force.[306] In part this was because of sexism, in part because the agency did not want to clash with state over laws that gave protection to female workers (so-called protective legislation), and in part because these clashes might have sapped the agency of the political capital it needed to address the urgent problem of racial discrimination. Indeed, in 1964 women's advocates in Congress had themselves objected to the inclusion of "sex" in Title VII precisely because they feared it would detract from the more urgent problem of race.[307]

Protective legislation—e.g. restrictions on the number of hours women could work or the amount of weight they could be expected to lift in one shift—proved to be the gordian knot of Title VII enforcement in the area of sex discrimination. They were also the crucial backdrop against which the stereotype theory of law emerged. These laws enjoyed a century's worth of explicit constitutional endorsement by the Supreme Court. Since 18723, the first challenge to protective laws under the Fourteenth Amendment,[308] the Court had held that sex classifications in state laws were to be reviewed under the permissive "rational basis" standard of scrutiny, which they invariably survived.[309]

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[304] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[305] Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton: Princeton University Press, 2010), pp. 129-147.
[306] Skrentny, *The Minority Rights Revolution*, pp. 111-119.
[307] *Congressional Record*, note 6 supra, pp. 2581-2582.
[308] *Bradwell v. Illinois*, 83 U.S. 130 (1873).
[309] *Minor v. Happersett*, 88 U.S. 162 (1875); *Muller v. Oregon*, 208 U.S. 412 (1908). In *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) the Court struck down a federal minimum wage law for women using the freedom of

The constitutional revolution that began in the late 1930 and reached its peak in the Warren Court's blows against Jim Crow did not at first apply to sex, Ruth Bader Ginsburg would later argue, because differential treatment of women did not have a "back-of-the-bus" connotation. Protective legislation had generally been understood as a benefit to women.[310] "Many women supported these laws," observes John Skrentny, "because they helped prevent exploitation of working-class women. Others opposed them on the principle that the law should treat women and men equally, and because they believed many laws were passed to eliminate women from job competition."[311] As we shall see, it is no accident that the stereotype theory of law, and the view of equality as (qualified) sameness it assumed, found resonance among members of the professional class, where labor is largely a cerebral affair. In practice, all this meant that Title VII was in conflict, not just with state laws but with decades of Supreme Court jurisprudence.

An agency feeble by design, the EEOC was hesitant during its first few years of its existence to narrow or weaken the BFOQ exception. In 1965 it issued its first rulings on the issue, stating that "an employer cannot justify his refusal to hire women on the basis of assumptions of the comparative employment characteristics of women in general, or stereotyped characterizations of the sexes, or because of his own personal preferences or those of his employees, customers or clients." Applicants had to be considered for the "individual capacities" rather than their group characteristics.[312] But the agency also said that it would "not find any

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contract doctrine from *Lochner v. New York*, 198 U.S. 45 (1905), but later overturned *Adkins* in *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937).

[310] Ruth Bader Ginsburg, "Women's Right to Full Participation in Shaping Society's Course: An Evolving Constitutional Perspective," in Betty Justice and Renate Pore, *Toward the Second Decade: The Impact of the Women's Movement on American Institutions* (Westport: Greenwood Press, 1981), p. 172.

[311] Skrentny, *The Minority Rights Revolution*, p. 95.

[312] Commission Guidelines of 22 November, 1965. Quoted in Jo Freeman, *The Politics of Women's Liberation: A Case Study of an Emerging Social Movement and its Relation to the Policy Process* (New York: D. McKay, 1975), p. 185.

unlawful employment practice where an employer's refusal to hire women for certain work is based on a state law which precludes the employment for such work, provided that the employer is acting in good faith and that the law in question is reasonably adapted to protect rather than to subject them to discrimination."[313] Given the dearth of legislative history, the EEOC pointed out, it was simply not possible to infer that "Congress intended to strike down [protective] legislation."[314] In short, the EEOC did not add much clarity in regard to how the general presumption in Title VII was to be reconciled with the exception. The issue was left to the courts.

What unfolded between 1965 and 1969 was a silent revolution in American jurisprudence. Soon after its creation the EEOC earned the scorn of women's groups and advocates for its unwillingness to act aggressively on women's issues, but women's groups had yet to mobilize to lobby the agency effectively. In 1966 the National Organization for Women (NOW) was created to fill that gap. One year later, after a series of measures that included sending letters with demands to the EEOC, drafting a Bill of Rights for Women in 1967, and picketing across the nation in protest of the agency's allowance of sex-specific employment ads, the EEOC held hearings on, among other things, protective legislation. Between 1968 and 1969 lower federal courts split on whether protective legislation conflicting with Title VII. For example, a district court in Georgia ruled that an employer did not violate Title VII when he refused to hire women for a job that involved repeatedly lifting weights of over 30 lbs., stating that the BFOQ clause "recognizes precisely the situation of the Defendant."[315] But a district court in California ruled that a similar weight-restricting law was not within the scope of BFOQ

[313] Ibid., p. 186.
[314] Commission Guidelines, ibid.
[315] *Weeks v. Southern Bell Telephone & Telegraph Company*

and thus void under the Supremacy Clause of the U.S. Constitution.[316] A number of governors had meanwhile declared their states' protective laws in conflict with federal law and thus void.[317]

In 1969, pressure from the lower courts and from the NOW finally got EEOC to revise its position on BFOQ. It now said that protective laws would no longer be viewed as compatible with Title VII, since the abilities that these laws presupposed in women were overly broad "stereotypes".[318] This opened up space for women's advocates to use stereotype analysis to narrow further and further the BFOQ clause, and to do so without forcing a direct confrontation between the Supreme Court's extant equal protection doctrine and Title VII. Henceforth, the question was not whether men and women were different, but rather which differences were relevant to employment and which were mere "stereotypes." This marked a victory for NOW, which was focused on promoting the race-sex analogy and its constitutional codification in the Equal Rights Amendment.[319]

But what exactly *is* a stereotype, and what distinguishes it from a reasonable generalization about men and women? Are statistically accurate generalizations legitimate grounds for employers to restrict their applicant pools or create differential pension schemes? What criteria should the courts and the EEOC use in assessing whether a generalization is reasonable and when it is based on outmoded beliefs? In short, what constraints were there on civil rights institutions, now that the vague notion of "stereotype" could be used to ban practices that lawmakers in 1964 either did not intend to prohibit or gave no thought to whatsoever?

According to Mary Ann Case, over time, courts came, in practice if not in theory, to define stereotypes as any generalization that is not true in one hundred percent of cases, in other

[316] *Rosenfeld v. Southern Pacific Company*, 293 F. Supp. 1219 (C.D. Cal. 1968).
[317] Freeman, *The Politics of Women's Liberation*, p. 187.
[318] Commission Guidelines of 19 August, 1969. Quoted in Ibid.
[319] Skrentny, *The Minority Rights Revolution,* p. 119.

words not a "perfect proxy." To escape the label "stereotype," a sex-respecting rule would have to be "true of either all women or no women or all men or no men; there must be a zero or a hundred on one side of the sex equation or the other."[320] That does not mean, of course, that courts *did* strike down every such rule, whether in legislation or in employment practices; at times they held that a rule *was* a perfect proxy, even if in Case's opinion it was not. Nevertheless, if Case is correct, then the distinction between reasonable generalization and stereotype evaporates, for a generalization is, almost by definition, an imperfect proxy. And this in turn meant that the law of sex discrimination, guided by stereotype theory, would become the statutory equivalent of "strict scrutiny." The gender-neutral society was just over horizon.

Policy making almost always involves making educated guesses and predictions based on imperfect knowledge. Regulation is impossible without making generalizations. And the same could be said for employers: it is in the interest of the employer to make particularized judgments about applicants or candidates for promotion, but given time and resource constraints generalizations inevitably enter the picture. Walter Lippmann, from whom we get the word "stereotype" in its contemporary use, understood well that, especially in a sprawling, dynamic and diverse society, the human mind cannot help but rely on mental shortcuts. That is why he thought that stereotypes are an inevitable fact of life, albeit one that can be managed with the proper techniques of information control.

The matter is quite different when courts are the arbiters of stereotypes. The obvious reason for this is institutional: courts are reactive institutions that adjudicate disputes put before them by two litigants. There is no guarantee that the litigants will be representative of the universe of cases they claim to represent. In fact, in lawsuits that challenge policies based on

[320] Case, "The Very Stereotypes," pp. 1449-1450.

generalizations, it is likely that one of the sides to the lawsuit will be most unrepresentative, since otherwise the dispute would not have arisen in the first place. This sounds abstract, and we will have occasion to this this in detail when we discuss *United States v. Virginia* below. For now, the point is simply that if stereotype analysis implies something akin to "strict scrutiny," in which a court invalidates a law or policy because it is not "narrowly tailored" to a "compelling interest," then the fact that courts are institutionally inclined to look at policy through the lens of the exception is revealing and important. For feminists like Mary Ann Case who support aggressive judicial review of sex-respecting rules and of sex-neutral rules that have a disparate effect on women, this is a very good thing. A dynamic, I have argued, is also on display in the transgender regulatory context, when courts and agencies use the exception of intersexuality to invalidate biological sex as an overly broad generalization. The origin of this is both ideological and institutional.

Sex discrimination law thus followed a path different from that of race discrimination law.[321] The Civil Rights Act of 1964 marked an effort by Congress to give enforcement teeth to the Warren Court's interpretation of the Equal Protection Clause. The addition of "sex" to Title VII, by contrast, was unsupported--indeed contradicted--by existing constitutional doctrine, but once added, it paved the way to an eventual reversal of that doctrine.

During the 1970's, the federal judiciary expanded the regulatory reach of the civil rights laws passed by Congress a decade earlier. Part of the reason for this is that "judges tend to be more adventuresome in their interpretation of statutes than in their interpretation of the Constitution."[322] But another reason was that both houses of Congress passed the Equal Rights

[321] This part of my argument is not original. See e.g. George A. Rutherglen, *Employment Discrimination Law, Theories of Equality in Theory and Doctrine* (St. Paul: LEG, Inc., 2017), p. 119 and context.
[322] R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Washington, D.C.: Brookings Institution, 1994), pp. 36-38.

Amendment by between 1971 and 1972, respectively, and this provided the Burger Court's liberal wing, led by Justice William Brennan, confidence in its use of stereotype analysis to grow sex discrimination doctrine at a more aggressive pace. Title VII thus provided feminists and their allies in the legal profession with a powerful tool to chip away at existing legal structures without challenging those structures directly. By the time the Supreme Court handed down *Reed v. Reed*,[323] inaugurated its equal protection about face, stereotype analysis had already gained a crucial foothold in federal law.

II: Ginsburg and the Constitution

When Ruth Bader Ginsburg co-founded the Women's Rights Project as a subdivision of the ACLU in 1972, she had one goal above all others: to get five justices of the Supreme Court to agree that sex classifications should be reviewed at the same level of scrutiny as racial ones. A year earlier the Court signaled its willingness to revisit its century-old jurisprudence when, in *Reed v. Reed*, it held that an Idaho probate code that designated men as the automatic administrators of estates in case of death in the family could not even meet the minimal requirements of bearing a "rational" relationship to a government objective. Ginsburg wrote the brief on behalf of the plaintiff, Sally Reed. That year the Court had also agreed to hear--although it never did end up hearing--a case called *Struck v. Secretary of Defense*,[324] for which Ginsburg also submitted an amicus brief.

Both briefs are noteworthy for their heavy reliance on non-legal analysis. Ironically, Ginsburg was using Brandeis-brief tactics to dislodge a jurisprudence that was secured through

[323] *Reed v. Reed*, 404 U.S. 71 (1971).
[324] *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971).

the original Brandeis brief.[325] *Struck* is especially noteworthy because in that brief Ginsburg develops her argument that sex classifications rely on stereotypical notions about men and women. The case dealt with a female Air Force officer who, after learning she was pregnant, was given the choice of leaving the service or aborting the fetus. In Ginsburg's view, this constituted sex discrimination in the clearest sense, for there was really no relevant difference between pregnancy and any other "physical conditions occasioning temporary disability" like breaking one's leg. The Air Force did not require other "temporarily disabled" personnel to leave the service, Ginsburg pointed out, and so there was "no rational explanation" for its pregnancy policy other than "the long-discredited notion that a woman who becomes pregnant should be confined at home to await childbirth and thereafter devote herself to childcare."[326]

Here, in a nutshell, was Ginsburg's thesis on the relationship between sex--or as she preferred to call it, gender--and the Constitution. Because some of the cases Ginsburg took on as part of her strategy to engineer a doctrinal reversal involved male plaintiffs, it is sometimes said that her understanding of equal protection was formalistic or anticlassificationist--that is, that sex classifications were, in her view, wrong as such. But as Neil Siegel and Reva Siegel have shown,

[325] The Brandeis Brief was written by then-legal advocate Louis D. Brandeis in support of the state of Oregon's protective labor law. Progressive women's advocates, including Josephine Lowell, who was Brandeis' sister-in-law, supported the state in the lawsuit. Brandeis argued the case before the Supreme Court. *Muller v. Oregon*, 208 U.S. 412 (1908).

[326] Ruth Bader Ginsburg, Brief in Support of Plaintiff, *Struck v. Secretary of Defense*, pp. 14-17. One can learn a lot from this analogy about Ginsburg's views on the meaning of equality. Is breaking one's leg like having a child? One does not incur responsibilities to another human being by virtue of breaking one's leg. Thus, for the Air Force to take those responsibilities into account in crafting its employment policies is not as ridiculous as Ginsburg seems to imply. Another possible equal protection argument would have been that in the name of equality, the Air Force should give *both parents* the choice between service and parenthood. Instead, Ginsburg argued that women should be treated as if they are men, in other words, as if they are being who are independent from the consequences of their sexual choices. As to the "long-discredited" comment, as we saw from our survey of the intersex and gender identity literature in the law reviews, it is a common tactic of progressive reformers to describe as accomplished fact and consensus a relatively controversial and even radical (though perhaps emerging) view they wish to oppose. The notion that women who bear children should be responsible for raising them was hardly "long-discredited" (even among women's advocates) in 1972. More on this in the pages below.

Ginsburg's theory of equal protection is better described as anti-subordination, an approach to civil rights law that she is often credited with having helped to develop.

In the racial context, the anticlassification or colorblind approach is captured most famously captured in Chief Justice Roberts' pithy remark in *Parents Involved in Community Schools v. Seattle School District No. 1* that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Antisubordination, in contrast, holds that classifications are neutral in themselves, but become invidious or benign in light of the social and historical context in which they are made. The distinction between these two approaches can therefore also be referred to as discrimination versus *invidious* discrimination. Although these labels reflect to some extent a perspective sympathetic to the latter of each pairing,[327] they are accurate enough and will do for our purposes.

In Ginsburg's view, sex classifications like the ones that underwrote most state protective labor laws were *ostensibly* about valorizing women as mothers and wives, but *in practice* limiting women's options to domestic sphere activities. And this was wrong, she thought, because at least some women have talents and abilities that they could not reasonably expect to cultivate, let alone realize, in a domestic role. She called sex classification "sex-role pigeonholing." The metaphor is revealing. It underscores the extent to which Ginsburg understands equality as self-actualization, to use a watchword of the time. There is a direct line

[327] Are advocates of a colorblind notion of discrimination not against invidious distinctions? Do they not think that classifications also subordinate? The question, of course, is which what kind of distinction is invidious, and whether there can actually be a classification that is non-subordinating. One problem with the antisubordination approach is that it implicitly calls upon government officials to exercise discretion and judgment about who qualifies for special treatment, under what circumstances, and against what limits. One might think that there is no guarantee that such a tool will be used only by the right people and in the right way—but this does not seem to be the view of those in the legal profession who support antisubordination, perhaps a reflection of the symbiotic relationship that has developed between the civil rights state and the legal academy.

that leads from Ginsburg's notion of "pigeonholing" to Chai Feldblum's argument that antidiscrimination law guarantees individuals "the right to define one's own concept of existence."[328] The purpose of sex discrimination law, in this view, is not merely to eliminate officials barriers of "opportunity," but to use government to liberate the individual from all manners of dependence on others.

When Ginsburg argued that women should have "the right to full participation in shaping society's course," her assumption was that women could not "shape society's course" if they were required or even encouraged by social institutions to be mothers and wives. Ginsburg thus accepts the separate-sphere logic of liberalism, which states that that which goes on in the home is "private" and not part of the *res publica*. It is worth pausing to reflect on how this put her at odds, not simply with male defenders of patriarchy, but with women reformers in the earlier part of the century and with some women in her own day.

As Theda Skocpol has shown in her study of early twentieth-century social movements, progressives at the turn of the century worked diligently to create a "maternal welfare state" in which the ethos of "separate spheres" for men and women would be injected in the public realm and codified in law.[329] This was part of a broader intellectual reimagining of the relationship between the individual and the collective. In contrast to classical liberalism, which envisions the individual as a natural entity who exists prior to civil society and who possesses by nature rights that put him in conflict with society's needs and demands, progressives conceived of the individual as an emanation of the collective and its institutions. "The old idea of natural rights postulated the particularist individual," wrote Mary Parker Follet, but "we know now that no

[328] Chai Felblum, "The Right to Define One's Own Concept of Existence": What Lawrence Can Mean for Intersex and Transgender People," 7 *Georgetown Journal on Gender and Law* 115 (2006).
[329] Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Belknap Press, 2009), Ch. 6.

such person exists. The group and the individual come into existence simultaneously." Progressives saw the collective, even the state, as the unit of historical progress. Thus, for Follett, "a true definition of liberty" is one that stresses the needs of the collective, since "I have no liberty except as an essential member of a group." In Rousseauan fashion Follett insisted that "to obey the group which we have helped to make and of which we are an integral part is to be free because we are then obeying our self."[330]

It was in this context that women reformers argued for protective legislation, justifying "separate sphere" laws as "in the moral best interest of society as a whole."[331] Indeed, even the demand for the right to vote was, for many women, subordinated to the larger and more important goal of ensuring that the government import maternalistic considerations into its policies.[332] "[S]ane and balanced progress," wrote Jane Addams, requires that "all points of view… be represented." If men alone were to preside over "the administration of our civic affairs," then the "American city will continue to push forward in its commercial and industrial development, and continue to lag behind in those things which make a City healthful and beautiful. After all, woman's traditional function has been to make her dwelling-place both clean and fair."[333] Paradoxically, then, the aggressive confinement of women to domestic life coincided with a flourishing of women's social and political mobilization.

Ginsburg's call for "women's right to full participation in shaping society's course" is thus somewhat an exercise in question begging. At issue between her and those who helped to frame the laws she opposed was not whether women should have a right to participate in shaping

[330] Mary Parker Follett, *The New State, Group Organization the Solution of Popular Government* (New York: Longmans, Green and Co., 1923), p. 138.
[331] Skocpol, *Protecting Mothers and Soldiers*, p. 318.
[332] Ibid., p. 319.
[333] Jane Addams, "Why Women Should Vote," *Ladies' Home Journal* 27 (1910).

society's course, but how women should do so and what course society should take. Do social institutions exist in in order to facilitate the flowering of individual talents and capacities, as Ginsburg argued? Or was the emphasis to be put more on the needs of the collective, and the individual's duties and rights inferred therefrom? Are women's roles as mothers and wives incidental to their "full participation" or an essential element of it? The stereotype theory of law is best thought of as part of an internal rift within feminism. According to Eileen McDonagh, "by emphasizing the political salience of women's maternalistic identities," women "reinforced a social construction of motherhood as a rationale for political citizenship." This same rationale would extend later in the century to other forms of public participation, including employment. And in McDonagh's view, women would eventually "pay dearly" for their use of "maternalistic reasoning" as a ground for female enfranchisement and public participation.[334]

Ginsburg's feminism is in the general spirit of John Rawls' *Theory of Justice*,[335] published around the same time she wrote her *Struck* and *Reed* briefs. According to Rawls, the individual whose rights are of paramount concern to the liberal state is an entity abstracting away from any particular attachments, roles and interdependencies that normally saturate and structure human life. Rawls' famous heuristic device, the "veil of ignorance," calls on us to imagine ourselves as rational and disinterested agents with no knowledge of our own individual characteristics or social roles.[336] The principles of justice must be ones that all individuals in this condition would agree to. Rawls, however, was criticized by feminists for his "neglect of gender." The individuals behind the veil of ignorance are, in his account, also (predominantly

[334] Eileen McDonough, "Race, Class, and Gender in the Progressive Era: Restructuring State and Society," in Sidney M. Milkis and Jerome M. Mileur ed., *Progressivism and the New Democracy* (Amherst: University of Massachusetts Press, 1999), pp. 166-167.
[335] John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971).
[336] Ibid., pp. 136-142.

male) heads of household,[337] which guarantees that they will exhibit intergenerational concern. For his feminist critiques, this means that the webs of dependence that exist within the family are not properly the subject of justice.[338] Ginsburg, too, makes a claim of this sort when she insists that the consequences of men's and women's biologically differentiated natures must be part of and not presupposed by "equal protection of the laws." But her position is still Rawlsian in that it simply tries to add one (admittedly crucial) human characteristic to the baggage left behind in the original position abstraction. Our biological natures *may* play a role in our "self-actualization" or our effort to devise a "life plan," but only if freely chosen under conditions of what Rawls calls "fair equality of opportunity."[339]

Ginsburg herself credits two intellectual currents for helping to shape her thinking about sex equality: "Mill and the Swedes."[340] The reference is to John Stuart Mill and his wife Harriet Taylor, and the women's movement in Sweden, where Ginsburg spent a year doing research in 1962. Mill's *Subjection of Women* was a must-read in 1960's feminist intellectual circles.[341] Its thesis can be broken down into four claims: that women are subordinated to men socially and legally; that this subordination operates in the name of nature, that is, on the basis of a belief in women's natural character as worthy of domestication and subjection; that what society takes for natural may actually be the consequence of centuries of social conditioning (hence we cannot

[337] Ibid., p. 128, 289, 292. The requirement that the individuals behind the veil of ignorance think of themselves as (potential) "fathers" is to ensure concern for individuals of future generations, which would preclude any claims to superior desert of one generation over the next.
[338] See e.g. Jane English, "Justice Between Generations," *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* Vol. 31, No. 2 (Feb., 1977), pp. 91-104; Susan Moller Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989), Ch. 5.
[339] Rawls, *Theory of Justice*, pp. 83-89.
[340] Letter from Ruth Bader Ginsburg, Professor, Rutgers Univ. Sch. of Law, to Jamison Doig, Professor Emeritus of Politics & Int'l Affairs, Princeton Univ, (Apr. 6, 1971). On file with the Library of Congress, Ruth Bader Ginsburg Papers, container 5, folder "Moritz v. Comm'r May 1971."
[341] Cary Franklin, "The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law," 85 *New York University Law Review* 83, 92-93 (Apr., 2010).

know what is natural and what is artificial about male and female character); and finally, that the subordination of women is a hindrance not just to women, but to society itself and its ability to progress to a higher stage of civilization.[342]

For Mill, liberalism had to move beyond its initial stage, where its goal was to establish that political authority was not natural and that its legitimate exercise came with limitations imposed in the name of natural rights. The chief threat now, Mill thought, came not so much from overbearing ruler who existed independently from and in antagonism with "the people," but from the notion that "the people," an entity that now ruled through its representatives, had no need to place limits on itself.[343] The challenge for political theorists was thus "where to place the limit… between individual independence and social control,"[344] between genuine freedom and subordination to public opinion. *Subjection* is meant to demonstrate this problem in a very important area of human life: the relation between the sexes. Mill is not an opponent of hierarchies as such, but only of arbitrary ones. A hierarchy that results from natural distribution of capacities need not be arbitrary, but a hierarchy that assumes the natural inferiority of one sex, where the individual qualities that support this inferiority are themselves socially produced, is arbitrary. Thus, "unnatural generally means only uncustomary, and… everything which is usual appears natural. The subjection of women to men being a universal custom, any departure from it quite naturally appears unnatural."[345] We "believe that the tree grows of itself in the way they have made it grow, and that it would die if one half of it were not kept in a vapour bath and the other half in the snow."[346]

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[342] John Stuart Mill, *The Subjection of Women* (Mineola: Dover, 1997).
[343] John Stuart Mill, "Introductory" from *On Liberty*, in Geraint Williams ed., *Utilitarianism: On Liberty, Considerations on Representative Government, Remarks on Bentham's Philosophy* (London: J. M. Dent and Tuttle, 1972).
[344] Ibid., p. 73.
[345] Mill, *Subjection*, p. 12
[346] Ibid., p. 21.

The problem for human freedom in the modern world, then, is the interpretation of convention as nature. For the ancient Greeks, the way of the world had a mystical character to it, as the gods were thought to operate within and behind the scenes of the human world. The philosopher's appeals to nature thus called into question the existing order. In the modern world, nature seems to have attained the status of a final authority, but it has become badly distorted, indeed itself a prejudice. Mill does not go as far as later philosophers like Nietzsche in saying that "nature" *is* a convention. Rather, his more modest point is that what we think is natural may not be so. Pace some of his feminist readers, Mill takes the more modest position that until women are free to cultivate their individuality on the same terms as men, we simply cannot know what is natural or unnatural about the sexes, and thus whether hierarchies between men and women are natural and just. In other words, Mill denies "that any one knows, or can know, the nature of the two sexes, as long as they have only been seen in their *present* relation to one another… What is *now* called the nature of women is an eminently artificial thing—the result of forced repression in some directions, unnatural stimulation in others."[347] Such sentiments do not exclude the possibility that women may by nature be dependent on--and thus subordinate to--men, though Mill seems privately to doubt this.

If mistaking convention as nature is one problem emphasized in *Subjection*, the other is what we might call the opportunity cost to society. Mill is, of course, well known for his "harm principle," the anti-paternalistic idea that the only legitimate exercise of authority over the individual is to prevent harm to a third party.[348] But it is not only the individual who benefits from this conception of liberty; the advantage accrues to society as well. Mill asks, "what is the peculiar character of the modern world, the difference which chiefly distinguishes modern

[347] Ibid., pp. 20-21.
[348] Mill, *On Liberty*, p. 78.

institutions, modern social ideas, modern life itself, from those of times long past? It is, that human beings are no longer born to their place in life, and chained down by an inexorable bond to the place they are born to, but are free to employ their faculties, and such favourable chances as offer, to achieve the lot which may appear to them most desirable."[349] "The modern conviction… is, that things in which the individual is the person directly interested, never go right but as they are left to his own discretion… This conclusion, slowly arrived at, and not adopted until almost every possible application of the contrary theory had been made with disastrous result, now (in the industrial department) prevails universally in the most advanced countries, almost universally *in all that have pretensions to any sort of advancement*."[350] The good of the individual and the good of the community are one: "freedom of individual choice is now known to be the only thing which procures the adoption of the best processes, and throws each operation into the hands of those who are best qualified for it."[351]

Mill is, of course, anticipating and in many ways laying the theoretical foundations for what today is known as "meritocracy." And that, it seems to me, is the major philosophical thrust of Ginsburg's position as well. According to the meritocratic ethos, the unleashing of individual talents, through the gradual erosion of tradition, in a situation of free and open competition ("equal opportunity") redounds to the benefit of society.

As aversion to talk of interests grew in American political discourse after the 1960's,[352] an implicit taboo of the meritocratic ethos became any mention of the personal interests of those rise to the top. Consider, for example, Ginsburg's defense of racial affirmative action: "Pursued

[349] Mill, *Subjection*, p. 16.
[350] Ibid., p. 17.
[351] Ibid.
[352] James Q. Wilson, "American Politics, Then and Now," in *American Politics, Then and Now, and Other Essay* (Washington, D.C.: AEI Press, 2010), pp. 3-18.

with intelligence and good faith, affirmative action should ultimately yield neither a pattern of 'reverse discrimination' nor abandonment of the merit principle. On the contrary, it should operate to assure more rational utilization of human resources."[353] In the wake of *Regents of the University of California v. Bakke*,[354] as "diversity" became the fighting creed of meritocratic elites (who see no real threat to their class position from "diversity"),[355] the economic progressivism of the New Deal was gradually abandoned. Progressivism made its peace with economic hierarchies and inequalities, on the condition that the way to the top be open to those once excluded. Ginsburg's feminism is as good an illustration as one can find of the emerging meritocratic ethos. It rarely if ever speaks of interests (especially those of women who stood to benefit from "equal protection"). It takes for granted that society will on the whole be served by the relegation of the duties of motherhood to the realm of "lifestyle" and choice. And it sings in a distinctively professional class accent.

Ginsburg's use of "stereotype" is a short-hand for the intellectual threads discussed above. To stereotype means, roughly, to mistake convention for nature in way that deprives both the individual of freedom or self-actualization,[356] and society of its ability to maximize its human resources. Although "stereotype" was already in circulation by the time Ginsburg began to deploy it, in her hands it received greater theoretical clarity and moral urgency. In effect, by deploying the argument about stereotypes in constitutional litigation Ginsburg was urging the Court to play catch up with where Title VII jurisprudence had already been heading.

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[353] Ginsburg, "Gender and the Constitution," p. 30.
[354] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)
[355] There is a fair amount of writing on this topic, but a good example is Thomas Frank, *Listen, Liberal: Or, What Ever Happened to the Party of the People?* (New York: Metropolitan Books, 2016).
[356] The connection between stereotyping and freedom as opposed to (formal) equality is discussed in a rather illuminating way in Anita Bernstein, "What's Wrong with Stereotyping?" 55 *Arizona Law Review* 655 (2013). Bernstein suggests thinking about stereotypes as prohibited under the Thirteenth Amendment to the U.S. Constitution.

Reed v. Reed was a disappointment to feminists who were expecting the Court to take a bolder stance on sex classifications. The disappointment was short-lived, for two years later, in *Frontiero v. Richardson*, the Court declared that sex was "like race" and therefore warranted the same degree of judicial scrutiny. In 1976 the Court reversed course again, this time coming up with a standard more demanding than "rational basis" review but not quite a searching as "strict scrutiny," which it called "intermediate scrutiny." Yet even this was arguably not to last, for as we will see, in *United States v. Virginia* (1996) the Court,[357] in an opinion authored by Justice Ginsburg, struck down a sex classification that was statistically true as a generalization but not what Mary Ann Case would call a "perfect proxy." The Court's two and a half decades of wavering back and forth on what degree of scrutiny is appropriate for sex classifications illustrates the hesitations of all but the most committed feminists in concluding that sex, like race, is always an irrelevant basis for distinctions.

The case that established "intermediate review," *Craig v. Boren*,[358] is remarkable for the exchange that took place between Justice William J. Brennan, Jr., who wrote the opinion of the Court, Justice John Paul Stevens, who wrote a concurrence, and Justice William Rehnquist, who dissented, regarding the concept "stereotype." The case dealt with an Oklahoma state law that differentiated between men and women in regard to the sale of alcohol. Licensed vendors could sell to women from age 18, but to men only from age 21. The state's rationale was that because men are more likely than women to drink and drive, they constitute a more serious risk to public safety. According to Brennan, in order to pass constitutional muster a sex classification must serve some "important government objective," public safety being acceptable in this case, and be "substantially related" to that objective, which the Oklahoma law was not. The statistical

[357] *United States v. Virginia*, 518 U.S. 515 (1996).
[358] *Craig v. Boren*, 429 U.S. 110 (1973).

disparities between men and women in regard to drinking and driving—0.18% of female versus 2% of males in the 18-21 age group—were not significant enough, Brennan said, to meet this threshold. Sex was simply not a good enough proxy for predicting behavior.

Brennan denounced the state's statistical analysis as resting on stereotypes. "The very social stereotypes that find reflection in age differential laws are likely substantially to distort the accuracy of these comparative statistics. Hence 'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home."[359] Justice Stevens, who only five years earlier as a judge on the Seventh Circuit Court of Appeals said he could not "find any guidelines in the language of [TitleVII] for differentiating between irrational stereotypes and reasonable requirements,"[360] now appeared to think that "drawing such lines" was the Court's most urgent task. "I would not be surprised," Stevens mused, "if [the Oklahoma law] represented nothing more than the perpetuation of a stereotyped attitude about the relative maturity of the members of the two sexes in this age bracket."[361]

On the one hand, Brennan's and Stevens' claims about stereotypes are not implausible, though it is not clear what empirical evidence supported their skepticism of the state's statistical analysis. On the other hand, as Justice Rehnquist points out in his dissent, neither argument is wholly convincing. Regarding Brennan's, perhaps the Court did not find Oklahoma's statistical analysis compelling, but other statistics could have been invoked to support the state's policy. For example, "over the five-year period from 1967 to 1972, nationwide arrests among those under 18 for drunken driving increased 138%, and… 93% of all persons arrested for drunken driving were male."[362] While most men do not drink and drive, the vast majority of people who

[359] Ibid., at 202 ff. 14.
[360] *Sprogis v. United Airlines Inc.*, 444 F.2d 1194 (7th Cir. 1971), Stevens dissenting, at 1205-6.
[361] *Craig v. Boren*, J. Stevens concurring in judgment, at 214 ff. 2/2.
[362] Ibid., J. Rehnquist dissenting, at 223.

drink and drive are in fact men. As for Stevens' claim about normative stereotypes, "if stereotypes are as pervasive as the Court suggests, they may, in turn, influence the conduct of the men and women in question, and cause the young men to conform to the wild and reckless image which is their stereotype."[363]

Part of the problem is that the *Boren* Court never defined what it meant by stereotype. Just what distinguishes a stereotype from a reasonable generalization? After all, does not Brennan tacitly concede in his questioning of the statistical analysis that whether sex classifications are based on stereotypes is an empirical question, a question of where, statistically speaking, to draw the line? But where indeed? If a ratio of 11:1 (male-to-female drunk drivers) is not statistically significant, what about 15:1 or 20:1 or 50:1? More importantly, *who gets to make that decision*? Rehnquist's point appears to be this: policymaking always requires reliance on imperfect generalizations, and precisely for this reason it is necessary that policy choices be made at the level of the more representative institution. When Rehnquist says that "a legislature, in enacting a new law, is [not] to be subjected to the judicial equivalent of a doctoral examination in statistics,"[364] he does not mean only that judges are not technically competent to conduct such an "examination," but more importantly that it is legitimate for a legislature to fail one.

Did the Burger Court have an intelligible criterion for distinguishing a reasonable sex classification from a stereotype, or was its approach "I know it when I see it"?[365] Does the matter come down to the empirical accuracy of a generalization? Or is it the message sent by the generalization, irrespective of the degree to which it accurately characterized men or women?

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[363] Ibid., at 224.
[364] Ibid.
[365] The reference is, of course, to Justice Potter Stewart's famous test for distinguishing Constitutionally protected obscenity from "hard-core pornography." *Jacobellis v. Ohio*, 378 U.S. 184 (1964), J. Stewart concurring, at 197.

And if the message is what matters, how should the Court interpret that message when it can point in two different directions (as we see from Rehnquist's critique of Stevens' position)?

These matters would remain fundamentally unclear for the next two decades. Intermediate scrutiny would come under criticism from feminists like Ginsburg who thought the standard was too lax and from conservatives who thought it too stringent. Then again, the rationale behind the three-tier system of equal protection review has itself come under criticism, some arguing that it is hopelessly vague, others that it is applied inconsistently and according to the political inclinations of judges.[366] The difficulty of spelling out the difference between an "important" government interest versus a "compelling" one, and of means that are "substantially related" to a goal versus "narrowly tailored," is, according to some critics, an invitation for what Justice Antonin Scalia has called "Supreme Court peek a boo."[367] These deeper difficulties will be seen with greater clarity when we discuss *United States v. Virginia* (the source of that quote).

III: "I Know It When I See It"

Before we turn to that opinion, it would be helpful to say a few more things about the concept "stereotype" and about the Title VII anti-stereotyping trajectory that culminates in the Supreme Court's 1989 decision, *Price Waterhouse v. Hopkins*. This case is considered "the most

[366] The latter, as we noted earlier, is the position of Mary Ann Case ("Perfect Proxy"), but also of Justice Antonin Scalia, as we will see momentarily in *United States v. Virginia*. Critics of affirmative action argue that federal courts (including the Supreme Court) have allowed too much latitude for universities to use race as a "plus factor," effectively transforming what should be a "narrow tailoring" to a quota system by other means. On the opposite side of the political spectrum, Sonu Bedi, a firm proponent of the antisubordination approach to equal protection, has argued that the Court's strict scrutiny is not strict enough with regard to *class* (that is, not critical enough of classifications that, in Bedi's opinion, hold groups in subordination to other groups), but too strict with regard to classifications (that is, too inflexible in allowing governments to pursue affirmative action). Sonu Bedi, "Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough," 47 *Georgia Law Review* 301 (2013).

[367] *United States v. Virginia*, J. Scalia dissenting, at 574.

influential judicial condemnation of stereotypes to date,"[368] and has become the legal foundation for the transgender rights movement.

Title VII is potentially implicated not only when there are overt preferences for men as a group over women as a group. Some of the trickier scenarios involve distinctions within the category of men or women where sex is not technically the proxy but still assumed to have relevance (e.g. a no-pregnancy rule), or facially neutral policies that have some disparate impact on one sex versus the other (e.g. an employer hiring only combat veterans). Since sex is not technically a qualification of employment in these scenarios, the applicability of BFOQ and of Title VII generally in these situations has been more controversial. And it is precisely in these situations that courts have drawn--though not necessarily explicitly--on Ginsburg's thesis on the connection between stereotypes, qualifications and expectations surrounding female maternalism and domesticity.

In a per curium opinion in 1971, the Supreme Court adopted as its official interpretation of BFOQ the EEOC's 1968 guidelines, which declared sex-based qualifications as presumptively stereotypical. *Phillips v. Martin Marietta Corporation* was the Court's first mention of "stereotypes" in the sexual context.[369] The defendant had a policy of not hiring women with school-age children, even though it hired men with children of that age. The employer claimed that it hired more women than men for the same position, but this, the Court said, was immaterial, since the exclusion of mothers was a sex-related requirement that did not meet the BFOQ standard. *Phillips* was for sex what *Griggs v. Duke Power* was for race: a turning point in which the Court interpreted Title VII against the grain of the 88th Congress.

[368] Anita Bernstein, "What Wrong with Stereotyping," p. 661.
[369] *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971).

The Seventh Circuit resolved a similar dispute in a similar way a few months after *Phillips*. In *Sprogis v. United Airlines Inc.*, the defendant had a policy wherein the employment category of flight attendant was open to women only, but provided they were not married. What made this case different from *Phillips* was that no men were hired for the flight attendant role. This allowed United to assert that its no-marriage policy was a restriction that operated within a policy that was otherwise favorable to women. United Airline's position was that it was not drawing a line between the sexes, but rather between members of the same sex. It stated as the rationale for its no-marriage rule that it had received complaints from husbands about the long hours and irregular schedules of their wives. The court rejected United's BFOQ defense and ruled in favor of the plaintiff, Mary Sprogis. In a sentence that would reverberate for decades to come, Judge Walter Cummings announced 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."[370]

The exact grounds of the Seventh Circuit's decision remain somewhat elusive. On the one hand, it seemed to suggest that United Airlines could have fulfilled its legal obligations simply by treating each applicant or employee as an individual, rather than as a member of a group. On the other hand, the court also said that BFOQ does not cover policies based on "irrational stereotypes," thus insinuating that United's was unlawful as such, and no particularized judgment would do. Was the no-marriage requirement an "irrational stereotype" and thus illegitimate in and of itself, or was the airline's policy wrong because it was applied without regard to individual circumstance? The court seemed to indicate both as grounds for its

[370] *Sprogis v. United Airlines Inc.*, at 1198.

decisions, but in doing so, it failed to provide complete analysis of either. That, at least, is the impression one gets from reading the dissent of John Paul Stevens.

According to Stevens, the court's method of analysis put the cart before the horse. Logically, before the BFOQ defense comes into play, plaintiffs must first show a (prima facia) case of discrimination "because of sex." And this in turn means demonstrating that the plaintiff would have been treated differently "but for" her sex. Yet, had a Mr. Sprogis applied for the job, he would have been rejected outright. The court was not alone in this reversal of burdens of proof. As Stevens pointed out, the EEOC had withheld its judgment about the case for two years, insisting that whether United's policy was lawful depended on the prior question of whether the no-marriage rule was, in and of itself, a "reasonable qualification." Such a construction of Title VII, Stevens thought, was simply "untenable," for it imposes on employers the burden of anticipating and meeting legal allegations *before* and *as a sufficient condition of* a showing of discrimination because of sex. In short, it was not "because of sex" that Mary Sprogis was fired, but because of her status as married. And although Judge Stevens agreed that this policy may be unwise and even unfair, there was nothing to suggest that it was in violation of Title VII.

Stevens' dissent is noteworthy not just for its discussion of the regulatory consequences on employers. He also raises deeper questions about the scope and limitations of judicial authority. "As a matter of policy," wrote Stevens,

> the majority's view may not only be contemporary but also wise. I am unable, however, to find any guidelines in the language of § 703(a)(1) for differentiating between irrational stereotypes and reasonable requirements. Even assuming *arguendo* that great deference should be accorded to the Equal Employment Opportunity Commission, I do not believe Congress intended to entrust the Commission with authority to draw such lines. In the long run, I believe justice will be served and the objectives of the legislation best accomplished by applying the simple comparative standard suggested by the language of the statute. The benefits of an objective standard will be shared by those enforcing the statute and those faced with problems of compliance.[371]

[371] Ibid., J. Stevens dissenting, at 1205-1206.

Sprogis illustrates that Ginsburg's understanding of sex discrimination was already in play in Title VII jurisprudence by the time the Supreme Court revised its equal protection doctrine. After all, the *Sprogis* court's basic argument was that the purported advantage that women had over men in eligibility for employment at United Airlines as flight attendants was really a disadvantage, since it reflected "stereotypes" about women's place in society. Stevens' dissent expresses, if not an explicit endorsement of the anticlassification approach to discrimination, then at least a reservation about the institutional and constitutional implications of antisubordination. What made judges authorities on when employment requirements or the assumptions behind them are "irrational stereotypes"?

Let us now broaden the discussion and ask: just what *are* stereotypes? The word itself comes from the world of printing; the first American court case to mention stereotypes involved copyright infringement.[372] Stereotype is a conjunction of *stereos*, which is Greek for "solid," and *typos*, or mold. To stereotype individual human beings is to fail to see what makes individuals unique and different from one another. It is somehow to "reduce"--the word is important--the individual to a particular trait, one that may have no control over, and one that society holds in low esteem. Walter Lippmann gave "stereotype" its modern meaning in his famous 1922 study *Public Opinion*.[373] "We do not see first and then define," Lippmann writes, "we define and then see." To make sense of the "blooming, buzzing confusion of the outer world we pick out what our culture has already defined for us, and we tend to perceive that which we have picked out in the form stereotyped for us by our culture."[374] Lippmann is echoing a point made almost a century earlier by Alexis de Tocqueville about the limitations of human intelligence, particularly

[372] *Callaghan v. Myers*, 128 U.S. 617 (1888).
[373] Walter Lippmann, *Public Opinion* (New York: Macmillan, 1922).
[374] Ibid., p. 81.

among a people as practical and as democratic as Americans. "There are uniformities sufficiently accurate," writes Lippmann, "and the need of economizing attention is so inevitable, that the abandonment of all stereotypes for a wholly innocent approach to experience would impoverish human life."[375] But stereotypes are not simply mental shortcuts. They are "an ordered, more or less consistent picture of the world, to which our habits, our tastes, our capacities, our comforts and our hopes have adjusted themselves. They may not be a complete picture of the world, but they are a picture of a possible world to which we are adapted. In that world people and things have their well-known places, and do certain expected things. We feel at home there. We fit in. We are members. We know the way around."[376] Stereotypes are a "guarantee of our self-respect" because they are a "projection upon the world of our own sense of our own value, our own position and our own rights." Stereotypes are "the fortress of our own tradition."[377] None of this means that Lippmann was a conservative defending tradition, but it did show his understanding of the problem and perhaps the impossibility, given the inherent limits of human intelligence, of a perfectly "individualized understanding" of the human world. Popular discourse about "stereotypes" today seems to have abandoned Lippmann's more modest view of things in favor of an uncompromising commitment to "individualized understandings."

For Lippmann, the paradigmatic case of stereotypes, or what he calls the "perfect stereotype," is found in Aristotle's treatment of slavery in *The Politics*.[378] It was Aristotle's intent, Lippmann says, to get his fellow Athenians to see convention--the mental and physical feebleness of slaves--as nature, for if he could be successful in this, then surely free Athenians would be affirmed in their belief their status in society reflects the natural (or even divine) order

[375] Ibid., pp. 89-90.
[376] Ibid., p. 95.
[377] Ibid., p. 96.
[378] Ibid., 97-98.

of things. Here again we see two key elements in the modern complaint about stereotypes: the connection to freedom and the mistaking of convention as nature.

The popularization of stereotype coincided, paradoxically, with its absorption, on the one hand, by a social science claiming to be value-neutral, and on the other hand, by the intensely value-ridden civil rights revolution. Harvey Mansfield has discussed this problem at length in his study of the virtue "manliness," which, he argues, has suffered from distortion at the hands of purportedly value-neutral social science. Stereotype, Mansfield explains, is social science's way of speaking about prejudice, but in a way that appeals to non-political and thus "objective" expertise. The gradual enlightenment of society by scientists is, of course, part and parcel of the modern political outlook, indeed the assumption that seems to justify modern democracy itself. But contemporary social science conceives of non-enlightened opinion, not as an inevitable (if somewhat regrettable) corollary of popular self-government, but as a problem to be fixed by a more aggressive intervention of science. If only society would be more deferential to the expertise of social scientists, prejudice could be expunged from the human mind once and for all, and the justification for popular government would be realized in fact and not just asserted in theory. "It is nothing new to suppose that people are prejudiced, but the concept 'stereotype' amounts to a scientific denial that they have to be."[379]

Mansfield sees a clear tension within this position. Social science pegs its authority to its claim of value-neutrality, yet it is hardly neutral toward traditional beliefs about what is unique and different about the sexes. "[S]cience earns its reputation for benefiting humanity by opposing common sense" in the name of "open-minded[ness]," [380] i.e. refusal to judge among different values, for instance the values of Victorian sexual mores and feminist ones. But in the very act of

[379] Mansfield, *Manliness*, p. 35.
[380] Ibid., p. 25.

describing common sense as "stereotypes," social science "prejudges the truth of nonscientific opinion." The scientific study of stereotypes is "a prejudice against prejudice." Social science is thus "hostile to the status quo and friendly to change toward the new gender-neutral society."[381]

What is more, Mansfield says, social science often ends up confirming what is already known more or less to common sense, for instance that men are (on average) more assertive than women.[382] As Lee Jussim and other social psychologists have argued, research on stereotypes in their field over the past fifty years has suffered from political bias. This vast literature almost always utilizes a definition of stereotype that assumes that generalizations about social groups are false or false enough. Yet, stereotype accuracy is one of the most reliable and replicable findings in social psychology.[383] Our "mental shortcuts" are far more accurate than we are led to believe. Perhaps this is because common sense is not wholly contingent on history or context, as some social scientists seem to believe, but is shaped, at least in part, by our experience of phenomena that stem from some deeper (if invisible), and even natural, causality.[384]

These considerations about the promises and limitations of social science inform the background to the Supreme Court's 1989 ruling in *Price Waterhouse v. Hopkins*.[385] One of the key questions in that case concerned the validity of social psychology, and specifically of research on sexual stereotypes, as a scientific field of study. The lawsuit was initiated by Ann Hopkins, a female manager at the prestigious consulting firm who was denied promotion to the role of partner. The case posed difficult questions about what it means to discriminate

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[381] Ibid., p. 34.
[382] Ibid., p. 32.
[383] See Lee Jussim et al, "The unbearable accuracy of stereotypes," in Todd Nelson ed., *Handbook of Prejudice, Stereotyping, and Discrimination* (Hillsdale: Erlbaum, 2009), pp. 199–227.
[384] This, again, is in the direction of Aristotle's theory of forms. Common sense plays an important role in Aristotle's science because forms or species are things apprehended (repetitively) by sight. The notion that forms might suggest a deeper structure of causality in nature, albeit one that humans may never have full knowledge of, is suggested by thinkers of the "critical realism" school. See Hull, *The Ontology of Sex*, Ch. 5.
[385] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

intentionally on the basis of sex. At trial Hopkins presented evidence of comments made by some of the firm's senior management, all of them men, about women in general and about her in particular. The problem was that there was "smoking gun" comment, that is, no comment made by a member of the promotion committee about Hopkins in particular that judged her based on her sex. Hopkins' use of stereotype analysis was meant to show that disparaging and overly broad assumptions about women were part of Price Waterhouse culture, and that these beliefs were highly likely to have influenced the decision to deny her promotion.

Most of the sex-related comments on record fell into two categories: comments made in the past about women other than Hopkins (or women in general), and comments that pertained specifically to Hopkins but that were made by supporters of her promotion who were hypothesizing on why they thought her critics were trying to deny her the promotion. The comment that would later resurface again and again in the law reviews, which were overwhelmingly supportive of the Supreme Court's decision, was that Hopkins should learn to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[386] The remark was made not by one of Hopkins' critics but by her "strongest supporter" in hope that it would help her improve her image before the promotion committee. This was significant, however, because it indicated her ally's beliefs about the attitudes of his colleagues toward women. Only one comment—that Hopkins needed to take a "course at charm school"—was made by a critic who was also in a position to deny her the promotion. But even this comment was hard to link causally to the decision, not least because, as the evidentiary record had shown, Hopkins was in fact a very tough manager who alienated and

[386] Ibid., at 235.

intimated subordinated and who frequently shouted profanities in a role that required social finesse.[387] It was certainly *possible* that women no less than men could lack charm.

No one disputed that Price Waterhouse could legitimately have given Hopkins a low score on interpersonal qualities, or that interpersonal skill was one of a handful of important considerations for promotion. Nor did anyone dispute that the bulk of the comments attributed to stereotyping were sexist. The question was, first, whether the partners' negative assessment of her management style was tainted by double standards (behavior that is condoned or overlooked in men but interpreted as inappropriate aggression in women), and second, how much weight impermissible sex-based motives played in the decision to deny her the promotion. But these questions were easily obscured under the mind-numbing technicalities of the legal dispute in the case. In legal terms, *Hopkins* dealt with two interrelated problems: what the technical procedure of burden shifting should be in "mixed-motive" discrimination cases, and which evidentiary standard ("clear and convincing" or "preponderance of the evidence") should apply at each stage of the adversarial process in Title VII suits.

It is important to clarify that Ann Hopkins was not alleging discrimination under Section 703(a)(2) of Title VII, which prohibits employment decisions that "deprive or tend to deprive" employees of some benefit "because of sex." *Hopkins* was not a disparate impact lawsuit.[388]

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[387] The firm's culture had historically stressed the importance of personal skills in its senior partners. See district court decision, p. 1113.

[388] According to this theory of liability, an employment practice that manifests no obvious intent to discriminate may nevertheless be unlawful if it has some adverse impact on a protected group. As Sean Farhang has shown, when Congress passed Title VII lawmakers could not have been clearer that their chief target was intentional discrimination. Whether Title VII would also prohibit disparate impact remained at best unclear. On the other hand, Title VII also clearly prohibits the use of racial and gender quotas to achieve equality of opportunity, and since in practice disparate impact creates powerful incentives for employers to use such quotas, there was a strong case to be made that disparate impact analysis was incompatible with the plain meaning of the law. As part of a compromise with conservative skeptics of civil rights, who believed—erroneously, it turned out--that handing to the courts rather than to the EEOC the responsibility to interpret and enforce the Civil Rights Act would prevent a liberal interpretation of the law, Congress created a private enforcement regime under Title VII. By 1971 the Supreme

Hopkins argued that Price Waterhouse had *intentionally* discriminated on the basis of sex. Her challenge, therefore, was to persuade the court to take a more expansive view of what constitute intent to discriminate. If sexist attitudes were sufficiently prevalent at Price Waterhouse, and if the firm had not done enough to discourage those attitudes in the past, then these attitudes should be presumed to have influenced the decision to a legally relevant degree. Price Waterhouse insisted that the evidence Hopkins read as causal and intentional was really circumstantial.

Hopkins called on the expert testimony of Dr. Susan Fiske, a social psychologist at Carnegie-Mellon University with expertise in gender stereotyping, a field that in 1982 was no more than a few years old. In preparation for the trial, Fiske did not conduct interviews with Price Waterhouse's partners, but instead examined the evidentiary record of comments made by senior members of the firm over the years and surrounding the Hopkins nomination. Nor did Fiske take into account the factual basis of the comments—whether, for instance, comments about Hopkins' aggressiveness were related to Hopkins' actual behavior—but only whether such comments could be inspired by sex stereotypes.[389] Although Fiske could not attest to whether the stereotypical attitudes actually "determined" the decision in Hopkins' case, she concluded that stereotypes were "a major factor in the firm's evaluation of [Hopkins]."[390] This would later give one of the appellate judges reason to question her credibility, though in truth one might think the superfluity of interviews to be implied by the very idea of *unconscious* bias.

The dispute between Hopkins and Price Waterhouse over the meaning of intent carried massive implications for social regulation. If employers could be held liable for discrimination because of attitudes inferred from general comments made by their employees even in unrelated

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Court had declared disparate impact a legitimate interpretation of Title VII. See Farhang, *The Litigation State*, pp. 142-144.

[389] *Hopkins v. Price Waterhouse*, 825 F.2d 458, 467 (D.C. Cir. 1987).

[390] *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985).

circumstances, employers would face strong incentives to take extensive measures to regulate workplace conduct both proactively and in a remedial way. As Frank Dobbin has argued, by this point corporations had already begun to create large human resource departments for the purpose of staving off civil rights lawsuits.[391] In her testimony, Fiske highlighted four areas of concern to employers: "antecedent conditions that encourage stereotyping," such as the number of women in positions of authority; "indicators that reveal stereotyping," in other words comments made; "consequences of stereotypes for out-groups," as measured in the actual distribution of roles and resources between the sexes; and "feasible remedies to prevent the intrusion of stereotyping into decision making," or in other words proactive efforts to shape employees' beliefs and actions.[392] As the first and third (but really all four) categories suggest, stereotype analysis makes the distinction between disparate treatment and disparate impact, between intent and result, exceedingly difficult to maintain.

Judge Gerhard Gesell, who presided over the trial phase, concluded that Fiske's testimony and the evidence on record were not enough to prove that stereotypes actually motivated the partners' decision in Hopkins' case. "Establishing a claim of disparate treatment based on subjective evaluations requires proof of discriminatory motive or purpose."[393] While acknowledging that "deep within males and females there exist sexually based reactions to the personal characteristics of one of the opposite sex,"[394] Gesell nevertheless was forced to conclude that "considering the infinite variety of work conditions; differences in experience, education and perceptions among individuals in working encounters; as well as the fact that the

[391] Frank Dobbin, *Inventing Equal Opportunity* (Princeton: Princeton University Press, 2009).
[392] Susan Fiske et al, "Social Science Research on Trial: Use of Sex Stereotyping Research in *Price Waterhouse v. Hopkins*," *American Psychologist* 46 (1991), pp. 1049-1060, 1050.
[393] *Hopkins v. Price Waterhouse* (D.D.C. 1985), at 1118.
[394] Ibid., at 1117.

interactions of personalities of either sex are as complex and inscrutable and as infinite as combinations of genes will produce, it is impossible to accept the view that Congress intended to have courts police every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex."[395]

Gesell nevertheless held that Hopkins was the victim of discrimination. "Although the stereotyping by individual partners may have been unconscious on their part, the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole." Hopkins "appears to have been a victim of omissive and subtle discrimination created by a system that made evaluations based on outmoded attitudes determinative." Because the firm took no proactive measures "to make partners sensitive to the dangers [of stereotyping], to discourage comments tainted by sexism, or to investigate comments to determine whether they were influenced by stereotypes,"[396] Price Waterhouse had violated Title VII. In other words, intent to discriminate could now be functionally equated to the "maintenance of a system" of unconscious bias, or more precisely, failure to take measures to detect and dismantle such a "system."

Price Waterhouse appealed and the D.C. Court of Appeals affirmed the district ruling in a 2-1 decision. Judge Stephen Williams, who wrote the dissent, argued that the sexual stereotype analysis of Title VII was a "novelty" and insisted that the majority's use of "stereotype" lacked the requisite "care."[397] The majority did not clarify exactly when or under what conditions the presence of stereotypes at a firm might constitute causal evidence of discriminatory intent. It all but ignored the context in which the gender-related comments were made, as if it were irrelevant

[395] Ibid., at 1118.
[396] Ibid., at 1119. Internal quotes omitted.
[397] *Hopkins v. Price Waterhouse* (D.C. Cir. 1987), at 473.

whether the stereotypical attitudes were found in those who acted favorably or unfavorably toward Hopkins. Even if the supposed "smoking gun" of the case—the claim by one of Hopkins' critics that she should take a "course in charm school"—was gender-specific, which Williams doubted,[398] this single comment could hardly shoulder the entire weight of claim that sex was the decisive factor in the denial of promotion. The comments on record, though some were no doubt sexist, were simply not enough to shift the burden of proof to the firm to demonstrate that its motives were legitimate. "The line between legally permissible and legally impermissible stereotyping," Williams concluded, "has yet to be drawn."[399]

Williams went further and questioned the credibility of Dr. Fiske, whom he described as "a witness purporting to be an expert in [the] field [of stereotyping]." In its appeal, Price Waterhouse had characterized Fiske's testimony as "sheer speculation." Williams seemed to concur, saying that her "art" consisted in drawing inferences and conjectures without making an "inquiry" into the "possible factual basis" of the negative comments made about or around Hopkins.

While it is undoubtedly true that women are at times subjected to sexism in ways that deny them equal opportunity, it is equally the case that women no less than men can exhibit undesirable character traits. Ann Hopkins' fate may very well have been overdetermined in that each of the reasons, her character and sexism in the firm, might have been enough on its own to deny her the partnership. On the one hand, as Justice Brennan would note in the Supreme Court's ruling, without a stereotype analysis of sex discrimination women would continue to find

[398] The full quote from the partner is: "Contacts with Ann are only casual… However, she is consistently annoying and irritating—believes she knows more than anyone about anything, is not afraid to let the world know it. Suggest a course at charm school before she is considered for admission. I would be embarrassed to introduce her as a [partner]." Ibid., Williams dissenting, at 475-476.
[399] Ibid., at 474 ff. 2.

themselves in "an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not." On the other hand, according to Judge Williams stereotype theory (as Dr. Fisk had presented it) seemed to create strong pressures on employers to overlook in women bad qualities that they would not overlook in men (call it affirmative action for bad character). That is why the question of "mixed motives" became pertinent by the time the case reached the Supreme Court.

The Court held that Title VII does in fact require "but for" causation (proof that the employment decision would not have been made "but for" the employee's sex), but the burden of proof for that causation, the Court said, falls on the defendant, not the plaintiff. Once the plaintiff has shown that sex played *a* role in the decision, it falls to the defendant to prove that sex was not the decisive factor. This was the Court's solution to the conundrum of how to smoke out illicit motives while recognizing that women can legitimately be poor candidates for promotion. Brennan conceded that "stray remarks" were not enough to establish causal evidence of discriminatory intent, but he rejected the narrow construction of causality that the Court's conservatives had argued was the only reasonable reading of the legislative language. That narrow construction simply could not capture the subtle ways in which sexism manifests itself in the workplace. Brennan agreed that the firm's partners did not deny Hopkins her promotion simply because she was a woman. Rather, it was because she failed to act in ways that met their expectations of how a woman should conduct herself. In contrast to Gesell's insistence that "it is impossible to accept the view that Congress intended to have courts police every instance where subjective judgment may be tainted by unarticulated, unconscious assumptions related to sex,"[400] Justice Brennan's plurality opinion held exactly that. "In forbidding employers to discriminate

[400] *Hopkins v. Price Waterhouse* (D.D.C. 1985), at 1118.

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."[401]

As to the validity of stereotype research in general and Fiske's testimony in particular, the American Psychological Association had submitted an amicus brief in support of Hopkins in which it testified to the scientific validity of stereotype research (Fiske herself was one of the APA panel members responsible for the brief).[402] Brennan rejected Price Waterhouse's claim that Fiske's conclusions were "gossamer evidence" and "intuitive hunches,"[403] but he (perhaps wisely) did not directly address the dispute over the scientific status of stereotype research. "It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.' Nor… does it require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex, and not her interpersonal skills, that has drawn the criticism." Fiske's testimony, in short, was "merely icing on Hopkins' cake."[404]

Recalling Mansfield's observation that social science stands or falls by its claim to be able to correct common sense, Brennan's approach seems to imply that social psychology confirms common sense and is therefore, at least in these circumstances, superfluous. Perhaps Fiske's testimony had a greater impact on Brennan, who after all had proven to be feminists' key

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[401] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). As noted above, the origin of this sentence is *Sprogis v. United Airlines*. The Supreme Court first borrowed this formulation in *Los Angeles Department of Water v. Manhart*, 432 U.S. 702 (1978). However, Justice Stevens' majority opinion there suggests that the policy in question--a pension plan that required more pay from women than from men on the grounds that women live longer than men and will need more payouts--was not based on stereotypes, but on statistically accurate generalizations. The Court nonetheless found the plan to be in violation of Title VII, which, Stevens wrote, is concerned with "fairness to individuals" rather than to classes. Since not *all* women outlive *all* men, using sex as a proxy for longevity and pay equity was sex discrimination. In practice, it is hard to see how this rationale differs from "stereotyping."

[402] On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Brief in Support of Respondent, American Psychological Association, June 18, 1988.

[403] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255 (1989).

[404] Ibid., at 256.

ally on the Court, than he was willing to admit. Or perhaps judges like Brennan had by that point felt confident enough to imply that when it comes to stereotypes, "I know it when I see it."

IV: Of Rats and Men (and Women)

If *Hopkins* is the most "influential judicial condemnation" of stereotypes to date,[405] two cases decided within months of each other in 1996--*United States v. Virginia* ("*VMI*") by the Supreme Court, and *Cohen v. Brown (II)* by the First Circuit Court of Appeals[406]--are surely the most illustrative of what I will call stereotype theory's anti-institutional thrust. *VMI* was a challenge under the Fourteenth Amendment's Equal Protection Clause to the state of Virginia's prestigious and traditionally all-male military institute. *Cohen* raised the question of what a school was obligated to do under Title IX in order to ensure "equal opportunity" for women in athletics. Both cases involved institutions defending policies that assumed (1) that there are natural (average) differences between men and women and (2) that these differences have meaningful and relevant consequences for the pursuit of the institution's core mission.[407] In both cases, the court condemned the institution's reasons as impermissible stereotypes.

Since *Cohen* has been discussed elsewhere,[408] we shall mention only a few brief words about that case after discussing *VMI*. These cases underscore two fundamental points about the sex stereotype theory of law. The first, which we have been developing, is individual-autonomy-centered logic behind stereotype analysis and the consequence of this logic for equal protection's tiers of scrutiny. The second, which we have not yet discussed, but which is related to the

[405] Bernstein, "What's Wrong with Stereotyping?" p. 661.
[406] Cohen v. Brown, 101 F.3d 155 (1st Cir. 1996).
[407] In the case of *Brown*, it seems unlikely that Vartavan Gregorian, Brown's president, would have agreed that athletics is part of a university's *core* mission. For discussion, see Melnick, *The Transformation of Title IX*, pp. 110-117.
[408] Ibid.

individual-autonomy thrust of stereotype analysis, is the tension between that analysis and what Hugh Heclo and others have characterized as decline in institutionalism.[409] VMI argued that its traditions were essential to its character as an institution and to its ability to mold young men into a noble and exceedingly rare type of citizen. Ginsburg's casual dismissal of these traditions as "stereotypical" is, I will argue, a breathtaking example of anti-institutionalism. This can be seen chiefly in the abstract manner in which she reasons about VMI, its place within the social order, and its relationship to the Constitution. The tension between stereotype theory and institutionalism described below comes most clearly into view two decades later in the form of transgender regulations.

VMI was by any measure a unique institution in America of the late twentieth century. Inaugurated a century and a half earlier, the academy had quickly garnered the reputation of a bastion of southern gentility. Like students at other American colleges, cadets at VMI would swear and live by an honor code. But unlike those other codes, which typically feature generic paeans to "integrity," "honesty" and "honor," VMI's was specific and gendered.

> A Gentleman . . .
>
> Does not discuss his family affairs in public or with acquaintances.
>
> Does not speak more than casually about his girlfriend.
>
> Does not go to a lady's house if he is affected by alcohol. He is temperate in the use of alcohol.
>
> Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public.
>
> Does not hail a lady from a club window.
>
> A gentleman never discusses the merits or demerits of a lady.
>
> Does not mention names exactly as he avoids the mention of what things cost.
>
> Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child are assumed by honorable men as a debt of honor.

[409] Hugh Heclo, *On Thinking Institutionally* (Boulder, CO: Paradigm, 2008); Yuval Levin, *A Time to Build: From Family and Community to Congress and the Campus, How Recommitting to Our Institutions Can Revive the American Dream* (New York, NY: Basic Books, 2020).

> Does not display his wealth, money or possessions.
>
> Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be.
>
> Does not slap strangers on the back nor so much as lay a finger on a lady.
>
> Does not `lick the boots of those above' nor `kick the face of those below him on the social ladder.'
>
> Does not take advantage of another's helplessness or ignorance and assumes that no gentleman will take advantage of him.
>
> A Gentleman respects the reserves of others, but demands that others respect those which are his.
>
> A Gentleman can become what he wills to be. . .[410]

Whether or not VMI cadets actually lived up to this ideal, it is hard not to be impressed that its vision of manly virtue is of a bygone era. What VMI tried to enforce through social norms, especially those that stressed self-restraint in the face of sexual desire and the tying of one's personal honor to respect for female sexual modesty, civil rights officials and college administrators would later try to enforce through mandatory freshmen training seminars workshops and campus Title IX tribunals.

VMI was also part of the old South, having trained officers for the Confederate Army and excluded African-Americans until 1968. By the late 1990's the academy still had paintings and statues on campus venerating confederate heroes, and African-American cadets would often experience feelings of ambivalence about the institution's pride in its past. Judge Jackson Kiser, a Reagan appointee to Virginia's Western District Court who handled the case at the trial phase, summed up the mood surrounding the lawsuit in the opening paragraph of his 1991 ruling:

> It was in May of 1864 that the United States and the Virginia Military Institute (VMI) first confronted each other. That was a life-and-death engagement that occurred on the battlefield at New Market, Virginia. The combatants have again confronted each other, but this time the venue is in this court. Nonetheless, VMI claims the struggle is nothing short of a life-and-death confrontation albeit figurative.[411]

[410] *United States v. Virginia*, 518 U.S. 515, 602-603 (1996).
[411] *United States v. Virginia*, 766 F. Supp, 1407, 1408 (W.D. Va. 1991).

In VMI's view, the struggle now was anything but "figurative." VMI's ultimate purpose was moral formation: to create citizen-soldiers who could understand and take seriously words like "duty," "sacrifice" and "honor". In its view, martial virtues are of central importance to (male) citizenship. One way to characterize the dispute between VMI and the Department of Justice (which was the named plaintiff) is over whether in fact VMI's "life" as the institution that it was could withstand the admission of women. Was the male-only admission policy incidental to its core mission, merely an accident of history reflecting a failure to think about the full meaning of democratic citizenship? Or was the policy an indispensable condition of that mission, and justifiable in light of a different conception of the common good? Because Justice Ginsburg's equal protection argument hinges on her explicit assumption that it is not just any military-style education that women seek but specifically that of VMI, the question of whether VMI's character would be transformed by the admission of women is of paramount importance.

According to Cass Sunstein, Justice Ginsburg's "said more than it needed in order to justify its decision in the case."[412] To appreciate why this is so, and the full meaning of the Court's ruling, it is necessary first to understand what kind of institution VMI was, and how important its traditions were to those who ran the institution and passed through it.

VMI's famous "adversative method" of education rests on two fundamental pillars. The first is an experience known as "rat line" or, in more recent years, "ratmass." Cadets in their first year at VMI are referred to as "rats," a term indicative of the underlying purpose of wiping away any remnant of individuality. Rat was VMI's animal of choice, an expert witness testified at the trial phase, because it is "probably the lowest animal on earth."[413] The rat line is "more stressful

[412] Sunstein does not think that the "exceedingly persuasive justification" test used by the Court was much of a novelty. Even before *VMI*, "intermediate scrutiny" was "strict in fact." Cass Sunstein, "Leaving Things Undecided," in Sunstein and Henry Paul Monaghan, "The Supreme Court, 1995 Term," 110 *Harvard Law Review* 1, 75 (1996).
[413] *United States v. Virginia*, 766 F. Supp, 1407 (W.D. Va. 1991), Appendix: Findings of Fact, III(B)(1).

than Army boot camp or Army basic training," and is closer in its ferocity to Marine Corps boot camp.[414] The basic idea is to subject cadets to severe forms of psychological and physical stress in order to break them down as individuals and build them back up as members of a cohesive group. It is "a grueling style of training that has been a rare phenomenon in American culture since the mid-1970's," writes Laura Brodie, a faculty member at VMI at the time.[415] So much so, in fact, that by 1996 VMI's "adversative method" had managed to garner negative attention quite apart from the gender issue.[416] Surviving the first year at VMI is a formative experience and guarantees the cadet his standing among upperclassmen. A rat's sole consolation in enduring his hardships is VMI's seniority system: with each successive year, a cadet will accrue more respect and more authority over his younger peers. This respect and authority, however, is premised on the fact that upperclassmen endured the same harsh experiences. Thus, to the extent that hierarchies are formed among cadets, they are rooted in criteria that are essentially egalitarian and accessible to all, irrespective of socio-economic background. What really counts is one's ability to withstand and excel under conditions of extreme physical and emotional duress--conditions that all are subjected to equally.

The second pillar at VMI is its policy of zero privacy. Cadets are under the watchful eyes of one another and of their superiors at all times of the day and night. Every moment of their lives is regulated, scrutinized, assessed and judged. Windows in the barracks and large and curtain free, and cadets' living quarters can be seen in panoptic fashion from the central courtyard where sentries are always on the march. Showers are open and communal, and toilets have no privacy barriers or doors. It is "almost impossible to be alone at VMI."[417] The goal is not

[414] Ibid., III(B)(5).
[415] Laura F. Brodie, *Breaking Out: VMI and the Coming of Women* (New York: Pantheon, 2000), p. 42.
[416] Ibid., pp. 40-41.
[417] Ibid., pp. 106-107.

to paternalize cadets but quite the opposite. Assured mutual scrutiny and accountability around the clock eventually encourages self-policing, at first through fear of shame and then through force of habit. Total absence of privacy is also essential to the radical egalitarianism VMI seeks to inculcate. "What they sacrifice in privacy, the cadets regain in both the responsibilities and rewards of community."[418]

The ratline and the zero-privacy policy operate in tandem. VMI's honor code is a major attraction of the school to many applicants,[419] and is vigorously enforced by the cadets themselves. Upperclassmen routinely engage rats in strenuous midnight workouts or pre-dawn pushup and sprint "sweat parties," all while yelling in their faces. Cadets will often get physically aggressive with rats, intimidating them as they exert them mentally and physically. Hazing by upperclassmen is not incidental to VMI's method or even a look-the-other-way policy of the administration; it is "arguably the central pedagogical tool in VMI's arsenal."[420]

Are ratline (with all its physical harshness) and zero-privacy methods of producing *male* citizen-soldiers out of *boys*, or methods of producing gender-unspecified citizen-soldiers out of gender-unspecified individuals? Are there other methods that are better suited to women in turning them into citizen-soldiers? How would the admission of women affect these two essential features of the VMI experience?

Consider just a few examples of the practical dilemmas facing VMI administrators when coeducation loomed as a genuine possibility. First, female cadets can get pregnant. A pregnant cadet facing the harsh physical discipline of rat line could easily endure harm to herself and to her fetus, resulting even in miscarriage. Did that mean that female cadets would, as a policy, not

[418] Ibid., p.108.
[419] Ibid., p. 36.
[420] Ibid., pp. 100-101.

be subject to the same level of physical hazing and discipline? Would it be incumbent on female cadets to inform their superiors about their pregnancy from the moment they knew? And even if they did not know, what responsibility would male or female hazers bear if things went wrong?[421]

Second, given that physical proximity and physical aggression were regular features of cadet life, how would VMI draw the line between acceptable aggression or intimidation and sexual harassment? Surely that line is an extremely hard one to draw in theory, and an even harder one to enforce in practice. Ultimately, would not the inclusion of women result in a policy that errs on the side of caution and therefore limits displays of physical aggression not just toward female cadets, but in the name of equality toward all cadets? And would this not undermine a key feature of rat line and cadet indoctrination? As Brodie pithily notes, VMI's "Code of the Gentleman" itself could nowadays "form the starting point for a sexual harassment policy."[422]

Third, a key part of VMI's importance to the people of Virginia is that it takes young men who do not do well in high school and gives them structure and self-discipline.[423] As coeducation seemed more and more likely, administrators at VMI who had been there for years doubted whether the school could carry on this essential social task. After all, for many wayward men the all-male, physically aggressive, honor driven nature of VMI was a major source of its appeal. Some feminists criticized VMI for its culture of excessive masculinity,[424] but the upshot of that

[421] Ibid., pp. 141-145.
[422] Ibid., p. 13.
[423] Ibid., pp. 34-35.
[424] See e.g. Katharine T. Bartlett, "Unconstitutionally Male? The Story of United States v. Virginia," in Elizabeth M. Schneider and Stephanie M. Wildman ed., *Women and the Law Stories* (New York: Foundation Press, 2011).

culture was that it at least provided some men with a safe, indeed socially beneficial outlet for their inclinations.

Fourth, as the Ginsburg opinion suggests, alterations would have to be made to VMI's program on account of the differences in physicality between men and women.[425] As VMI would soon discover, this meant a significantly lower threshold of upper-body strength tests, one of the more challenging and frustrating requirements cadets face in their first years at VMI.[426] Here the Court clearly understood equality to mean equality in difference, or as Ginsburg put it, "inherent differences between men and women, we have come to appreciate, remain cause for celebration."[427] Yet the Court never considered what might be the consequences for unit solidarity and cohesion once the "celebration" subsides. Experience at other military academies that had recently gone coed suggested that different standards for men and women were not met with widespread sympathy and understanding, but were instead the cause of division and jealousy. As General Farrell, VMI's Dean of the Faculty, aptly put it at the time, "There is a point at which 'fair' may actually compromise the women's chances of integration here."[428] Justice Ginsburg's opinion is contradictory on this point. On the one hand, she insists that women have the right to attend VMI because its training program—and in particular its ratline—is not "inherently unsuitable to women."[429] On the other hand, and to repeat, she recognizes that alterations to those same programs would have to be made to accommodate women's physical differences from men. This tension reflects a deeper failure to appreciate the institutional

[425] *United States v. Virginia*, 518 U.S. 515, 550 (1996).
[426] Brodie, *Breaking Out*, p. 152.
[427] *United States v. Virginia*, 518 U.S. 515, 533 (1996). Internal quotes omitted.
[428] Brodie, *Breaking Out*, pp. 154-157.
[429] *United States v. Virginia*, 518 U.S. 515, 520 (1996).

nuances and complexities of VMI. Ginsburg seems oblivious to the possible institutional consequences of subjecting cadets to different training regimes.

Fifth is the problem of eros. Clearly, going coed would require the creation of privacy barriers between cadets. The existence of these barriers "were liable to eat away at the open spirit that distinguished VMI life," and experience at other military academies had shown that once the precedent was set, male cadets would begin to demand privacy from one another as well.[430] But perhaps the more important implication of eros is the threat it poses to equality. Sexual attraction and sexual relations introduce a powerful motive for competition and jealousy among cadets that, unlike other forms of competition, does not point toward the common good. It is essential to a system like that of VMI that individuals within it compete for honors and rankings through activities that redound to the good of the group. In the army, running faster than your peers means that you can evacuate the wounded or take over a building faster. In the air force, superior intelligence means being able to operate a fighter jet under conditions of extreme stress and accomplish your mission. VMI's conception of honor was very much in line with Jean Jacques Rousseau's belief that only by harmonizing the rewards of personal honor and ambition with the good of the community as a whole might genuine citizenship be achieved. But what advantage is it to other cadets when John and Mary relish in each other's erotic affection, especially if there are multiple Johns who lust after Mary and multiple Marys who lust after John? The satisfaction of sexual desire is essentially a private and exclusive good.

Finally, as anyone who had been following the trajectory of civil rights regulation since the 1970's could reasonably have predicted, once it was established that VMI could not discriminate on the basis of sex in its admission policy, it would be a matter of time before civil

[430] Brodie, *Breaking Out*, p. 108.

rights advocates and government officials would expect to see a steady increase in the number of females admitted and graduated. Equality of access would give way to--because it would be measured in the light of--equality of outcomes. Under affirmative action, VMI-ers feared, the first institution to be modified to the point of being unrecognizable would be the rat line.[431] And indeed, no sooner had the Court handed down its decision than the Department of Justice began to demand annual reports with detailed breakdowns of how many women applied, how many were offered letters of acceptance, and what the reasons were for denying admission to the rest. DOJ also wanted to know exactly what institutional measures VMI was taking, including hiring of staff, training of faculty, procurement of resources such as uniforms (there were different uniforms for men and women), and alteration of physical activities. As Brodie points out, "no other military college had done so much to prepare for coeducation," and yet the very fact that VMI had been locked into confrontation with the civil rights apparatus of the federal government meant that its actions and policies would be viewed with "dark skepticism."[432] The *Wall Street Journal* explicitly likened the federal government's micromanagement of VMI to "federal judges [taken] over the running of entire city school systems."[433]

In short, for many instructors and administrators at VMI during the 1990's the answer to the question of what would happen to the institution once it had gone coed was essentially unknown and unknowable until the social experiment would commence. And that was exactly the problem. VMI had acquired its reputation for producing citizen-soldiers not by meticulous and rational planning at the hand of experts with PhDs in education, but over a long period of time, through trial and error, and as a consequence of often subtle and unknowable social

[431] Ibid., pp. 61-63.
[432] Ibid., pp. 186-187.
[433] Editorial, "Taking VMI Prisoner," *The Wall Street Journal*, June 3, 1997. Quoted in Ibid., p. 187.

dynamics operating just below the surface of life there. VMI's argument--though it was not articulated in this way--was in that sense Burkian.

It was extremely unlikely, however, that VMI could hew to its traditions and methods with only a few minor adjustments to its facilities and programs. And yet this is exactly what Justice Ginsburg insisted in her *VMI* opinion when she wrote that "alterations" would have to be made to VMI's "living arrangements" and "physical training programs." That Ginsburg refused to get specific here and merely asserted that other military institutions that have gone coed have somehow "manage[d]",[434] is instructive. Her opinion rarely descends from the realm of abstract discoursing on the meaning of equality to consider the hard dilemmas and choices VMI would face as a consequence of going co-ed. Perhaps this reflects Ginsburg's confidence in the capacity for planners--given the right degree of intelligence and the right kind of motives--to engineer the same outcomes with women at VMI as without them.

That Ginsburg fails to think institutionally because she operates at a high level of abstraction can be seen in the tensions that run through her opinion. As noted earlier, a core premise of Ginsburg's equal protection argument is that it is to VMI's unique adversative method that women should have an equal right of access, and not simply to any military education. In her view, VMI's admission policy rested on "generalizations" about women, specifically about the physical and psychological abilities relative to men. Ginsburg *agrees* that these generalizations hold true qua generalizations, but nevertheless insists that "VMI's implementing methodology is not inherently unsuitable to women, [as] some women . . . do well under [the] adversative model; some women, at least, would want to attend [VMI] if they had the opportunity; some women are capable of all of the individual activities required of VMI cadets…

[434] *United States v. Virginia*, 518 U.S. 515, 551 (1996).

and can meet the physical standards [VMI] now impose[s] on men. It is on behalf of *these* women that the United States has instituted this suit, and it is for *them* that a remedy must be crafted."[435] The comment on remedies alludes to VMI's proposed remedy--affirmed by the appellate court--of creating a parallel institution to VMI, suited to the unique interests and abilities of women. Ginsburg struck down this compromise on the grounds that separate was not really equal, for even if it could get the same level of resources per student, the Virginia Women's Institute for Leadership simply could not enjoy the degree of institutional prestige that VMI had, and thus could not offer its cadets the same ladder to professional success. But where does this prestige come from? Ginsburg recognizes in this regard the deep connection between VMI's prestige, its harsh methods, the reasons cadets have for wanting to join VMI, and the career prospects opened up to them by doing so.[436] She writes that although those methods may be unsuited to *most* women, there are at least "some" who can do "all the individual activities" and "meet the physical standards VMI now imposes on men." But in the very next breath, Ginsburg concedes that alterations would "undoubtedly" have to be made to VMI's facilities, programs, and physical training regiments in order to accommodate women.[437] How can both of these statements be true at the same time? Ginsburg, in short, rejects as "stereotypical" the assumptions that VMI has made about women, and then proceeds to affirm these very assumptions.

From a constitutional law perspective, *VMI* effectively fudged the three-tier system of scrutiny that the Court had given rise to in *Craig v. Boren*. Ginsburg wrote that in order to

[435] Ibid., at 550. Internal citations and quotations omitted, emphasis mine.
[436] It is interesting that careerism ("leadership") features so heavily in the Ginsburg opinion. Surely that is *a* motive that some teenagers have in applying to VMI, but as Brodie seems to indicate in her study of the institution, many and perhaps most incoming cadets are there because it is part of their family legacy to attend. Others simply want the challenge.
[437] Ibid.

survive judicial review sex classifications had to have an "exceedingly persuasive justification." As Justice Scalia points out in his dissent, this is not "intermediate scrutiny" in any reasonable meaning of that standard. After all, the majority concedes that most women are not suited to VMI's adversative method, and is willing to stand by that generalization (and somehow distinguish it from a stereotype). It insists, rather, that "some women" are suitable for VMI. Perhaps recognizing that the number of women who actually would attend would be exceedingly small, Cass Sunstein has written that "[t]he continued existence of an all-male military school in Virginia may have been more significant for its expressive effects than for the actual deprivation of educational opportunities."[438] The *VMI* litigation was part of a broader and more principled campaign by women's advocates to purge American institutions of gender-specific policies.[439] According to the logic of the Court, says Scalia, one "would have to conclude" that even "a single woman" willing and able to undertake VMI's adversative method would have rendered the all-male policy not "exceedingly persuasive."[440] The Court struck down VMI's all-male policy because maleness was not what Mary Ann Case has called a "perfect proxy." It bears mention that Case agrees with Scalia's reading of the basis and meaning of the majority decision in *VMI*, but disagrees over whether such scrutiny by the courts is desirable.

Before we conclude, a word on *Cohen v. Brown* is in order. *Cohen* signaled the federal courts' acceptance of the view that Title IX should be interpreted according to its "purpose," which supposedly is (and always has been) the eradication of "stereotypes." Just as in *VMI*, the *Cohen* court said that it was simply trying to reconcile Brown's institutional purposes with "equal opportunity," but in fact what it was doing was subordinating the former to the latter. The

[438] Sunstein, "Leaving Things Undecided," p. 74.
[439] Bartlett, "Unconstitutionally Male?" p. 134.
[440] *United States v. Virginia*, 518 U.S. 515 (1996), J. Scalia dissenting, at 573.

court seemed just as indifferent to the effects that its reading of Title IX would have on Brown's pursuit of its core institutional mission as the Supreme Court in *VMI* was in regard to how its equal protection argument would translate into realities on the ground.

Conclusion

I named this chapter "*Brown* in reverse." The civil rights enactments of the 1960's largely addressed the problem of race. They responded to massive social upheavals, grew out of a broad (though hardly unanimous) consensus about the moral impermissibility of intentional racial discrimination, and sought to empower Congress and the executive branch to enforce a landmark ruling by the Supreme Court. In contrast, government regulation of the relationship between men and women depended from the outset on the activities of strategically positioned elites whose views about the meaning of equality were more controversial. The inclusion of "sex" in Title VII posed a direct challenge to state laws and extant constitutional holdings by the Supreme Court. Although a cautious approach by lower courts and the EEOC managed to fend off confrontation, in relatively little time the courts chipped away at the constitutional edifice on which protective legislation and sex-respecting employment practices depended.

The addition of "sex" to Title VII created the impression that race and sex might be analogous, an impression that was explicitly endorsed by feminists who wished to harness the moral prestige of racial civil rights and who perhaps genuinely saw a parallel between Jim and Jane Crow. But Title VII's BFOQ clause also expressed the limits of this analogy. Over the next few decades, a "private enforcement regime" arose unexpectedly to narrow the grounds of BFOQ and enlarge quite significantly the scope of "because of sex." Doctrinal changes in statutory law carried over to the constitutional realm, which then conferred ex-post facto

legitimacy on the groundbreaking Title VII rulings. The stereotype theory was the vehicle driving this silent constitutional revolution.

Are contemporary proponents of stereotype theory right to insist on a seamless continuity with the past when they call the belief that sex is biological a "stereotype"? In the next chapter we tell the story of how a legal theory designed to put cracks in the dam that its proponents said was holding back women turned into a rhetorical strategy for redefining what a woman is.

Chapter 5
The Three Waves of Stereotype Theory

"Complexity," writes Shep Melnick, "is an essential part of the politics of Title IX regulation."[441] A very good example of this is footnote 2 of the letter sent by the Office for Civil Rights' James Ferg-Cadima to transgender advocate Emily Prince on January 7, 2015.[442] The footnote contains a long list of federal court and agency decisions, and implies that these cases establish the letter's conclusions regarding the legal obligations of schools under Title IX. The court and agency decisions cited in footnote 2 do bear some relation to the policy dispute over sex-specific accommodations. Moreover, there is a good case to be made that they point generally in the direction of Ferg-Cadima's interpretation. But a closer look at these decisions discloses that none of them alone, nor all taken together, support the conclusion that treating students according to their biological sex is unlawful. That is because none of the cases that produced these decisions turned on the question of whether the complainant is in fact male or female. The true sex of the complainant was irrelevant to whether they had suffered from discrimination. Since this letter served as the springboard for the "institutional leapfrogging" on the transgender issue, the Obama administration's claim in 2016 that its transgender guidelines were nothing now was ultimately unconvincing.

In order to show this more clearly, this chapter divides the history of transgender rights into three distinct phases or waves. In the first, which began in the mid-1970's and lasted until 2000, federal courts (with one minor exception) and the Equal Employment Opportunity Commission declined to consider sex discrimination adverse action taken against a person because of incongruent gender identification. That began to change in 2000, as courts started to

[441] Melnick, *Transformation of Title IX*, p. 74.
[442] James Ferg-Cadima letter to Emily Prince, January 7, 2015, p. 1 ff. 2.

see an analogy between transgender plaintiffs and Ann Hopkins, the plaintiff from *Price Waterhouse v. Hopkins*. Crucially, the change in law was predicated upon courts *not* seeing transgender plaintiffs as these plaintiffs saw themselves. In other words, the idea that sex is biological was not only compatible with wave two decisions, it was in important respects constitutive of them. Only around 2016 did a third wave of transgender rights claims emerge, this time surrounding questions of access to sex-specific accommodations. It is here that the question of what defines male and female became a civil rights matter.

It should be noted that we are looking only at a slice of transgender legal history, the one that deals with the confrontation between transgender people and federal employment and education antidiscrimination law.[443] The simple reason for this is that the present chapter provides crucial background for the next, in which we try to discern a deeper logic behind the jurisprudence of recent transgender regulations.

The argument of this chapter is that wave three decisions have been justified on the basis of wave two precedents, and although the two types of decisions would seem incompatible, what makes them so is willingness of the civil rights state to use "stereotype" at a higher degree of abstraction. This chapter thus pushes back against the popular impression that there is some deeper, intelligible and coherent principle the unfolding of which over time explains the history of transgender regulation in the United States. Put another way, stereotype theory has allowed officials and advocates to abstract away the particular circumstances of various rulings on transgender-related issues, as if these circumstances were merely backdrop phenomena. Obscured in this narrative are all of the philosophical and regulatory questions that make transgender civil rights such an interesting and controversial subject.

[443] For a broader history of the transgender movement see Joanne Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* (Cambridge: Harvard University Press, 2002).

I: Wave One

The word "transgender" was not used in the initial phases (1971-2000) of transgender litigation. People with incongruent gender identifications were referred to and usually referred to themselves as "transsexual." A transsexual was generally understood to mean someone who changed his physical body to bring it into conformity with what his mind perceived his sex to be. Sex researchers and clinical practitioners until recently viewed body modification as the last step in an escalating series of therapeutic techniques designed to minimize gender incongruency-related stress. The metaphysical notions that there can be a man "trapped" in the body of a woman, or that there is a deep self that can have a "lived experience" of gender independent of the body, though not unheard of at the time, certainly did not dominate scientific thinking at the time (and arguably they do not do so today).

Uncertainty about the status of the plaintiff and the nature of the discrimination they were alleging helps to explains why judges at first refused to recognize transsexual claims of discrimination. Although the point of the discussion in this section is to show this in detail, it would help to state the reasons up front. Generally speaking, judges declined to extend Title VII protections to transsexuals for one (or more) of three reasons.

First, judges thought that plaintiffs were asking the courts to recognize transsexuals as a discrete and insular minority worthy of the same constitutional protections as African Americans. In other words, judges were being asked to recognize transsexuality as a suspect classification. This they declined to do. For one thing, lower courts are generally hesitant to offer up new interpretations of the Constitution as these interpretations draw attention and risk overturning by higher courts of appeal. Moreover, there was no mobilized movement of

transsexuals at the time (Stonewall notwithstanding) and thus no political pressure to add this new category of persons to equal protection jurisprudence. At the deepest level, transsexuality was not recognized as a protected status because it was not perceived as analogous to race (or sex). That is, it was seen not as an innate characteristic that bears no relation to one's ability to perform a job or contribute to society and over which one has no control, but as a behavior, as something that one does and thus has control over. Indeed, transsexuality in all its different iterations was often viewed as an expression of homosexuality, an association that many people still make today. The individualistic and egalitarian ethos of American political culture holds that no class or group of people is naturally inferior to any other, and that any social hierarchies that develop must be the result of individual effort. Consequently, American constitutional law (at least since 1938) is hostile to legal distinctions that rest on innate or unchosen status, but open to those that presuppose individual agency or choice.[444] That is why groups face strong incentives to frame their grievances in terms of status rather than behavior.

Second, judges took transsexuality to be a mental illness or sex disorder rather than as a legitimate human expression of identity. The act-status distinction mentioned above was probably enough to dissuade judges from adopting an expansive interpretation of civil rights and constitutional law, but the perception of abnormality most likely strengthened the conviction that transsexuality is not like race or sex or even ethnicity and national origin. What helped this perception take root was, ironically, the effort by plaintiffs themselves to convince judges that cross-gender identification is innate and immutable. In almost every Title VII case to date, the

[444] For an interesting discussion of the status-act distinction, see *Robinson v. California*, 370 U.S. 660 (1962). The Court in this case struck down a California law that made it unlawful to have the status of a drug addict. In other words, it imposed criminal penalties irrespective of what individuals did, simply because they were addicts (of course, one cannot become an addict without doing certain things). The Court held that this was in violation of the Eighth Amendment's prohibition on "cruel and unusual punishment."

plaintiff has produced a clinical diagnosis of what was called until 2013 "gender identity disorder." The problem was in part that the medical profession was the gatekeeper to society's interaction with and understanding of transgender people until very recently (and to some extent even today). But in part it was that the institutional structures and patterns on which the civil rights state arose encouraged minority rights entrepreneurs to couch their claims in the language of immutability. Prior to the advent of "lived experience" discourse, which is a non- or post-scientific way of talking about the deep and immutable self, transgender people looked to conventional, material-reductive science as the only recognized authority on human nature.

Third, judges were reluctant to extend legal protections to "transsexuals" simply out of political calculation. As mentioned in the previous chapter, courts and the EEOC were still trying to figure out how Title VII and the Constitution applied to the relations between men and women. Taking on a new and controversial cause would most likely have made it harder for the women's movement to get the civil rights state to interpret federal law in the way that they wished. It is probably no coincidence that federal courts first began to extend legal protections to transgender plaintiffs only after the Supreme Court's decision in *United States v. Virginia*.

Three circuit court rulings defined the first wave of transgender rights litigation. In *Holloway v. Arthur Andersen* (1977), the Ninth Circuit held that in passing Title VII, "Congress only had the traditional notions of sex in mind" and "intended to place women on an equal footing with men."[445] Gay rights advocates at the time lobbied for an amendment that would add "sexual preference" to Title VII, but Congress declined to do so, in part out of fear that opening up the Civil Rights Act to amendment would threaten the law as a whole. Since the court in *Holloway* viewed "transsexuality" through the lens of "sexual preference,"[446] it took

[445] *Holloway v. Arthur Andersen*, 566 F.2d 659, 662 (9th Cir. 1977).
[446] Ibid., at 663.

Congressional refusal to amend Title VII as a strong indication that lawmakers would not have agreed with a pro-transgender ruling. In short, according to the Ninth Circuit, the plaintiff was asking for legal redress on account of her *status*, but what was really at issue was her *behavior*.

The Eighth Circuit reached a similar conclusion in its 1982 ruling *Sommers v. Budget Marketing Inc.*, holding that there was no reason to believe that that "Congress intended by its laws prohibiting sex discrimination to require the courts to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual."[447] Presciently, the court surmised that once judges declared the meaning of sex a question of civil rights law, the "practical problem" of "which restroom… the plaintiff [should] use" would come up.[448] "We are not unmindful of the problem Sommers faces," the judges conceded. "On the other hand, Budget faces a problem in protecting the privacy interests of its female employees."[449]

The third case, *Ulane v. Eastern Airlines*,[450] decided in 1984 by the Court of Appeals for the Seventh Circuit, would become the leading precedent on transsexual discrimination claims in the years that followed. This case is worth examining in greater detail because the district court had sided with the plaintiff, only to be overturned by the appellate court later on. Exactly why the district court broke with earlier precedent is an interesting part of the story, one that had to do with some of themes discussed in Chapter 3.

Kenneth Ulane had flown combat missions over Vietnam before returning to civilian life, where he took a position flying commercial aircraft with Eastern Airlines. In 1979 Kenneth opted for sex-change surgery, after which he changed his name to Karen. The Federal Aviation

[447] *Sommers v. Budget Marketing*, Inc., 667 F.2d 748, 749 (8th Cir. 1982).
[448] Ibid., at 750.
[449] Ibid.
[450] *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

Administration recertified Karen's license after a series of physical and psychiatric evaluations, but Eastern Airlines refused to let her continue piloting its aircraft. The airline argued that, in light of Ulane's failure to disclose her psychiatric disorder and her continuous use of hormone drug therapy, allowing her to fly commercial jets constituted a safety hazard. The airline offered Ulane a conciliatory ground crew position,[451] at which point she filed a complaint with the EEOC, which issued her a right-to-sue letter. Ulane alleged that she was discriminated against both because she female and transsexual. Judge John Francis Grady, who presided over the trial, began the proceedings by noting that all prior cases involving adverse employment action against transsexuals were dismissed, and that, as the *Holloway* court had said, there is a dearth of legislative history regarding Congress' intent with regard to Title VII. "The question we are confronting here today," he declared, "is: What did we get when we got sex?"[452]

Yet, in Grady's view, all of the previous cases of this kind were dismissed because they lacked "a factual record as complete as the one we have here."[453] In other words, the question of whether Karen Ulane was in fact a woman was, in Grady's view, essential to the legal conclusions of the case. Grady also distinguished between transsexuality and homosexuality,[454] which meant that *Holloway* inference about Congressional intent was unhelpful.

The *Ulane* court was the first in the employment law context to rely on the testimony of expert witnesses from the new area of transsexual and gender identity research on the question of what makes human beings male or female. "Prior to my participation in this case," wrote Judge Grady," I would have had no doubt that the question of sex was a very straightforward matter of

[451] "Pilot Loses Sex Change Case Appeal," *Chicago Tribune*, April 16, 1985 (http://articles.chicagotribune.com/1985-04-16/news/8501220309_1_eastern-airlines-appeals-army-pilot).
[452] *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 822 (N.D. Ill. 1984).
[453] Ibid., at 823.
[454] Ibid.

whether you are male or female." But "[a]fter listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex." The key issue, in Grady's view, was that all of the credible witnesses at trial had agreed that sexual identity--the fact of being male or female--is, at least in part, "a psychological question."[455]

Because the specific circumstances of this case had no precedent in this area of federal law, Grady drew an analogy to another set of circumstances in which "things we think we know we do not necessarily know and [in which] people sometimes react to other people according to stereotypes, misperceptions, and other motivations which are arguably discriminatory and are arguably redressable under statutes which might not be thought ordinarily to apply to those situations."[456] What he had in mind was the "interesting case" of *Carrillo v. Illinois Bell Telephone Company*,[457] decided by a different judge at the same district court just two years prior. *Carillo* raised the question of whether Title VII and 42 U.S.C. Section 1981 (an antidiscrimination provision of the Civil Rights Act of 1866), in prohibiting discrimination on the basis of race, also protected Hispanics from discrimination. In other words, are Hispanics a "race" for the purposes of these laws? Although Hispanics are technically white, the court had said, they are perceived by non-Hispanics, and by some Hispanics as well, as non-white. The court then cited a federal district court ruling from 1977 that had held--also in the context of Section 1981--that the word "race" ought to be construed on "a realistic," even if "unscientific," basis.[458] This meant that individuals of a particular group should be considered part of a racial group if they are perceived to be part of that group, regardless of whether this perception has any grounding in scientific fact.

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[455] Ibid.
[456] Ibid., at 824.
[457] *Carrillo v. Illinois Bell Telephone Company*, 538 F. Supp. 793 (N.D. Ill. 1982).
[458] Ibid., at 796.

Reasoning by analogy, Grady determined that whether one belongs to a sexual group need not depend on one's actual sex, but rather on one's perceived or self-perceived sex. The switch from an "unscientific" to a "realistic" basis of classification means that motivations and actions once thought non-addressable under a particular statute become so over time, in accordance with changing or newly discovered social circumstances. "Title VII," Grady declared, "is a remedial statute which is to be liberally construed."[459]

But Ulane and the sympathetic Judge Grady still had two arguments to contend with. First, an expert witness, Dr. Thomas Wise of John Hopkins Medical School's Sexual Behavior Unit, historically a pioneering institution in the study of sexual identity and medicine, had denied that maleness and femaleness are wholly or even partly psychologically determined. Rather, he said, they are a matter of chromosomal composition. A person may feel or believe, with utmost sincerity, that they are a member of the opposite sex, but that alone does not make them so.[460] Second, relying on Dr. Wise, Eastern Airlines argued that Karen Ulane was in fact not actually transsexual but rather a transvestite, someone who derives sexual pleasure from dressing up as or "acting the part" of the other sex. This would mean, first, that Ulane was seeking redress for her actions rather than her status, and second, that the medical and psychiatric intervention she had sought and received were medically unnecessary and possibly dangerous to her functioning as a pilot.[461]

Judge Grady "did not feel comfortable relying upon the testimony of Dr. Wise," whom he characterized as a "remarkable witness." According to the judge, Dr. Wise had

> stated that the plaintiff is beyond a shadow of a doubt a transvestite. This is a man of science who had never seen the plaintiff, who knew very little about her, who had not even read all of the records pertaining to her, who had read very few of the recent records which seemed to me to be very important, who had read

[459] *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 822, 824 (N.D. Ill. 1984).
[460] Ibid.
[461] Ibid., at 826.

> some of the literature in the field but stated that he disagreed with other literature even though he had not read it, and who stated that he knows beyond a shadow of a doubt[--]those are his exact words[--]that this plaintiff is a transvestite and not a transsexual. I have been listening to witnesses for many years, and I have never heard an expert witness state that he was sure of anything beyond a shadow of a doubt. That was typical of Dr. Wise's testimony… I can tell you quite candidly that I attach no weight whatever to his testimony.[462]

One of the witnesses whose testimony Grady did find persuasive, however, was Dr. Richard Green. Like Dr. Wise, Dr. Green had spent the previous two decades conducting research in the area of human sexuality and sexual identity. Dr. Green, who also a lawyer by training, had come to the view that although a person's sex can be determined by a number of factors including chromosomes, gonads, hormones, genital appearance, and internal reproductive structures, "the criterion of sex that is most salient to the hermaphroditic individual is not any of the [these]. The essential criterion is gender or sexual identity, namely whether the person considers himself or herself to be a male or a female."[463] Dr. Green testified that transsexualism is not a mental illness, but a non-pathological form of severe discontent with one's natal sex that can be treated through social transition and, if necessary, surgical and hormonal intervention. The notion that transsexuality involves a delusion--a claim crucial for the success of the defense--works only if one assumes, *a priori*, that sex is purely a physical matter (say, of chromosomes). As it happens, the law presupposes such a biological understanding of sex, but given developments in the field of sexology, Dr. Green urged, it is now appropriate for the law to reconsider the meaning of sex.[464]

This was enough for the court. "Sex," Judge Grady announced, "is not a cut-and-dried matter of chromosomes." Notwithstanding the disagreement within the medical community on

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[462] Ibid., at 824.
[463] Richard Green, "Spelling 'Relief' for Transsexuals: Employment Discrimination and the Criteria of Sex," 4 *Yale Law and Policy Review* 125 (1985), pp. 125-140.
[464] Green, Ibid., pp. 128-130.

this point, "the evidence in this record satisfies me that the term, 'sex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII."[465] There was an additional, independent reason to come to this conclusion, Grady suggested, which is the fact that some states had already started to recognize transsexuals in their asserted identity for purposes of legal documentation. Illinois, Ulane's state, had issued her a new birth certificate with her sex listed as female. Grady took this as evidence of evolving "social policy," to which he believed the court should give some deference.[466]

On the question of Ulane's sexual identity, then, the court found that she had proven that she was both female and transsexual. But this raises two difficulties. First, it is not clear how Ulane could be simultaneously female and transsexual. Unless one assumes that all human beings are transsexuals, the implication of saying that someone is both female and transsexual is that there is one subset of the category female that is transsexual and another subset that is non-transsexual. And if that is so, then presumably "transsexual" would modify the word "female" such that individuals to whom both labels apply are in a crucial respect less female than those to whom only the label "female" applies. And if the transsexual female is, so to speak, less female than the non-transsexual female, it follows logically that she is also more male. And if that is the case, then Judge Grady is begging the question when he describes Ulane and both transsexual *and female*. It is this problem that explains why many transgender people do not want to be recognized as *transgender* women, but as women simply. To state the same problem from the other angle, if sex is a psychological fact, as Grady seems to suggest, then "transsexual" must mean someone whose sex was incorrectly recorded at birth. But if that is the case, then there is

[465] *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 824-825 (N.D. Ill. 1984).
[466] Ibid., at 824.

no such thing, strictly speaking, as a transsexual, but only someone whose true sex was incorrectly "assigned at birth."

This deeper confusion comes across in one of Grady's more peculiar statements. After professing his openness to the "new science," Grady said:

> It should be noted that the surgery is not designed to cure anything. The person after the surgery is still a transsexual. So it does not cure the transsexuality. It is hoped that the person will be more comfortable and lead a happier life, but the most energetic supporter of the surgery would have to concede that even where that happens, the person who had the surgery still has an underlying problem. He is walking around with a sexual situation that he or she was not born with.[467]

So much, then, for Ulane's claim that she had been discriminated against for being female. As to her claim that she had suffered discrimination because of transsexuality, the court, having decided that "because of sex" does not preclude "because of transsexuality," now had to assess the causal evidence for Ulane's allegation. Was Ulane discharged solely because of her transsexuality, or was her change of sex an indication from which Eastern could reasonably infer some other, perhaps legitimate, causes of action against her? Given the defendant's concession that Ulane was a "better than average" pilot and the timing of her dismissal, there was little doubt that it was at least triggered by her change of sex. But this did not resolve the causal issue. If the defendant could cite a "legitimate safety consideration" rationally linked to Ulane's medical status, Ulane would have to prove that that cause of action was merely pretextual.

In Judge Grady's opinion, Eastern Airlines did not even pass the first hurdle of citing a rational cause of action. The airline had relied on experts who, in the court's opinion, "knew nothing" or "next to nothing… about the subject." Eastern relied on vague predictions and inferences about the psychological effects of sex transition, never bothering to determine if these applied in Ulane's particular situation. It resolved to take an "ostrich-like position" on the matter,

[467] Ibid., at 831.

rather than "[attempt] to solve it intelligently by investigation and education."[468] Further, in claiming that reinstating Ulane as a pilot would impede the airline's efforts to assure its clientele that flying is safe, the airline, said Grady, is rehashing the same tropes heard by white restaurant owners who feared the business impact of serving African-Americans. But the most damning of the airline's arguments was its assertion that, had it known in advance that Ulane would have undergone her transition, it would not have hired her in the first place. This, for the court, was a "virtual admission of discrimination… based on sex within the meaning of the [Title VII]."[469]

Ultimately, the sympathetic Grady was forced to concede the deeper tension between Ulane's two claims of discrimination. If the court recognized a claim of discrimination on the basis of transsexuality, it could not also recognize a claim of discrimination because of being female. Therefore, and despite its foray into the philosophical question of human sexual identity, Grady ruled in Ulane's favor on the count of discrimination because of transsexuality. "The evidence much more clearly establishes in my opinion that transsexuals are entitled to protection under the act than it does that an operated transsexual is now a woman."[470] Just in case the appellate court would be open to ruling for Ulane on both counts, Judge Grady stressed that he did not find her other claim--discrimination because she is female--to be unpersuasive. But then, in a later issued Memorandum, Grady reversed yet again, deciding "upon further reflection" to grant both counts of Ulane's Title VII complaint.[471]

Ulane was not the first time a court was confronted with the question of sex determination. Half a decade earlier, a state court ruled that a male-to-female transsexual could not be barred from participating in an athletic tournament as a female if "the sole criterion" for

[468] Ibid., at 829-830.
[469] Ibid., at 832.
[470] Ibid., at 838.
[471] Ibid., Memorandum Opinion, at 839.

sex determination was chromosomal makeup.[472] But at issue there was the question of whether chromosomal makeup was by itself the necessary and sufficient determinant of sex for the purpose of athletic competition. In *Ulane*, it was whether the psychological dimension of sex--one's self-identification and/or recognition by others--is sufficient to determine sexual identity. Clearly, the circumstances in these two cases mattered too. Physicality matters for athletic participation, and perception (by oneself and by others) can matter greatly for social discrimination.

Eastern Airlines appealed the decision to the Seventh Circuit Court, which reversed the district court, repeating, once again, the logic of *Holloway* and *Sommers*. "It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning."[473] Title VII's mention of "sex," the court insisted, suggests that "it is unlawful to discriminate against women because they are women and against men because they are men."[474] The purpose of Title VII was to bring women on an equal footing with men in employment opportunities; going beyond that was legislating from the bench. Even if Title VII is to be "liberally construed," the district court erred in applying the law to a "sexual identity disorder."[475] Ulane's reliance on a medical diagnosis to prove she was in fact female (according to the psychological definition of sex) thus backfired on her.

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[472] Renee Richards, a male-to-female transgender tennis player, was barred from competing as a female in the 1976 US Open by the United States Tennis Association (USTA). A New York state court that the USTA had in fact violated the state's Human Rights Law subjecting Richards to a chromosomal test for sex determination. A transsexual, which the court defined as "an individual anatomically of one sex who firmly believes he belongs to the other sex," can compete as female, despite her chromosomal makeup, if, among other things, her somatical ("muscular tone, height, weight, breasts, physique") features are more female than male. The court ruled that chromosomal makeup should not be "the sole criterion" in determining sex for the purpose of athletic competition. *Richards v. United States Tennis Association*, 93 Misc. 2d 713 (N.Y. Sup. Ct. 1977).
[473] *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1081 (7th Cir. 1984).
[474] Ibid., at 1085.
[475] Ibid.

Notably, both district and appellate courts cited Congress' silence on whether transsexuality is comprehended under "sex," but each came to a different conclusion. The district court's argument was that Congress considered homosexuality and refused to extend Title VII to that category, but never explicitly rejected transsexuality, and what is more, given developments in the medical understanding of sex, even a conservative reading of that term would suggest that Ulane is female. The appellate court's position was that Congress' silence did not empower courts to define sex in a way different from what legislators in 1964 had in mind, and Congress' persistent refusal to expand the definition of "sex" should inform courts in their interpretation of Title VII.

The appellate court further noted that although the district court found Ulane to be female, it never required proof that the airline discriminated on that basis alone. The airline's decision in regard to Ulane's employment was premised on her being, not female per se, but a transsexual female. Her transsexuality was inextricably linked to her presentation as female. "It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual -- a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female."[476] The circuit court thus brought to the surface the tension within the Grady's argument, a tension that Grady sought to do away with--even after recognizing it explicitly--in the Memorandum.

Despite her ultimate defeat in federal court, Karen Ulane came to a settlement with Eastern Airlines that was "substantially more" than the damages she was initially awarded by Judge Grady. In 1989, just five years after having her legal victory revoked in the Seventh

[476] Ibid., at 1087.

Circuit, Karen Ulane was killed in a plane crash attributed to "pilot error." No evidence surfaced that could link that error to her change of sex.[477]

II: Wave Two

The Seventh Circuit's ruling all but shut the judicial door in the face of transgender plaintiffs, and one can certainly sympathize with their frustration. How could it be that transgender people can be subjected to unfair treatment by the employers and yet have no recourse in law, especially in circumstances when the only conceivably reason for that treatment is their transsexuality? Was the lacuna in Title VII jurisprudence a function of an overly narrow reading of the words "because of sex," a lacuna that judges armed with the right theory of statutory construction could fill? Or would that have constituted legislating from the bench?

In 1989 and 1998, two Supreme Court rulings would change the fortunes of transgender plaintiffs and in short order inaugurate the second wave of transgender rights litigation. The first, *Price Waterhouse v. Hopkins*, was discussed in the previous chapter. *Hopkins* put the Supreme Court's imprimatur on the theory that a broad delegation of discretion to the courts to find and eradicate stereotyping is not only a reasonable reading of Title VII, but also what Congress had originally "intended." The second ruling, which came in 1998, was *Oncale v. Sundowner Offshore Services, Inc.* Joseph Oncale had filed a complaint against his employer alleging that he was harassed because his fellow employees mistook him to be gay. Oncale claimed to have been subjected to hostile environment discrimination, which the Court had previously found to be a form of discrimination "because of… sex."[478] At issue was whether Title VII implied only a class-based comparison of women to men, which would have been fatal to Oncale's claim.

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[477] Joseph Sjostrom, "Pilot Error Cited in 1989 Crash," *Chicago Tribune*, August 24, 1991 (http://articles.chicagotribune.com/1991-08-24/news/9103030162_1_training-flight-pilot-stall)
[478] *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

Writing for a unanimous Court, Justice Scalia held that although "male-on-male sexual harassment" was not what Congress had in mind in 1964, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[479] The combination of these two rulings, transgender advocates would in time argue, liberates regulators to ignore Congress' original "expectations" about what Title VII would accomplish, in favor a deeper and wider understanding of Congress' "intent."

The case that officially opened the floodgates of transgender litigation was *Schwenk v. Hartford*,[480] decided in 2000 by the Ninth Circuit Court of Appeals. Although not technically a ruling on Title VII, *Schwenk* introduced the idea that "sex" and "gender" are "interchangeable," and therefore that a law barring discrimination against women (i.e. against a particular *sex*) also applied to a man who appears and acts like a woman (i.e. to someone with a male *sex* and a feminine *gender*).

In 1994, Crystal (born "Douglas") Schwenk was transferred to a medium security unit in an all-male Washington state prison. Robert Mitchell, a guard stationed at her new unit, began to subject Schwenk to persistent harassment and assault. Mitchell pressured her to have sex with him, threatening that if she refused, he would have her sent to the main cell block, where she was likely to be targeted with violence by other inmates. Schwenk filed charges against Mitchell and various institutional authorities, alleging violation of her Eighth Amendment rights under Section 1983 of the Civil Rights Act of 1871.[481] Section 1983 exposes public officials to liability in civil suits for their part in violating constitutional rights, in this case for inflicting "cruel and unusual

[479] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).
[480] *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).
[481] 42 U.S.C. § 1983.

punishment." Schwenk's court-appointed counsel tacked on an additional complaint under the Gender Motivated Violence Act (GMVA), a subsection of the Violence Against Women Act passed by Congress the same year Schwenk had suffered the abuse.[482] The Act provides victims of gender-based crimes with a civil rights (i.e. non-criminal) private cause of action for wrongs "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."[483]

Mitchell claimed qualified immunity on both accounts:[484] for the Eighth Amendment charge because his conduct was "harassment" and not "assault," and for the GMVA because the law applied to harassment of women by men because of the former's sex, and any interpretation to the contrary could not reasonably have been foreseen by him (a claim that would trigger qualified immunity against liability otherwise imposed by Section 1983). The district court agreed with Mitchell on both claims of qualified immunity but refused to grant summary judgment on his behalf, and so Mitchell appealed his case to the Ninth Circuit Court.

Presiding over the appellate court hearing was a liberal icon of the federal bench, Judge Stephen Reinhardt. The Ninth Circuit ended up upholding the district court's decision with regard to immunity on the Eighth Amendment charge. More complicated, however, was its ruling on the GMVA issue. If the GMVA was to apply to transsexuals, the court agreed that no reasonable person could have foreseen such an interpretation, and this suffices to qualify

[482] 42 U.S.C. Ch. 136 §§ 13925-14045d.
[483] 42 U.S.C. § 13981(c).
[484] Qualified immunity is intended to shield public officials from litigation in which plaintiffs seek damages through civil suits. Both Section 1983 and GMVA expose public officials to tort litigation over claims of constitutional rights violations. The threefold rationale for qualified immunity, as developed by the Supreme Court is that it would be unfair to hold public officials personally liable in areas where constitutional law is vague; public officials may be over-deterred in performing their duties for fear of lawsuits; and finally, constitutional tort litigation without qualified immunity could impose heavy costs on individuals and on the government even where the legal charges turn out to be non-meritorious. See Alan Chen, "Burdens of Qualified Immunity," 47 *The American University Law Review* 1 (1997), pp. 3-4.

Mitchell for immunity. But in order to get to that conclusion, the court had to address the question of whether GMVA applied to Schwenk in the first place, since the defendant had argued that it did not. According to Mitchell's counsel, the GMVA was a subsection of a larger bill called the Violence Against *Women* Act, and as such it did not cover violence of men against other men. Moreover, Mitchell's actions were not "gender motivated" in the sense captured in that law, for the plaintiff "alleged only that the attack occurred because of [her] transsexuality, which… is not an element of gender, but rather constitutes gender dysphoria, a psychiatric illness."[485]

The court rejected both of these claims. In response to the contention that GMVA protects only women, Judge Reinhardt cited, among other things, public comments by the bill's major sponsor, Senator Joe Biden (D-DE), to the effect that one of its purposes is to provide a remedy for male inmates who suffer abuse at the hands of other men. The court also mentioned *Oncale* and its holding that same-sex sexual harassment is discrimination "because of...sex."[486] Reinhardt's verdict on Mitchell's other claim, regarding Schwenk's transsexuality, would pave the way for transgender plaintiffs in future Title VII suits. Reinhardt first pointed out that it was Congress' intent to have GMVA mirror the standards and rules of evidence in cases of discrimination on the basis of race or sex under Title VII. Following the mixed-motive ruling in *Price Waterhouse*, which was subsequently codified by Congress in the Civil Rights Act of 1991, "gender" had to be one, but not the sole, motivating factor. More importantly, said Reinhardt, it is necessary to determine what exactly is meant by "gender." Courts ("including this one") have long distinguished between sex and gender when interpreting Title VII, and it was this distinction that had led rulings in the ninth and seventh circuits that discrimination

[485] *Schwenk v. Hartford*, 204 F.3d 1187, 1199-1200 (9th Cir. 2000).
[486] Ibid., at 1200.

against transsexuals was not covered under Title VII. But those rulings, said Reinhardt, were based on the theory that discrimination "because of...sex" refers to adverse action on the basis of "an individual's distinguishing biological or anatomical characteristics,"[487] rather than discrimination because of "gender." The problem is that this rationale is not compatible with the "logic and language" of *Hopkins*, in which the Court had said that the term "sex" in Title VII means both sex *and* gender. According to Reinhardt, Ann Hopkins was penalized, not because she *was* a woman, but because she did not *act* like one. Thus, at least for the purpose of discrimination law, "the terms 'sex' and 'gender' have become interchangeable."[488] What matters for the court's analysis of GMVA is whether *either* sex *or* gender was present in the mind of the perpetrator and constituted a motive for the alleged mistreatment. Mitchell, Reinhardt concluded, had subjected Schwenk to mistreatment because of Schwenk's gender, i.e. because of Schwenk's

"assumption of a feminine rather than a typically masculine appearance or demeanor."[489] The question of whether Schwenk really is a woman is therefore irrelevant.

Reinhardt, however, recognized that his interpretation of GMVA--and implicitly, of Title VII—lay in tension with previous circuit court decisions. Since the Supreme Court had only indirectly hinted at this interpretation of Title VII and GMVA in *Hopkins*, Reinhardt felt he had no choice but to grant Mitchell his qualified immunity claim with regard to GMVA.

When Mitchell argued that GMVA applied only to women and that Schwenk was not a woman, Reinhardt could simply have denied Mitchell's premise about Schwenk's sex status. Instead, invoking *Oncale* and *Price Waterhouse*, Reinhardt chose to say that discrimination

[487] Ibid., at 1201.
[488] Ibid., at 1202.
[489] Ibid.

because of sex includes discrimination because of gender, and that although Schwenk's sex was male, his gender (i.e. behavior) was typical of females. (We can set aside, for the moment, the fact that Reinhardt was himself relying on stereotypes in coming to this conclusion). Reinhardt, in other words, saw a strong similarity between Schwenk's situation and that of Ann Hopkins. Like Schwenk, Hopkins suffered adverse consequences for not conforming to what is expected of her sex. Thus, despite declaring sex and gender "interchangeable," Reinhardt's argument very much assumes a distinction between these terms. Perhaps that is why, despite declaring it proper to refer to Schwenk in female pronouns (because doing so would "follow the convention of other judicial decisions" and show respect to Schwenk herself),[490] Reinhardt could not bring himself to use female pronouns consistently.[491]

The decade after *Schwenk* saw other federal courts fall in line with its reasoning about who transgender people are and why they are covered by sex discrimination law. The first to do so was the Sixth Circuit in *Smith v. City of Salem*,[492] decided in 2004. It must be recalled that *Schwenk* touched on Title VII only indirectly, drawing on that law to clarify how courts should interpret GMVA. Title VII was the focus of the litigation in *Smith*, and for that reason it is usually cited nowadays more frequently than *Schwenk*.

Smith involved a male-to-female transsexual who had been working as a firefighter in Salem, Ohio, for the better part of a decade as a man. Smith received a diagnosis of Gender Identity Disorder (GID). After she began presenting herself as a woman to her colleagues, she

[490] Ibid., at 1192, ff.1.
[491] According to the court, "there is no indication Schwenk's behavior was in any way inconsistent with gender dysphoria during his incarceration at Walla Walla. By all accounts, Schwenk conducts himself among his peers and with his immediate authorities as a female insofar as he is allowed by prison regulations, states a preference for the female identity as opposed to mere sexual gratification for the female sex roles, and has believed this since early adolescence and even before adolescence." Ibid., ff. 4.
[492] *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

was repeatedly told that her "appearance and mannerisms were 'not masculine enough,'"[493] a weighty charge in a profession that values physicality and manly risk-taking. After notifying management about her situation and her intent to undergo sex reassignment surgery, Smith's superiors decided that she would have to pass psychological evaluations. Their hope was that she would either "resign or refuse to comply."[494] Smith requested and received a "right to sue" letter from the EEOC, and was suspended from the fire department shortly thereafter.

After disappointment at the district court level, Smith appealed her case to the Court of Appeals for the Sixth Circuit and won. What sticks out immediately about the Sixth Circuit's decision is that although it repeatedly refers to Smith as "biologically and by birth a male" and uses male pronouns, it goes out of its way to cite with approval other court decisions that declared the mis-pronouning of people a form of sex-based harassment.[495] Other commentators on *Smith* may be tempted to write this off to carelessness or to a lack of sensitivity. In fact though, it is directly relevant to the reasoning of the court.

The Sixth Circuit effectively agreed with *Schwenk* that "the approach in *Holloway*, *Sommers*, and *Ulane*… has been eviscerated by *Price Waterhouse*."[496] The district court in this case had erred in its refusal to apply Title VII, the appellate court said, because it failed to see that Smith was in fact a male who was not conforming to male gender norms. "The district court… gave insufficient consideration to Smith's well-pleaded claims concerning his contra-gender behavior, but rather accounted for that behavior only insofar as it confirmed for the court Smith's status as a transsexual, which the district court held precluded Smith from Title VII

[493] Ibid., at 568.
[494] Ibid., at 569.
[495] Ibid., at 574.
[496] Ibid., at 573.

protection."[497] The appellate court then stated explicitly what was only implied in the *Schwenk* decision: "discrimination against a plaintiff who is a transsexual--and therefore fails to act and/or identify with his or her gender [read: sex]--is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman."[498]

The *Smith* ruling is peculiar in light of another Sixth Circuit decision issued just weeks earlier, which upheld an Ohio federal district court ruling against a transgender plaintiff on a Title VII claim of discrimination. [499] The plaintiff, Selena Johnson, was a transgender woman whose official government documents recognized her as male.[500] Johnson began to use both men's and women's restrooms at her workplace. After hearing complaints from Johnson's coworkers, her employer sent her home and asked that she return only after procuring a statement from her physician indicating her "gender." Johnson's lawyers claimed that Johnson was "neither entirely male nor entirely female, and it was most appropriate for her to use a women's restroom or, alternatively, a unisex restroom."[501] The employer conditioned her return upon her use of the men's room only. Fearing for her safety and well-being, Johnson refused to return under these conditions, and was subsequently fired for absenteeism.

Noting the discrepancy between *Ulane* and *Price Waterhouse*, the judge in Johnson's case ruled against her on the grounds that her employer "did not require Plaintiff to conform her *appearance* to a particular gender stereotype, [but] instead… only required Plaintiff to conform

[497] Ibid., at 574.
[498] Ibid., at 575.
[499] *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996 (N.D. Ohio 2003).
[500] The Ohio Bureau of Motor Vehicle's policy was not to change a person's listed sex unless they had undergone sex-reassignment surgery.
[501] Ibid., at 998.

to the accepted principles established for gender-distinct public restrooms."[502] In other words: the men's room is for all males, however gender nonconforming, and the women's room is for all females, however gender nonconforming. (It is worth noting that this is exactly the position of those who objected to regulations like the ones issued by the Office for Civil Rights in 2016.) Johnson's employer, the court said, had made a "good faith effort"[503] to determine what her gender was, but rather than provide verification for being female (contrary to what was disclosed in her official documents), Johnson, through her lawyers, stated that she was neither male nor female. As such, the court ruled, the employer had acted reasonably. In a one-sentence, unpublished opinion, the Sixth Circuit court affirmed.[504]

The district court opinions in *Johnson* and in *Smith* were decided by the same judge, Peter Economus, and within only a few weeks of each other. Both cases utilized the same legal analysis and came to the same legal conclusion. But the Sixth Circuit Court of Appeals affirmed the first (*Johnston*) and overturned the second (*Smith*). Why?

One possible explanation is that the *Smith* court had summoned to its panel California district judge William Schwarzer, the Ninth Circuit having earlier handed down a trans-inclusive interpretation of Title VII. But another, more likely explanation is the difference in regulatory issues represented in these cases. *Johnson* implicated the question of who qualifies as male or female, and thus who is eligible for use of female-only facilities, whereas *Smith* did not turn on whether the plaintiff was actually female, and if anything, seemed to require the assumption that Smith was male. In other words, the Sixth Circuit's assumptions about human nature remained consistent throughout both opinions. It bears mention that a year after *Smith*, the Sixth Circuit

[502] Ibid., at 1000.
[503] Ibid., at 1001.
[504] *Johnson v. Fresh Mark, Inc.*, 98 Fed. Appx. 461 (6th Cir. 2004).

issued yet another ruling for a male-to-female transgender plaintiff on the grounds of "failure to conform to sex stereotypes concerning how a man should look and behave."[505]

In 2008, the D.C. district court resolved a case that nudged regulation under Title VII closer to what would appear during the Obama administration. In *Schroer v. Billington*,[506] a veteran of the U.S. special forces and leading candidate for a position in counter-terrorism research at the Library of Congress (LOC) was dismissed after the hiring manager learned of the candidate's intent to transition from male to female. While the hiring manager's concerns were not entirely without basis,[507] ultimately Schroer was a well-qualified candidate who was terminated because of unproven assumptions, a misunderstanding of her situation, and probably animus toward her atypical gender status. Schroer argued that LOC discriminated against her *both* because of "failure to conform to sex stereotypes," *and* because of her gender identity, which, because a component of sex, meant that LOC discriminated literally "because of sex."

In regard to the stereotyping argument, the D.C. district court noted the hiring manager's confession that it was Schroer's "particularly masculine" background as a special forces operative that in her opinion would make Schroer's transition to female all the more jarring for her potential contacts in Congress and in the military.[508] The hiring manager expressed concern that Schroer would be perceived at times as an insufficiently masculine man, at times as an insufficiently feminine woman, and at times as a nonconforming transsexual. To this the court responded that it did not matter for the purpose of Title VII what the hiring manager thought

[505] *Barnes v. City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005).
[506] *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).
[507] These included: Schroer's ability to maintain working contacts with key people in the military; second, her credibility when testifying before Congress; third, her trustworthiness, as Schroer had not mentioned her transition at the start of the hiring process; fourth, the possibility of her transition process distracting her from her job; and fifth, her ability to maintain her security clearance, given the "male" designation on her government documents.
[508] 305

Schroer's genuine sex status was since all three scenarios constituted stereotyping. The court could find LOC's actions unlawful without any definitive judgment about Schroer's sex.

As to whether Schroer had properly stated a claim of *per se* sex discrimination, the court heard testimony from two expert witnesses, one claiming that gender identity (or psychological sex) was one of nine components that together made up a person's sex status, the other claiming that gender self-identification was a matter of sexuality. Because gender identity was not known to have a "fixed [biological] etiology," this expert said, it could not legitimately be counted among the factors that determine sex. After hearing the evidence, the court decided that "[r]esolving the dispute" was "not within [its] competence." Luckily, it was also "unnecessary." "Imagine," the court explained, "that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination 'because of religion' easily encompasses discrimination because of a change of religion."[509]

It is perhaps true that "no court would take seriously the notion that converts are not covered by the statute,"[510] but the analogy to religion actually demonstrates that the court *did* take a position on the basis of human sexual identity. Suppose Schroer's expert witness was correct and gender identity is part of innate human sexual makeup. In that case, Schroer would not have been a "convert" to femaleness, as the analogy implies, but a female all along. The word "convert" implies that one was once and X and is now a Y. According to the court's

[509] Ibid., at 306-307.
[510] Ibid.

religion analogy, therefore, gender identity is *not* an innate and immutable ("psychological") property, which, to recall, is the position that LOC's expert took.

But if that is the case and gender identity is, as that expert had said, part of "sexuality," then the question becomes whether "because of sex" means "because of sexuality." According to the *Schroer* court itself, the answer would seem to be no. The court faulted decisions like *Holloway* and *Ulane*, not for reading the words "because of sex" too *narrowly*, but for reading them too *broadly.* To take the leading example, the Seventh Circuit in *Ulane* deliberated about whether transsexuality or change of sex were comprehended within "sex," but this, the *Schroer* court said, was entirely unnecessary, since decisions like the one made by LOC were "literally" based on Schroer's sex. In other words, it is the plain meaning of the word "sex," *and only it*, that should guide courts in their construction of Title VII on claims such as Schroer's. Rulings that deny transgender claims, the court implied, are based on *too broad* a reading of the law. Using an originalist *bête noir* against its would-be critics, the *Schroer* court even went as far as to say that its predecessors had believed "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its maker," which "is no longer a tenable approach to statutory construction."[511]

Schroer was the first time a federal court had held that discrimination against "transsexuals" was sex discrimination *per se*. Stereotype theory was therefore not strictly necessary for transgender plaintiffs to succeed. Yet, the recurring problem with this argument, as we have seen, is that if transsexuality is a status independent of sex, it is not clear how it comes under Title VII. And if it is related to sex, then we get the same difficulty from the *Ulane* district court of maintaining that a person is at once both female and transsexual.

[511] Ibid., at 307.

In 2011 the Eleventh Circuit provided an example of the dynamic discussed in the previous chapter, in which legal doctrines developed under Title VII are then read backwards into equal protection jurisprudence, as if they were always implicit in the Fourteenth Amendment. *Glenn v. Brumby* involved a transgender woman who was fired from her government job and alleged a violation of her right to equal protection of the laws under the U.S. Constitution. "Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications," the court said, "its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes."[512] Vandiver Glenn, the aggrieved employee in this case who was "born a biological male,"[513] was told by her employer that it was "unsettling" and "unnatural" to think of "a man dressed up as a woman and made up as a woman."[514] To the court, these statements were indisputable evidence of stereotyping. It reasoned that because, as the *Schwenk* court had said, sex and gender are "interchangeable," it follows that discrimination "because of sex" means discrimination "because of gender." And what Glenn was doing, the Eleventh Circuit suggested, was not conforming to her biological sex. After mentioning the importance of *Hopkins*, the court went on to say that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." And "governmental acts based upon gender stereotypes–which presume that men and women's appearance and behavior will be determined by their sex–must be subjected to heightened scrutiny because they embody the very stereotype the law condemns."[515]

[512] *Glenn v. Brumby*, **663 F.3d 1312, 1319 (11th Cir. 2011).**
[513] Ibid., at 1314. According to the logic of wave three, Glenn was not born a biological male, but was "assigned male at birth."
[514] Ibid.
[515] Ibid., at 1320.

In sum, after *Price Waterhouse* transgender litigants could succeed where Ramona Holloway, Audra Sommers and Karen Ulane had failed if they got judges to view them as being "like" Ann Hopkins. Analogy, to repeat, is the art of the lawyer in a common law system. The scenario of discrimination for Schwenk, Smith, and Glenn on the one hand, and Hopkins on other, was held essentially to be the same: an employee is penalized for failing to conform to social expectations in regard to the conduct or appearance of his or her biological sex. Judges had to make no dramatic doctrinal changes in Title VII to enable transgender plaintiffs to prevail, but only to recognize that expressing a *gender* opposite to one's *sex* is an example of gender nonconformity, albeit perhaps one that is more extreme than Hopkins' display of manly aggression, and one that may appeal to precisely those norms and beliefs that courts otherwise consider stereotyping.[516] These were differences of degree, not of kind.

That the question of the plaintiff's true sex was either irrelevant to the employment discrimination claim or (more likely) assumed to be the opposite of their gender identity can be seen at even greater clarity when comparing the employment cases discussed above to other wave-two cases that *did* turn on the question of what makes humans male or female. In *Goins v. West Group* (2001),[517] for example, a transgender woman who was denied access to the women's room filed discrimination charges against her employer under the Minnesota Human Rights Act, which prohibits discrimination on the basis of "sexual orientation" (MN law defines transgender as a subset of sexual orientation).[518] The plaintiff claimed that access should be based on "self-

[516] See Chapter 3 for explanation of how trans-as-between rests on rather than challenges gender stereotypes. In the *Brumby* case, the court casually noted that Glenn began to come to work "presenting as a woman." How exactly does "a woman" "present"? How would the court know that Glenn's presentation is in fact womanly, if not by comparing it against generalizations about how women usually "present"? Is this not exactly the kind of stereotyping that feminists routinely condemn?

[517] *Goins* v. *West Group*, 635 N.W.2d 717 (Minn. 2001).

[518] Minnesota Human Rights Act, § 363A.03, Subd. 44.

image" of gender rather than on "biological gender," but the state supreme court disagreed. Reasoning that the legislature could not possibly have intended for MHRA to be read in this way, the court affirmed "the traditional and accepted practice" of designated restroom access by "biological gender." The law, the court emphasized, "neither requires nor prohibits" employers from adopting one definition of sex over another.[519] Minnesota, it should be noted, is one of the most progressive states in the country on LGBT rights, and in 1993 became the first state to enact protections for transgender people in its civil rights code.

The Tenth Circuit reiterated this view in 2007, holding that the firing of a male-to-female transsexual who refused to use the men's restrooms did not constitute of Title VII or of the Fourteenth Amendment's Equal Protection Clause (the employee worked for the government). As the district court was careful to point out, the plaintiff "was never teased or treated disrespectfully during her employment… No one… criticized her for being effeminate or made any remarks critical of transsexuals." Additionally, she "said that the termination was not carried out in a disrespectful or hurtful manner, and that [her supervisors] seemed sincerely concerned about the restroom issue."[520] Restroom access was, in short, the only issue at play. With the focus sufficiently narrowed, the court held that the plaintiff had not stated a valid claim of discrimination. Restroom separation is based on biological sex, and one is entitled to use the facilities that accord with one's sex no matter how gender nonconforming one is. The circuit court affirmed: "However far the United States Supreme Court's holding in Price Waterhouse reaches, [we] cannot conclude it requires employers to allow biological males to use women's

[519] *Goins* v. *West Group*, 635 N.W.2d 717, 724 (Minn. 2001).
[520] *Etsitty v. Utah Transit Authority*, Case No. 2:04CV616 DS (D. Utah Jun. 24, 2005), p. 3.

restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."[521] *Etsitty v. Utah Transit Authority* remains good law.[522]

III: Wave Three

In 2012, the Equal Employment Opportunity Commission adopted both the holding and the rationale of *Schroer* in a ruling involving a transgender police detective who applied for a job as a ballistics expert at the Bureau of Alcohol, Tobacco, Firearms and Explosives.[523] The EEOCs decision in *Macy v. Holder* was an opening salvo in a stream of guidelines issued by various executive agencies within the Obama administration. The Department of Education's guidelines on transgender students grew out of a campaign against bullying and harassment it launched in 2010, on the logic that getting schools to affirm students' gender identities is necessary for making schools "safe and welcoming."[524] But there was another, more internal thrust to the legal developments during this time, and it was the effort to character the kind of regulations contained in the 2016 Dear Colleague Letter as consistent with the precedents set in the employment cases discussed above. Thus began wave three.

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

[522] But that might change when the Supreme Court decides *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, Docket No. 18-107 (upcoming, 2019-2020 term).

[523] It is perhaps not surprising that the landmark transgender employment cases all involve male-to-female individuals with backgrounds in manly professions: special forces, firefighting, and police. This raises the question of how transgender people fared in professions that are not (or less) traditionally gender-specific during this time.

[524] Secretary of Education Arne Duncan, "The Myths About Bullying," Speech at Bullying Prevention Summit, Washington, D.C., August 11, 2010. Duncan announced an "epidemic" of bullying and called on schools to do more to create a "positive school climate" in which all students are "valued" and "feel[] like they belong," the implication being that to be physically safe means not just the absence of violent aggression, but a positive feeling of being "valued." The speech was followed up by two successive OCR actions: a "Dear Colleague Letter: Harassment and Bullying," on October 26, 2010, and a document titled "Questions and Answers on Title IX and Sexual Violence," on April 29, 2014. As others have shown, although OCR claimed merely to be applying the standards for peer-on-peer harassment ("bullying") announced by the Supreme Court in *Gebser* v. *Lago Vista Independent School Dist.,* 524 U.S. 274 (1998) and in *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999), it actually changed those standards significantly, and in ways that contravenes the delicate constitutional balancing that the Court had done in those cases. See Melnick, *Transformation of Title IX*, pp. 189-222. See also U.S. Commission on Civil Rights, "Peer-to-Peer Violence and Bullying: Examining the Federal Response," September 2011, Dissents of Commissioners Todd Gaziano and Peter Kirsanow (pp. 128-180) and of Commissioner Gail Heriot (pp. 181-312).

A number of background factors converged to create the conditions for the civil rights state's movement from wave two to a new paradigm. For the sake of simplicity, we can divide these into three groups: political-electoral, organizational and cultural.[525]

Political-electoral. The acronym LGBT (and its many derivatives) is not a sociological label but a political one, and a somewhat misleading one at that. Lesbians, gays, bisexuals, and transgender people are held together in one coalition more so by their common opposition to what can broadly be called sexual traditionalism than by any substantive agreement on what a just society might look like. For a brief moment during the late 1960's and early 1970's, transgender and queer activists banded together with gays and lesbians under a broad "liberationist" rubric. The reason for this was that a sizable number of gays and lesbians, who were always the more numerous and politically powerful part of the coalition, believed that the path to rights and respect went through the radical transformation of society. Sexual liberation meant the liberation of *all* individuals from the constraints of tradition. The break came in the late 1970's, however, as the gay and lesbian camp became internally divided over strategy. One side (liberationists) insisted on a politics aimed at "queering" society. The other side (assimilations) advocated for a minoritizing, identitarian approach in which gays and lesbians would be recognized as a distinct but respected and legally equal subgroup in exchange for not challenging society's basic norms and institutions.

Over time, the assimilationists triumphed over the liberationists. The reasons for this are complicated and cannot be enumerated here. Suffice to say that social acceptance for homosexuality grew steadily and strong over the following decades, as did the organizational capacities, economic resources and political clout of gay rights advocacy groups. Because gay

[525] The distinction between these categories is obviously not clear cut.

rights advocates often faced collective action problems, they relied heavily on mainstream foundation grants and individual donations. But gay rights groups could not appeal successfully to progressive foundations and donors without distancing themselves from the radical liberationist politics of the 1960's and 1970's. They could not on the one hand argue that gays and lesbians are "just like everybody" else and therefore want the benefits of two-parent, child-centered, monogamous marriage, and on the other hand that society's definition of male and female was a social construct that had to replaced, for instance, with an emphasis on queering sexual categories and radical subjectivity. "By identifying as queer," the activist David Link wrote in 1993, "lesbians and gay men do exactly the same thing that the most virulent homophobes do: they make their sexual orientation hyper-important, more important than any single factor should be in a complex human personality. Equally important, by marking ourselves as outsiders, we deny what we have in common with others."[526] Transgender politics, in contrast, is essentially a queer politics. Transgender claims are ultimately claims about "what constitutes legitimate knowledge."[527]

As it grew in power, and indeed as a condition of this growth, gay rights made a strategic decision to exclude transgender activists from its ranks. This was reflected, for instance, in gay leaders' decision to exclude transgender language from the proposed Employment Non-Discrimination Act in 2007.[528] As late as 2005, the Gay, Lesbian and Straight Education Network, one of the most prominent LGBT organizations in the country and a major force behind the Obama administration's Title IX initiatives, defined "transgender" as "people who do

[526] David Link, "I Am Not Queer," in Bruce Bawer ed., *Beyond Queer: Challenging the Gay Left Orthodoxy* (New York: The Free Press, 1996), p. 274.
[527] Stryker, "(De)Subjugated Knowledges," pp. 8-9.
[528] Susan Gluck Mezey, *Beyond Marriage: Continuing Battles for LGBT Rights* (New York: Rowman & Littlefield, 2017), pp. 6-11.

not identify with the gender roles assigned to them by society based on their biological sex,"[529] a clear reflection of the fact that transgender discourse had not yet become standard within LGBT issue networks. Even the Human Rights Campaign, the nation's leading LGBT rights group, referred repeatedly to "physical" sex in a pamphlet it published in 2005 on transgender people.[530] Less than decade later, both organizations would declare that using such language was derogatory and dehumanizing.

The about face within gay rights with regard to its acceptance of transgender activism came during the second term of the Obama administration. This was a consequence of a number of deeper causes working in tandem. One had to do with electoral calculation and partisan coalition building. The Obama administration set out to forge a new, younger, more female and socially progressive base for the Democratic Party to replace its withering blue-collar (and largely culturally traditional) backbone.[531] President Obama promised bold action in his "We Can't Wait" reelection campaign in 2012. He also nominated prominent LGBT rights advocates to key positions within his cabinet, including Kevin Jennings (founder of GLSEN) to the Department of Education's Office of Safe and Healthy Students, which played a leading role in formulating the administration's anti-bullying initiatives and eventually grew into the transgender regulations of 2015 and 2016. President Obama also appointed John Berry, who is openly gay, to head the Office for Personnel Management, which in 2011 issued the administration's first ever guidelines on transgender federal employees.[532]

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[529] GLSEN, "School Climate Survey," 2005, p.5 ff. 1.
[530] HRC, "Transgender Americans: A Handbook for Understand," 2005, p. 5.
[531] Kenneth S. Lowande and Sidney M. Milkis, "'We Can't Wait': Barack Obama, Partisan Polarization and the Administrative Presidency," *The Forum* 12 (2014): 3-27, pp. 14-15.
[532] OPM, "Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace," May 27, 2011.

The federal government during this time was also behind a growing number of states that had added transgender protections to their civil rights and anti-bullying codes. We already mentioned the *Mathis* case out of Colorado in 2013, and a similar ruling was handed down by the Supreme Court of Maine a year later. Also in 2013, California's governor Jerry Brown signed into law the School Success and Opportunity Act, which went even further than OCR's DCL would go three years later by stating that schools must not only permit access to sex-segregated facilities by gender identity, but that they also could not deny a student of either sex participation in any athletic activities.[533] Although Minnesota was the only state with gender identity included in its nondiscrimination ordinance between 1993 and 2003, between 2003 and 2015 eighteen states added the category to their own laws.[534] Thus, a federal administration anxious about cementing the loyalty of socially progressive voters and led by a president who frequently spoke about being on the "right side of history" would likely have sensed that the time to revise its position on transgender issues was now.[535]

Another reason, which we discuss more below and in the next chapter, had to do with social and cultural transformation that had been underway in American society since the 1960's. Transgenderism appeals to a cultural disposition that values authenticity and self-expression, that holds self-esteem to be a precondition for, rather than a consequence of, personal achievement and desert. I mention this here for the simple reason that as the political parties have become more ideologically homogeneous (a process known as "sorting"),[536] and especially as opposition

[533] Ca. A.B. 1266, Ch. 85. §221.5(a)-(f).
[534] Taylor et al, *The Remarkable Rise of Transgender Rights*, p. 32.
[535] For Barack Obama's frequent use of "right/wrong side of history," see David A. Graham, "The Wrong Side of 'the Rights Side of History,'" *The Atlantic*, December 21, 2015.
[536] Matthew Levendusky, *The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans* (Chicago: University of Chicago Press, 2009); Alan I. Abramowitz and Kyle L. Saunders, "Ideological Realignment in the U.S. Electorate," *Journal of Politics* 60 (August 1998): 634−52.

to religious conservatism has become a rallying cry within progressive politics,[537] taking bold positions on otherwise divisive cultural issues may offer partisans on both sides a promise of electoral rewards.

A third reason for the change in relationship between gay rights and transgenderism was a growing problem of cyberbullying in schools, a phenomenon that seemed to have greater impact on gender nonconforming teenagers of all stripes in comparison with their peers.[538] Beginning around 2009, a potent combination of smartphones and social media gave rise to a new platform of peer-on-peer harassment ("cyberbullying"), and as gay rights organizations have been quick to point out, LGB and T adolescents were its prime victims.[539] The challenge of online bullying brought together two groups that had for years been at odds with one another. This is a key point. According to one critic, the Title IX transgender regulations were little more than thinly veiled attempts to disguise gender ideology promotion as noncontroversial "anti-bullying" programs.[540] This is an exaggeration with a kernel of truth, but more importantly, it misses the deeper political point that framing transgender policy as anti-bullying helps to keep an otherwise fragile coalition intact.

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[537] George Yancy and David A. Williamson, *What Motivates Cultural Progressives? Understanding Opposition to the Political and Christian Rights* (Waco, TX: Baylor University Press, 2012).

[538] See e.g. Musu-Gillette et al, "Indicators of School Crime and Safety: 2016," May 2017, Report for National Center for Education Statistics, U.S. Department of Education, and Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice.

[539] A widely cited report published in 2009 by the Gay, Lesbian and Straight Education Network (GLSEN) found that LGBT students faced a persistently "hostile school climate." The report observed that of the 7,261 students surveyed, ninety percent had experienced anti-gay slurs "frequently or often" at school; sixty-two percent reported hostile remarks about their "gender expression"; a similar percentage felt unsafe at school because of their sexual orientation, and forty percent because of their gender expression; fifty three percent experienced cyberbullying, an activity that often begins at school but extends well beyond its walls. The report linked bullying and harassment to a number of negative outcomes, including absenteeism, lowered academic aspirations and achievement, and poor psychological wellbeing, all in addition, of course, to physical intimidation and violence. GLSEN, "National School Climate Survey," 2009.

[540] Ryan T. Anderson, "A Brave New World of Transgender Policy," 41 *Harvard Journal of Law & Public Policy* 309 (2018), p. 315.

Last but certainly not least was the Supreme Court's decision on same-sex marriage in 2015,[541] which in a stroke of a pen "robbed" a large number of well-funded, highly visible advocacy groups staffed with talents and ambitious lawyers of their *raison d'etre*. Institutional inertia dictates that organizations that come into existence in order to solve a particular problem will typically look for new venues for activism once that problem is solved. Groups like the Human Rights Campaign, the ACLU's Gay and Lesbian Rights division, Lambda Legal, and the National Center for Lesbian Rights, which had focused so much of their energy, fundraising and lobbying on marriage now faced strong incentives to take up another cause. They found it in transgender rights.

Organizational. The political trends discussed above are both reflected in and to a significant extent the products of transgender interest group formation. Organizing the transgender people and their advocates into a movement has always posed significant challenges. Although the transgender *cause* has become an elite-driven phenomenon, transgender *people* tend to be economically weak, socially isolated from one another (and often from their communities), and often politically disconnected. Because transgender advocacy faces significant collective action problems, the transgender rights project is highly susceptible to the framing and leadership of transgender interest groups. Indeed, advocates' desire to speak on behalf of a transgender "community" is one of the reasons why the word "transgender" itself has become an "umbrella term" that encompasses identities that are in conflict with one another.[542] In short, as an identity, "transgender" is not purely or perhaps even primarily a sociological phenomenon, but one that is shaped in profound ways by political incentives and opportunity structures.

[541] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[542] Currah, "Gender Pluralisms Under the Transgender Umbrella," p. xv.

As Anthony Nownes has found, the number of national interest groups focused exclusively on transgender issues between 1964 and 1985 was between 0 and 2. That number spiked to 19 by 2005. A similar trend was observable at the state level. But even by this point, policy influence was limited due to the superior numbers, resources and organization of gay rights groups.[543] Transgender organizations depended heavily on self-funded entrepreneurs, and once launched, these organizations competed with LGB groups and with other transgender groups for resources and attention.[544] According to Taylor and Lewis, "transgender individuals did not comprise a significant resource base to many statewide LGBT rights groups," perhaps due to "the small size of the transgender community and the discrimination-related poverty that afflicts it. Nearly all of the state-level LGBT rights advocates noted that gay and lesbian individuals provide most of the money for the interest groups and they also supply the vast majority of the volunteer and staff labor."[545] Of the fifteen largest LGBT national interest groups, the first thirteen are LGB groups that have "added the T." In 2014 the wealthiest transgender-specific advocacy group, the Transgender Law Center, had an annual operating income of $1,285,591, compared to operating incomes of $41,364,760, $29,654,304, and $15,075,163 of the three largest LGB groups.[546] Some of the major donors to gay rights groups (who were themselves gay) were openly skeptical about the wisdom of pursuing transgender causes.[547]

Among the key reasons for the sudden proliferation and success of transgender interests, then, was that "LGB groups, even when they were not particularly interested in transgender

[543] Nownes, *Organizing for Transgender Rights*, 2019, Ch. 5.
[544] Anthony J. Nownes, "Interest Groups and Transgender Politics: Opportunities and Challenges," in Jami K. Taylor and Donald P. Haider-Markel ed., *Transgender Rights and Politics: Groups, Issue Framing, and Policy Adoption* (Ann Arbor: University of Michigan Press, 2014), pp. 91-92.
[545] Jami K. Taylor and Daniel C. Lewis, "The Advocacy Coalition Framework and Transgender Inclusion in LGBT Rights Activism," in Ibid., p. 120.
[546] Taylor et al, *The Remarkable Rise of Transgender Rights*, p. 110.
[547] Taylor and Lewis, "The Advocacy Coalition Framework," pp. 119-121.

rights, served as training grounds for transgender rights activists."[548] The latter have used the political skills and connections as well as the funding and institutional learning of the former in order to advance their goals. If the transgender movement owes a great debt to 1960's feminism for the creation of a theory of statutory interpretation that has made Congressional amendment of the Civil Rights Act unnecessary, it owes to gay rights an equally large debt in terms of organizational capacity and resources. It is the latter much more than the former resource—organizational rather than legal-doctrinal—that best explains the emergence of wave three regulation.

Culture. Finally, the advent of wave three regulations is an outgrowth of profound changes in American culture. I am using the word "culture" in a broad sense here. It includes not just beliefs and attitudes about the human person, education, religion, justice, and so forth, but also (or as part of those beliefs) what science, and thus the medical establishment as its representative, says about matters of human sexual identity.

In 2013 the American Psychological Association published the DSM-V.[549] Among the changes made from DSM-IV was the replacement of "gender identity disorder" (GID) with "gender dysphoria" (GD). It is tempting to draw analogies to the depathologization of homosexuality in the DSM-III in 1980, but here again the tendency to lump all sexual minorities into one supposedly cohesive social group should be resisted. Unlike gay rights advocates, transgender advocates were conflicted about whether to remove GID from the DSM altogether. Doing so would have deprive many transgender people of a diagnosis that has crucial

[548] Nownes, *Organizing for Transgender Rights*, p. 179.
[549] American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (Arlington, VA: American Psychiatric Association, 2013).

implications for insurance coverage of their treatments.[550] "Gender dysphoria" was a compromise: its replacement of "disorder" with the more neutral "dysphoria" would reduce the stigma on transgender people without compromising their insurance status.

Authenticity, self-expression and depathologization have proved to be *the* defining themes of the mainstreaming of transgender politics. *Time* magazine's cover story in June, 2014, was entitled "The Transgender Tipping Point." The issue featured Laverne Cox, the transgender star of the hit *Netflix* series *Orange is the New Black*. 2014 was also the year that *Netflix* aired the series *Transparent*, which tells the story of a transgender woman and her struggles to reconcile her life-long aspiration to live as a woman with the father role her children had come to expect of her. In 2015, TLC launched it hit reality show "I Am Jazz" about a fifteen year-old transgender girl, student protesters at Mount Holyoke College demanded and won the cancellation of the feminist play "The Vagina Monologues" because of its "inherently reductionist and exclusive" assumption that all women have vaginas,[551] and Caitlyn Jenner catapulted to national celebrity when she came out as a woman. *Vanity Fair* featured Jenner on the cover of its July edition in a female bathing suit (much to the chagrin of feminists). *Glamour Magazine* gave its "woman of the year" award to Jenner in 2014 and to Cox in 2015. The ethos of authenticity, self-discovery and self-disclosure are also noticeable in Judge Andre Davis' mention of "lived facts" in *G.G. v.*

[550] This has been a point of controversy within the transgender movement for quite some time. See e.g. Arlene I. Lev, "Disordering gender identity: Gender Identity Disorder in the DSM-IV-TR," *Journal of Psychology & Human Sexuality*, 17(3–4), 35–69; Sarah R. Kamens, "On the Proposed Sexual and Gender Identity Diagnoses for DSM-5: History and Controversies," *The Humanist Psychologist*, Vol. 39, Issue 1 (2011): 37-59.

[551] Yvonne Dean-Bailey, "All-Women's College Cancels 'Vagina Monologues' Because It's Not Feminist Enough," Campus Reform, January 15, 2015. The play's creator, Eve Ensler, defended herself against the student accusers by insisting that "I never intended to write a play about what it means to be a woman, that was not what the Vagina Monologues ever intended to be… It was a play about what it means to have a vagina. It never said, for example, the definition of a woman is someone who has a vagina." Oliver Laughland, "Vagina Monologues playwright: 'It never said a woman is someone with a vagina,'" The Guardian, January 16, 2015 (https://www.theguardian.com/world/2015/jan/16/vagina-monologues-eve-ensler-rejects-mount-holyoke-college-claims-reductionist-exclusive).

Gloucester and in Catharine Lhamon's admission that her department's guidelines were "never really about bathrooms" but about how transgender students "will be perceived and seen."[552]

In sum, what I am calling wave three transgender regulations, in which the question of what makes human beings male or female, is a consequence of a convergence of a number of factors. The details of wave three need not be discussed further here, since they have been developed at length in previous chapters. Suffice to say that this was not merely the extension of an argument from the employment context to the educational context; it was a dramatic departure from the civil rights state's prior understanding of the human person and of what it means to have rights.

Conclusion

Viewed without nuance, the history of transgender rights is one of incremental but secular progress. And yet, wave three litigation has generated opposition in a way that wave two litigation did not. This may seem coincidental, but the deeper analysis provided above shows the problem in grouping all transgender policy debates under the abstract heading of "transgender rights," to say nothing of the yet more abstract "LGBT rights." The narrative of secular and incremental progress implied by OCR's list of precedents in its transgender guidelines cannot explain why conservative groups largely lay dormant for a decade and a half, seemingly oblivious to transgender gains in employment discrimination, and then one day decided it was time to push back. Nor can it explain why feminists, who laid the intellectual foundations for the application of *Hopkins* and *Oncale* to transgender people in employment and who were a potent force behind wave two, all of a sudden were deeply and rancorously divided over transgender

[552] "74 Interview: Catherine Lhamon Takes On Trump with Probe into Cutbacks on Student Civil Rights," June 27, 2017 (https://www.the74million.org/article/74-interview-catherine-lhamon-takes-on-trump-with-probe-into-cutbacks-on-student-civil-rights/).

rights beginning around 2014 or so. As we noted at the outset of the previous chapter, explicit statements made by Ruth Bader Ginsburg in support of gender equality and against sexual stereotypes are now considered stereotypical themselves.

Irrespective of whether OCR was sincere in its belief that its transgender policies were nothing new, there may be good arguments for taking that position. Do the words "because of / on the basis of… sex" have a plain meaning? How much weight, if any, should the intentions of lawmakers in the 1960's and 1970's be given in interpreting Titles VII and IX? In what sense precisely did Congress "intend to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" when it passed the original civil rights statutes? At what level of abstraction should judges read the words "because of sex"? And perhaps most importantly, what are the regime-level implications of how judges interpret vague federal mandates? It is to these questions that we must now turn in our next and final chapter on jurisprudence.

Chapter 6
The Jurisprudential Foundations of Transgender Regulation

> [T]he history of transsexuality… illustrates the rise of a new concept of the modern self that placed a heightened value on self-expression, self-improvement, and self-transformation.
>
> --Joanne Meyerowitz, author of *How Sex Changed: A History of Transsexuality in the United States*[553]

As the Court of Appeals for the Seventh Circuit made clear in *Whitaker v. Kenosha*, the two key pillars of the transgender rights movement's strategy are *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner Offshore Services*. In *Hopkins*, the Supreme Court held that "because of sex" includes because of "stereotypes," but also that "Congress intended" such an interpretation. This implied that Congress delegated the responsibility to determine which beliefs *are* stereotypes to some combination of courts and Equal Employment Opportunity Commission. In *Oncale*, the Court held that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils," which, in combination with *Price Waterhouse*, transgender advocates have taken to mean that Congress intended an evolving, and perhaps open-ended, understanding of "stereotypes."

Although almost all court and agency decisions on transgender rights have treated the two rulings as if they express different sides of the same "expansive view" of sex discrimination law,[554] it is not obvious what *Oncale* actually adds to *Hopkins*, especially if, we saw in wave two litigation, *Hopkins* is interpreted to to have condemned "stereotypes" at a higher level of abstraction than was necessary to resolve the dispute in that case. Perhaps the reason why *Oncale*

[553] Meyerowitz, *How Sex Changed*, p. 9.
[554] See e.g. Dear Colleague Letter , "Transgender Students," May 13, 2016, p. 6 ff. 5; *Whitaker* by *Whitaker v. Kenosha Unified School District Board of Education*, 858 F.3d 1034, 1048 (7th Cir. 2017); *Doe v. Boyertown Area School District*, 893 F.3d 179, 198 (3rd Cir. 2018); *M.A.B. v. Board of Education of Talbot County*, 286 F.3d 704, 713 (D.M.D. 2018).

is cited is that it was written by Justice Antonin Scalia. If even the icon of judicial conservatism for the past thirty years has embraced the "expansive view" of Title VII,[555] then surely there could be no good reason to oppose it.

But *Oncale* and *Hopkins* are not redundant, they are in an important sense contradictory. Consider how the quote from *Oncale* ends: "it is ultimately the provisions of our laws *rather than the principal concerns of our legislators* by which we are governed."[556] Scalia's point seems to be that if sexual harassment is a form of sex discrimination (and one could certainly entertain doubts about that),[557] then there is nothing in the plain language of Title VII to limit harassment exclusively to conduct engaged in by one sex against the other. No appeal to legislative intent or purpose is required. Scalia was a known critic of methods of interpretation that look beyond the original public meaning of a legal text to its supposed underlying intent or purpose. Yet this is precisely what the Court had done in *Hopkins*.

Thus, one can just as easily read *Oncale* as an effort to rein in the "expansive view" of Title VII endorsed in *Hopkins*. *Hopkins* comprehends an expansive role for judges and perhaps the legal profession at large to articulate and address "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," an ambitious project that entails robust judicial supervision of the usual mechanisms of democratic self-government. *Oncale* acknowledges that legislatures speak often in generalities and that a common law system

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[555] The *Kenosha* court does not mention Justice Brennan as the author of the plurality opinion in *Price Waterhouse*, but does mention Justice Scalia as the author of the unanimous opinion in *Oncale*. See *Whitaker v. Kenosha*, ibid.
[556] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).
[557] Consider e.g. the dissent by Robert Bork, Antonin Scalia and Kenneth Star, then judges on the Court of Appeals for the D.C. Circuit, in *Vinson v. Taylor*. As Bork points out, characterizing sexual harassment as discrimination leaves the law with nothing to say to the bisexual (i.e. equal opportunity) harasser. This proves, in his view, that Congress could not have envisioned that Title VII would cover sexual harassment. *Vinson v. Taylor*, dissent from denial of rehearing en banc, 760 F.2d 1330 (D.C. Cir. 1985). This would seem to hold true even if one agrees with Catherine MacKinnon that sexual harassment is largely a gender-based phenomenon. Catherine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979). For overview of debate about the foundations of sexual harassment as discrimination, see Melnick, *Transformation of Title IX,* pp. 161-168.

supports some measure of reasoning by analogy in interpreting those generalities, but seeks nevertheless to constrain judges by tethering them to the words rather than the "concerns of our legislators." The rationales in *Hopkins* and *Oncale* present competing views of judicial power and of the role of courts within a constitutional democracy.

This chapter reflects on the jurisprudence of transgender regulation in federal law. Given that no one seriously contends that lawmakers in 1964 or 1972 contemplated the transgender issue, in what sense can it be said that "Congress intended" Title IX to prohibit schools from assigning students to accommodations based on biological sex? What assumptions about the authority of judges, and perhaps of the legal profession more generally, underlie such a claim? What is the relationship between the substantive and procedural questions regarding transgender regulation on the one hand, and the theory and practice of American constitutional democracy on the other? In addressing these questions, this chapter ascends back to the regime-level questions with which we began. The scholars and jurists discussed below are keenly aware that their theories of legal interpretation are *ipso facto* answers to the perennial questions of political life: Who should rule? To what end? By what authority? By what means? Subject to what constraints?

Shep Melnick has suggested that the jurisprudence behind the transformation of Title IX from a ban on the overt exclusion of women from educational programs to an all-encompassing mandate empowering the civil rights state to change societal beliefs about sex, gender, sexuality and identity, is "dynamic statutory interpretation" (DSI).[558] According to DSI, it is the job of judges to ensure that laws like Title IX "evolve" in light of the changing needs of society. This means that judges may often have to interpret laws beyond and even against the original

[558] Melnick, *Transformation of Title IX*, pp. 241-246.

intentions of their authors, and even in ways that contradict the plain meaning of the law's words. Part I argues that DSI in actually not the best theory to explain how civil rights regulators have understood their role in interpreting and enforcing Title IX.

A better framework, I argue in Part I, is Ronald Dworkin's theory of "layers of intent." Dworkin's legal and political philosophy has been characterized as having two sides: one that calls for a "moral reading" of the Constitution, and another that insists that such a reading would be most faithful to the intentions of the framers. Parts II and III take up these themes in reverse order. Part II explains why, in Dworkin's view, fidelity to the framers of the Constitution means interpreting its rights-bearing clauses at the highest possible degree of abstraction, even if that means thwarting the framers' expectations in regard to what the clauses would do. Such an approach mirrors the assumption of judges and administrators that by construing "on the basis of sex" at a level of abstraction high enough to allow or even compel transgender regulation, they are fulfilling the intent of Congress, and this even if lawmakers at the time had no expectation that the law would be applied in this way. Part III examines the "moral reading" of the Constitution, at the heart of which, says Dworkin, is the right to "equal concern and respect." Our goal here will be to understand what Dworkin—or better yet, John Rawls, whose political theory Dworkin means to have courts enforce—means by "respect," and how the notion of dignity behind this demand for respect informs wave three transgender regulation.

Part III considers an alternative jurisprudential basis for transgender regulations. I call this approach "therapeutic pragmatism" because it brings together the therapeutic ethos of post-1960's American culture and a particular kind of philosophic (though as we shall see, not necessarily legal) pragmatism. The two thinkers discussed in this section are Judge Richard Posner, arguably the leading pragmatist of his generation, and Richard Rorty, a philosopher

known for his distinctively "postmodern" pragmatism. The reader may find that this section provides the most intuitive explanation for transgender regulation. Bluntly stated, "therapeutic pragmatism" says that transgender students suffer, suffering is bad, and if civil rights institutions can help to alleviate that suffering, then compassion dictates that they should do so, irrespective of constraining interpretive methodologies.

To conclude this long (but I think necessary) introduction, three brief caveats are in order. First, the bulk of this chapter discusses constitutional rather than statutory interpretation. There are obviously differences between the two.[559] Nevertheless, civil rights statutes draw their intellectual and political force from the Constitution, and especially from the Fourteenth Amendment's Equal Protection Clause. It is no accident that many of the lawsuits filed by transgender students against their schools allege violations under Title IX as well as the Constitution. The Civil Rights Act of 1964 and Title IX have acquired quasi-constitutional status, and as some prominent legal scholars have argued, their passage marks a "constitutional moment" in which the American regime changed in fundamental ways.[560] The assumption of this chapter is that judges are guided in their interpretation of statutes by ideas and political legacies established in the constitutional realm.

Second, while the discussion below focuses mostly on courts and how judges interpret the law, in regard to both Title VII and Title IX legal interpretation and enforcement is at times an agency-focused enterprise, and at other times a collaboration between courts and agencies. The institutional dynamics of civil rights enforcement are not wholly independent from how civil rights laws are interpreted. For example, "institutional leapfrogging"—the process whereby

[559] For brief discussion see Melnick, *Between the Lines*, pp. 3-8.
[560] See e.g. Bruce Ackerman, *We the People, Volume III: The Civil Rights Revolution* (Cambridge: Belknap Press, 2018).

courts and agencies take incremental steps beyond each other in interpreting and enforcing civil rights statutes—can obscure legal innovation and regulatory expansion. Nevertheless, the discussion below will focus on judges and courts, not just for the sake of simplicity, but also because, as we shall see in Part III, there is a common understanding of the contemporary civil rights project that cuts across institutions.

Third, I frequently use the term "transgender regulations." Unless I specify otherwise, the this refer to "wave three" regulations, i.e. those that implicate the question of who counts as male and female and why. Most of wave three concerns Title IX controversies in schools, but a current Supreme Court case also raises the issue under Title VII.[561]

I: Are Transgender Regulations an example of Dynamic Statutory Interpretation?

What makes statutory interpretation "dynamic," argues William Eskridge, is that "the interpreter asks not only what the statute means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society."[562] In its "weak" version, DSI construes a statute beyond the expectations of its authors; in its "strong" sense, DSI implores the judge to go against those original expectations.[563] So far it would seem that DSI is good fit for transgender regulation.

Except that when Eskridge says "but also," he seems to mean "instead." DSI, that is, is not a *supplement* to legislative history or abstract readings, but an *alternative* to it. Eskridge contrasts DSI with its three most well-known competitors. The first is "intentionalism," an approach advocated for by jurists like Robert Bork and William Rehnquist. Intentionalism

[561] *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, Docket No. 18-107 (upcoming, 2019-2020 term).
[562] William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Cambridge: Harvard University Press, 1994), p. 50 (quoting Arthur Phelps, "Factors Influencing Judges in Interpreting Statutes," 3 *Vanderbilt Law Review* 456, 469 (1950)).
[563] Ibid.

"directs the interpreter to discover or replicate the legislature's original intent as the answer to an interpretive question."[564] The second, defended by legal scholars Henry Hart and Albert Sacks and widely practiced during the New Deal era,[565] is "purposivism." Purposivism holds that "statutory ambiguities can be resolved, first, by identifying the purpose or objective of the statute, and then by determining which interpretation is most consistent with that purpose or goal."[566] A third, practiced most famously by Justice Antonin Scalia, and critical of the previous two, is "textualism." According to textualism, the words of a legal text should be interpreted according to their "public meaning" at the time of enactment.

The problem, as Eskridge sees it, is that all three methods fail on their own terms. Each assumes that the point method in the first place is to constrain judges from results-based reasoning. To this end, each of the methods offers a way to reach legal decisions without resort to external (moral and political) justifications. But no amount of "statutory archaeology," says Eskridge, can yield a single, authoritative answer to settle disputes over legislative intent, legislative purpose or textual meaning. The judge who utilizes any of these approaches must ultimately draw on precisely the type of considerations his method condemns. For example, if simply by staring at the text of Title VII we cannot tell whether by "discriminate" Congress meant any employment policy that distinguishes people by race or only invidious distinctions, then the textualist is deluding his readers (and perhaps himself) when he chooses the former interpretation on the grounds that it is the "plain meaning" of "discriminate."[567] Eskridge insists

[564] Ibid., p. 14.
[565] Henry Melvin Hart, Jr. and Albert Martin Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William N. Eskridge, Jr. and Philip P. Frickey (New York: Foundation Press, 1994).
[566] Eskridge, *Dynamic Statutory Interpretation*, pp. 25-26.
[567] Eskridge seems to ignore the textualist's insistence that words be interpreted according to their public meaning *at the time of enactment*. "Discriminate" is an ambiguous term, he argues, because it "has *acquired* nuances in our culture that undermine any attempt to confine the term to [the colorblind] definition" (Ibid., 39, my emphasis).

that neither one these three approaches can accurately describe what judges do in fact,[568] and for that reason alone they ought to be rejected.

But he also thinks that they are normatively wrong. Fundamentally, statutory interpretation should be forward- rather than backward-looking, sensitive to social circumstance and change--in short, "evolutive."[569] Eskridge describes his approach as "pragmatist-inspired" and "Aristotelian."[570] It is "pragmatist" because it "emphasizes the concrete over the abstract and is problem-solving in its orientation," and because it eschews "foundationalist" claims about any fixed and knowable principles to guide the interpretive enterprise (except, of course, for DSI). And it is "Aristotelian" because it emphasizes "practical reasoning" over theoretical speculation, or to be more precise, over formalistic legal reasoning.[571]

Eskridge's position is odd to say the least. Here I shall limit myself to two brief observations. First, it is interesting that for all his denunciation of intent, purpose and text, and for all his desire to liberate judges from the apparently non- or less-"evolutive" grip of democratic legislatures, Eskridge feels that he, too, must ground DSI in some notion of legislative intent. He writes, for instance, that the "statutory drafters" themselves "realize that, in an important sense, statutory meaning is not fixed until it is applied to concrete problems."[572] Why mention this "realization" moments after condemning "statutory archaeology" as futile and regressive? Eskridge, it seems, cannot do without the (small-c) constitutional legitimacy that accrues to the courts when they hew to the will of legislative majorities. This may not be a decisive argument against Eskridge, but it does expose a fundamental weakness in his position.

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[568] Ibid., p. 6.
[569] William N. Eskridge, Jr., "Dynamic Statutory Interpretation," 135 *University of Pennsylvania Law Review* 1479, 1483, 1483, 1488, 1492 (1987); Eskridge, *Dynamic Statutory Interpretation*, p. 58.
[570] Eskridge, *Dynamic Statutory Interpretation*, p. 50.
[571] Ibid.
[572] Ibid.

Second, Eskridge misunderstands or at any rate mischaracterizes Aristotle's position when he enlists him in the service of pragmatism. This is no mere academic hairsplitting: Eskridge takes Aristotle (through his legatees in the American pragmatist tradition) to be *the* authority for his approach. Yet there are good reasons to believe that Aristotle would have found "dynamic statutory interpretation" deeply, and perhaps fatally, flawed. The Greek philosopher does of course famously champion practical reason, and he does so, presumably, against the excessive and dangerous intrusion of theoretical reason into the political realm, a tendency some might be inclined to see in the thought of his teacher, Plato. But Aristotle is anything but an anti-foundationalist—in other words, anything but a "pragmatist" in the sense Eskridge means. Practical reason is only a virtue, according to Aristotle, inasmuch as it is guided by what is good for humans according to reason. And reason, it must be remembered, is the faculty by which human beings can discover nature, the universally true and fixed essence of things.

Yet it is precisely this deeper assumption about reason's ability to discover the human good that Eskridge denies when he calls his approach "evolutive" and "postmodern." The interpreter, he says, his limited by his "historically situated" "horizon." "Because our horizons are conditioned by the world into which we have been thrown, an interpreter of a different time or culture from the [law's] author's may have a vastly different interpretation of the same written text."[573] Indeed, from an "evolutive" perspective, the possibility of progress itself seems incompatible with a "foundationalism" of the kind advanced by Aristote.

Perhaps the point can be more clearly seen once we explain why DSI is not even pragmatist (or, for that matter, "pragmatist-inspired"). Pragmatism is a theory about social change, not *judicially induced* social change. The law is one instrument of social change, but it is

[573] Ibid., p. 58.

certainly not the only one, or even, in many circumstances, the best one. As the preeminent pragmatist jurist of our time, Richard Posner, has emphasized, "pragmatic adjudication cannot be derived from pragmatism as a philosophical stance. For it would be entirely consistent with pragmatism the philosophy *not* to want judges to be pragmatists," and instead to "confine[] themselves to the application of rules."[574] This makes intuitive sense: if the legislature is operating in the spirit of genuine pragmatism, then judicial deference is required by the pragmatist outlook. That is why the original pragmatists were deeply skeptical of the judiciary as an agent of social progress, a skepticism that found full justification after the Supreme Court's use of substantive due process in *Lochner v. New York*. Thus, precisely if one agrees with Eskridge that society "can figure out what works best in specific cases without a general theory of what works,"[575] one might wonder why *judges* are uniquely endowed with such an understanding.

Eskridge obviously takes a different view of the courts. That view is inspired by the prestige generated by the Warren Court's constitutional activism and especially by the political capital accrued to the legal profession in the wake of *Brown v. Board of Education*. It is also, considering Eskridge's embrace of "hermeneutics,"[576] inspired by his position as a member of the "middle-class" who has spent his career in the "insider institutions" (Ivy League law schools and prestigious clerkships).[577]

There are good reasons to believe, moreover, that far from being the ideal agents of the (progressive) pragmatism, the legal profession is in crucial respects a conservative force in

[574] Richard Posner, "Pragmatic Adjudication," in Morris Dickstein ed., *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Durham: Duke University Press), p. 236.
[575] Eskridge, *Dynamic Statutory Interpretation*, p. 200.
[576] Ibid., p. 58.
[577] Ibid., p. 200.

American political life. This is obviously an argument that would have to be fleshed out in great detail, but suffice to say that Alexis de Tocqueville praised American lawyers for their habitual veneration of forms over and against the impetuous torrents of democratic equality.[578] In the realm of sexual freedom itself, a good argument can be made that the legal profession has been inclined to take the "conservative" side of disputes within progressive politics. For example, in *Obergefell v. Hodges* the Court endorsed an understanding of equality that gay liberationists and queer activists spent decades arguing was regressive and unjust. As one liberationist put it a few years earlier, "[t]he campaign for marriage, never a broad-based movement among gay and lesbian activists, depended for its success on the courts. It was launched by a relatively small number of lawyers, not by a consensus among activists… If marriage is so fundamental to a program of rights, why did gay men and lesbians resist it over the twenty-five year period of their most defiant activism?"[579] Recognition of same-sex partnerships as marriage "would only confirm the relevance of spousal status, and would leave unmarried queers looking more deviant before a legal system that could claim broader legitimacy."[580] Same-sex marriage appealed to elites—including legal elites—because of its embrace of some of the key features of traditional marriage: monogamy, exclusivity, domestication, and even child-centricity. Even in the transgender context, as we saw in Chapters 2 and 3, the legal profession has by and large settled on an understanding of the human person that rests on essentializing notions of gender (e.g. "brain sex"), in diametric opposite to what those in the Avant-garde of gender theory had said for over a generation.

[578] Tocqueville, *Democracy in America*, pp. 251-258.
[579] Warner, "Beyond Gay Marriage," pp. 262-263.
[580] Ibid., p. 282.

All of this is simply to say that *especially* if one accepts Eskridge's pragmatist-progressive outlook for society, it is a huge leap from there to the conviction that *lawyers* are the undisputed prophets of progress. The deeper difficulty is this: since he cannot accept a "foundationalist" theory of justice and the human good (such as Aristotle's own in the *Nicomachean Ethics*), Eskridge's "Aristotelianism" is really a form of high-minded conventionalism. One suspects that when a thinker like Eskridge speaks of "evolutive" notions of justice, what he really means is justice according to current (and evolving) public opinion.

Turning to whether DSI is an apt framework for explaining transgender regulation, crucial here is Eskridge's claim that DSI comes into play once intentionalism and purposivism are exposed as inadequate. In his discussion of *United Steelworkers v. Weber*, the case that Melnick calls the "archetype" of DSI,[581] Eskridge rejects the "purposivism" of Justice Brennan's majority opinion just as surely as he rejects the "intentionalism" of Justice Rehnquist's dissent. Both rely on what Eskridge calls "statutory archaeology." If anything, Eskridge finds that the "historical perspective tilts toward Weber's interpretation, because the legislative history reveals hostility to quotas generally and because the purpose most broadly accepted in Congress was that of creating a color-blind society."[582] As for the textual analysis, Eskridge finds it "inconclusive." He celebrates *Weber* only on account of how this decision *could* have been justified according to the "evolutive" perspective. What he is celebrating, in other words, is his own rewriting of *Weber*.[583]

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[581] Melnick, *Transformation of Title IX*, p. 243.
[582] Eskridge, "Dynamic Statutory Interpretation," pp. 1490-1492.
[583] It bears mention that Eskridge's defense of *Weber's* result rests on the dubious premise that Kaiser's affirmative action program was voluntary. Eskridge himself acknowledges that Kaiser was under intense pressure from the federal government to use affirmative action, making his definition of "voluntary" something of a mystery. Because Eskridge (and Dworkin, for that matter) both seem to assume that coerced affirmative action would weigh the case in Weber's favor, and perhaps decisively so for Dworkin (see text, infra), one wonders how their recognition of the background facts can be squared with their endorsement of the outcome. Eskridge et al, *Statutory Interpretation Stories* (New York: Foundation Press, 2010), pp. 99-100.

Justice Brennan's opinion in *Weber* is thus not an example of DSI, nor does Eskridge believe it to be.[584] Eskridge identifies Justice Blackmun's concurrence in *Weber* as the opinion most consistent with his own approach. Blackmun agreed with the dissenting opinion of Judge Minor Wisdom in the Fifth Circuit that, given Kaiser's history of discrimination, the practical challenges it faced in the wake of the Supreme Court's decision in *Griggs v. Duke Power*,[585] which authorized disparate impact liability, made it necessary to create a way for employers like Kaiser to use affirmative action without exposing themselves to private lawsuits.[586] This is what Eskridge seems to have in mind when he says that the interpretation of statutes must take into consideration evolving circumstances (in this case, the regulatory dilemmas created by *Griggs*).

In any case, Eskridge's more general argument about how statutes evolve beyond and even against the original expectations of their drafters seems better suited to Title VII than Title IX. For one thing, Title IX does not contain the same level of specificity in regard to how its drafters understood "discrimination." Although Title IX contains exceptions for such things as admissions to private colleges and boy scouts, nothing in the text of the statute itself weighs against its extension to transgender rights in the way that, say, Sections 703(a)(2), (d) and (j) arguably weigh against race-conscious employment practices. Moreover, the dearth of legislative history surrounding Title IX makes it harder to articulate a relatively clear set of legislative expectations against which the statute might need to "evolve."[587] Thus, proponents of expansive regulation have less of a need for DSI in Title IX than they do in Title VII.

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[584] Melnick recognizes this as well. See R. Shep Melnick, "Statutory Reconstruction: The Politics of Eskridge's Interpretation," 84 Georgetown Law Journal 91, 106 (1995-1996).
[585] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[586] Eskridge, "Dynamic Statutory Interpretation," p. 1492.
[587] Title IX was added to the Education Amendments of 1972 with almost no debate. Both houses of Congress had just passed the Equal Rights Amendment with large majorities, and the assumption was that Title IX expressed a similar commitment to sex equality. Moreover, Title IX, unlike the Civil Rights Act, was itself a reflection of deeper cultural trends already underway in American society. See Melnick, *Transformation of Title IX*, pp. 5-6, 40-42.

To better explain interpretive changes under Title IX, we need a theory that at least takes at face value regulators' claim that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." For this we turn to Ronald Dworkin.

II: Dworkin on Fidelity and Intent

Dworkin commented on *Weber* soon after the decision came out.[588] His commentary is useful not only as point of comparison to Eskridge, but also because it demonstrates the profound interpretive overlap, in Dworkin's outlook, between the Fourteenth Amendment's Equal Protection Clause and the Civil Rights Act of 1964.

Dworkin agrees with the result of *Weber*, but also with Eskridge's conviction that Justice Brennan's opinion leaves much to be desired. Yet unlike Eskridge, Dworkin does not believe that an "evolutive" approach to statutory interpretation is either necessary or appropriate, either in *Weber* or elsewhere. Indeed, in a separate essay Dworkin deems "hardly intelligible" the view that the meaning of the Constitution--and, it would seem, of civil rights legislation--evolves according to some mysterious metaphysics of shifting "horizons." He consequently rejects the notion that judges ought to make the Constitution's rights-bearing clauses "conform to the needs and spirit of new times." Dworkin insists that he "know[s] of no prominent contemporary judge or scholar who holds anything like" such a view. [589]

Whereas Eskridge suggests that *Griggs* at once changed the regulatory environment of Title VII and reflected a change in the moral consensus of American society (or at any rate the

[588] Ronald Dworkin, "How to Read the Civil Rights Act," in *A Matter of Principle* (Cambridge: Harvard University Press, 1985), pp. 316-331.
[589] Dworkin, "Comment," in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), p. 122.

enlightened elements within it), Dworkin's reading of Title VII is less cavalier. Unlike Eskridge, who argues that the evidence of "statutory archaeology" "tilts toward Weber's interpretation" of "discrimination," Dworkin insist that the question of whether "discrimination" ever meant all race-based distinctions or only invidious ones is a "difficult" one to answer. "*Weber* was not a simple case to decide."[590]

Dworkin's reconstruction of *Weber* draws on what he believes is a second argument lurking just beneath the surface of Brennan's "explicit" one about the "spirit" and "purpose" of Title VII. According to this second argument, which "must be reconstructed from [Brennan's] independent remarks,"[591] there are two different meanings of "discriminate," the no-distinctions principle and the no-*invidious*-distinctions principle. The choice among these options, Dworkin insists, should be made on the basis of the "coherence theory" of law: when faced with ambiguity in the text, the judge should prefer the reading that "furnish[es] the best political justification" for the statute.[592] By "best," Dworkin does not mean "best in light of a changing consensus within American society," but rather best simply, independent of shifting public opinion or historically situated "perspectives." Or so it would seem. As Dworkin emphasizes again and again in his writings, putting the Constitution--or in this case, a quasi-constitutional statute--in its "best light" means trying to find what clauses like "cruel and unusual" and "equal protection" *really mean*,[593] rather than what they happen to mean in light of historical or even contemporary "expectations." It is this gap, between the supposed essence of moral concepts and mere contextual understandings of them, that proves essential, as we shall see, toward Dworkin's

[590] Dworkin, *A Matter of Principle*, p. 317.
[591] Ibid., p. 326.
[592] Ibid., p. 327.
[593] See e.g. Ronald Dworkin, "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve," 65 *Fordham Law Review* 1249, 1252 (1997).

effort to distance himself from "historicists" like Robert Bork and Antonin Scalia. Fundamental to the success of his theory of legal interpretation is the notion that political philosophy, not empirical or historical inquiry, should guide the judge.[594]

Fair enough, but what is "the best political justification" for Title VII? *Weber* is a difficult case, Dworkin suggests, because there is good historical evidence of legislative intent on both sides of the distinction/invidious-distinction debate. Consequently, there is no "mechanical" way to resolve this debate.[595] By "mechanical," Dworkin means a judicial philosophy or method that, well applied, can yield a definitive answer to an interpretive conundrum with the intervention of judges' personal political or moral preferences. So "best political justification" cannot be discovered through conventional legal methodologies. Crucially though, this does not mean that there is no solution to *Weber* from within the law. It all depends on what we mean by law." For Dworkin, the legal text itself is a conduit through which political philosophy enters political life. Thus, political and moral interpretations *are* legal interpretations.[596]

Thus, the judge faced with a case like *Weber* must resort to moral reasoning, and this obviously raises the question of legitimacy. By what authority do judges apply their own moral standards rather than enforce those of democratic majorities? For Dworkin, this question is synonymous with "what justifies judicial review," and his answer is developed in his critique of the "majoritarian premise" in favor of what he calls "the constitutional conception of democracy."[597] In his *Weber* commentary he leaves it at assuring his readers that "if each judge faces the moral decision openly, an informed public will be in a better position to understand and criticize them than if the moral grounds of decision lie hidden under confused arguments about

[594] See e.g. Dworkin, *Freedom's Law*, pp. 303-305.
[595] Dworkin, *A Matter of Principle*, p. 328.
[596] Orwin and Stoner, "Neoconstitutionalism," p. 453.
[597] Dworkin, *Freedom's Law*, p. 17.

nonexistent legislative intents."[598] In other words, democracy can safely accept the moral philosophizing of judges because judges are accountable to the people. Note, however, that Dworkin speaks not just of any public but an "informed" one, and says that this "informed public" can "understand and criticize" judicial determinations but not that it can change or override them. Perhaps Dworkin, more than Eskridge, recognizes that the public in question was, to put it mildly, unsupportive of either overt racial quotas or more subtle means of affirmative action, not in 1964 and not in 1979.[599]

As others have pointed out, there are two dominant thrusts Dworkin's jurisprudence, and these are meant to work in tandem. One thrust is Dworkin's claim to have out-flanked the originalists on their own terms, that is, to have come up with a theory of interpretation that is more faithful to the intent of those who drafted and ratified the Constitution. The other thrust is Dworkin's "moral reading" of the Constitution, or his claim that judges have no choice but to reach through its abstract clauses and pull out the non-historical meaning of moral ideas, all in order to place the Constitution in its "best light." Dworkin's thesis, broadly and hopefully not unfairly stated, is that the framers of the Constitution intended to empower judges to serve as society's moral conscience. The resemblance of this thesis to the assumptions that underwrite regulation under Title IX should be at least superficially obvious.

Let us take a step back and gain some context. The prevailing wisdom in the legal profession of the 1970's was that there were two approaches to constitutional interpretation. There were those who believed that judges should interpret the actual, written Constitution, and only it, and there were those who thought that judges should expound the "basic national ideals

[598] Dworkin, *A Matter of Principle*, p. 329.
[599] Thomas B. Edsall and Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* (New York: W. W. Norton & Co., 1991), pp. 143-144. In fairness, Eskridge acknowledging in passing that the elite consensus in support of affirmative action was fleeting. Eskridge, *Dynamic Statutory Interpretation*, p. 304.

of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution."[600] This became known in legal circles as the interpretivist/non-interpretivist divide. According to a leading proponent of "non-interpretivism," judges all too often "resort to bad legislative history and strained reading of constitutional language to support results that would be better justified by explication of contemporary moral and political ideals not drawn from the constitutional text."[601]

It was against this tendency of judges to look beyond the text to its supposed underlying but unmentioned "fundamental values" that a number of legal scholars and jurists rebelled. Called "originalists," their argument was that judges should be constrained in their interpretation of a legal text by the intentions of its authors. Nothing else could "prevent courts from invading the proper domain of democratic government."[602] By the late 1980's, however, the objection was moot, for a near consensus had arisen across the legal profession that judges should at least not ignore history and text when interpreting the Constitution. "It seems difficult," wrote Michael Perry at the time, "in American political-legal culture, to make a persuasive case for nonoriginalism. That difficulty helps to explain why it is so hard to locate a real, live nonoriginalist, whether judge or, even, academic theorist."[603] John Hart Ely noted as early as 1975 that non-interpretivism faced a steep uphill battle in the court of public opinion and for an

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[600] Thomas Grey, "Do We Have an Unwritten Constitution?" 27 *Stanford Law Review* 703, 706 (1975).
[601] Ibid.
[602] Robert H. Bork, "Speech at the University of San Diego Law School," in Steven G. Calabresi, *Originalism: A Quarter-Century of Debate* (Washington, D.C.: Regnery, 2007), p. 90. It is important to clarify that although this originalism sought to restore the intentions of a generation steeped in natural law and rights-of-Englishmen thinking, it did not itself appeal to extra-Constitutional sources of law. Rather, the idea was to bind contemporary judges to conventions in the past that could reasonably be discerned through historical inquiry. If natural law or English common law concepts happened to flow through into present-day adjudication, then that was a happy accident. From the beginning originalism was a form of legal positivism and even, to quote Dworkin, "historicism." The originalist might accept that charge, justifying it as a price to be paid for counteracting a dangerous, free-wheeling discovery of "fundamental values" hidden beneath the written Constitution.
[603] Michael Perry, "The Legitimacy of Particular Conceptions of Constitutional Interpretation," 77 Virginia Law Review 669, 687 (1991). Quoted in Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996), p. 138.

understandable reason: the power of judicial review draws its justification from the very document that non-interpretivists encourage judges to look beyond.[604]

Ronald Dworkin was a key figure in legal liberalism's appropriation of original intent. Dworkin understood originalism's intuitive appeal to a people with a tradition of skepticism toward power in general, and toward unelected officials in particular. Progressives at the turn of the century had argued that written constitutions are the product of their time and that their clauses articulate ideas and principles that are time and space specific.[605] But by the late 1980's, such a view of the Constitution was neither necessary as a theoretical foundation for social progress nor politically prudent for progressive judges to espouse. Theories like dynamic statutory interpretation, inasmuch as they openly (though not necessarily consistently) disavowed the intentions of Congress, were actually unrepresentative among progressive legal elites, who "thought originalism too valuable to surrender… to [Robert] Bork."[606] In short, "we are all originalists now."

Recognizing the danger in legal liberalism's "turn to history,"[607] a new variety of conservative scholars and jurists represented by Justice Antonin Scalia argued that if judges were to come under the rule of law, they had to interpret laws not according to original intent, an amorphous and easily manipulated idea, but according to the public meaning of the words of a law at the time of its enactment. "Textualism" thus promised to be a method in the proper sense of the words, a way of interpretation that placed a barrier between the judge's private moral and political preferences, which are irrelevant, and the question of what the law means, which alone

[604] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), p. 4.
[605] See e.g. Woodrow Wilson, "What is Freedom" (pp. 50-51) and "The Study of Administration," both in Pestritto and Atto ed. *American Progressivism*. See also Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: MacMillan, 1913), Ch. 1.
[606] Kalman, *Strange Career*, p. 137.
[607] Ibid., Ch. 5.

is pertinent. Textualism viewed with suspicion the interpretation of clauses as open-ended "standards" and preferred, to the extent possible, to construe them as concrete "rules." The rule of law, as Justice Scalia famously put it, meant the law of rules.[608] Against the accusation that textualism was too "formalistic," Scalia's response was that this was no accusation at all, but a high compliment.[609]

Dworkin remained unconvinced, calling Scalia's brand of originalism no less "historicist" than that of Bork.[610] At bottom, Dworkin professed that both strands of originalism are themselves the exact kind of judicial imposition of private moral and political preferences that originalists claim to detest. Only the methodologies of Bork and Scalia were less honest than Dworkin's and—though Dworkin certainly did not put it quite this way—too politically conservative. Dworkin was concerned, in short, that legal elites were advancing a conservative judicial ideology under the guise of apolitical neutrality, respect for democracy and rule of law.[611] The debate between him and the "historicists" takes us to the heart of the interpretative debate over transgender rights and Title IX.

To see what Dworkin has in mind, it is necessary to distinguish, as he does, between what someone says, and what someone expects or hopes will be the consequence of their saying it, or in more technical terms between "semantic originalism" and "expectation originalism." He gives this example:

> Suppose a boss tells his manager (without winking) to hire the most qualified applicant for a new job. The boss might think it obvious that his own son, who is an applicant, is the most qualified; indeed he might not have given the instruction unless he was confident that the manager would think so too. Nevertheless, what the boss *said*, and *intended* to say, was that the most qualified applicant should be hired, and if the manager thought some other applicant better qualified, but hired the boss' son to save his own job, he would not be following the standard the boss had intended to lay down.[612]

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[608] Antonin Scalia, "The Rule of Law as a Law of Rules," 56 *The University of Chicago Law Review* 1175 (1989).
[609] Scalia, *A Matter of Interpretation*, p. 25.
[610] Dworkin, "Comment," p. 119.
[611] See e.g. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), pp. 133-134.
[612] Dworkin, "Comment," pp. 116-117.

Dworkin's claim is not that the hiring manager is getting off on a technicality, twisting the boss' words in order to produce a result she likes while remaining blameless ("ah, but you never specified what you meant by 'best qualified'!"). The point, rather, is that boss has expressed two types or layers of intent, one abstract and another concrete. If the hiring manager acted correctly, that is because she perceived a deeper tension between these layers of intent and tried to resolve that tension by being faithful to the more important intent, which is the more abstract one. By going against her boss' expectations (and thus risking her job) in order to realize his higher intent, the manager is, as Dworkin puts it in another context, the "true hero of fidelity."[613]

Four points are crucial for understanding Dworkin's position on intent and fidelity. First, simply as an analytical matter, the scenario described above involves a major premise, which is that the best qualified candidate should be hired, and a minor premise, which for the boss is that his son is the best qualified, and for the hiring manager that another is more qualified than the son. By definition, the major premise operates at a higher degree of abstraction than the minor, since the latter is derived from the former. Although Dworkin cautions that both are the actual intentions of the author and any effort to argue that one but not the other is the "true intent" would be "incoherent,"[614] it stands to reason, and Dworkin indeed believes, that the major premise is in some (lexical and logical) sense superior.[615]

Second, Dworkin also thinks that the major premise, the more abstract intent, ought to be controlling for a reason independent of authorial intent and the grammar of human communication. It would be good for the company if the best person be hired, regardless of what the boss says or thinks. The previous argument (about fidelity and original intent) is sometimes

[613] Dworkin, "Arduous Virtue," p. 1249.
[614] Dworkin, *Freedom's Law*, p. 293.
[615] Dworkin, *Taking Rights Seriously*, p. 135, 136.

referred to as the Dworkin of Fit, whereas this argument (about putting the policy in its "best light") is referred to as the Dworkin of Rights Answers.[616] According to Dworkin, the legitimacy of judicial review seems to rest on the harmony between "fit" and "right answers." Specifically, legitimacy relies on the claim that "fit"—that is, a method of faithfully interpreting the legislator's intent—constrains and channels the finding of "right answers." Dworkin's critics argue that while there is a theoretical tension between "fit" and "right answers," somehow Dworkin of Right Answers always seems to get his way, thus suggesting that Dworkin's method is not really a method at all, but a guise for judicial to impose (progressive) their own moral and political preferences.[617] We return to this debate below, but for now, it is important to note that the question of what "best qualified" means can be answered *either* by interpreting the boss' intent *or* by raising the philosophical question of what "best qualified" really means.

Third, and to return to the side of Dworkin that focuses on fidelity and intent, once it is conceded that fidelity to the boss means understanding his instructions at a high level of abstraction, the question becomes: just how high? The answer is: as high as possible.[618] The reason for this is that the only alternative to interpreting "best qualified" so abstractly as to be "of quite breathtaking scope and power,"[619] is to interpret that term in a way that limits its meaning to the subjective expectations of the boss. For Dworkin there is no middle ground between "breathtaking" abstraction and "historicism." The only way to avoid "expectation originalism" is to ascend as far as possible up the ladder of abstraction.

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[616] Michael McConnell, "The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's Moral Reading of the Constitution," 65 *Fordham Law Review* 1269, 1270 (1997).
[617] Ibid.
[618] Dworkin, *Freedom's Law*, p. 31.
[619] Ibid., p. 10.

Fourth, it is perfectly possible, in Dworkin's methodology, to believe that one has reached the highest level of abstraction, only to discover that subsequent interpreters will find a higher level still. The process of abstraction is, therefore, essentially ongoing.[620] This builds flexibility into the law and allows judges to adapt it to changing circumstances without reneging on their claim to higher fidelity.

What applies to bosses applies equally to drafters of constitutions. What the framers of the U.S. Constitution said and what they thought would result from their saying it are two different things. The interpreter must assume that the drafters understood the basic conventions of the English language, that they spoke in good faith, and that they meant what they said.[621] Those who wrote the Eighth Amendment could have said "punishments widely regarded as cruel and unusual at the date of this enactment," but instead chose the more abstract "cruel and unusual." To Dworkin, the difference is between outlawing punishments *conventionally* understood as cruel and unusual, and punishment that *really are* cruel and unusual. [622] This is a crucial point. Bork's originalism would limit the meaning of "cruel and unusual" only to those punishments that the framers would reasonably have expected the amendment to prohibit, and Scalia's textualism would limit the meaning according to the linguistic conventions of the day, which amounts to the same thing. Both are methods that rely on "dated subjective readings," and thus "historicist."[623] For Dworkin, the fundamental purpose of abstraction is to wrest the moral

[620] Ibid., p. 43.
[621] Dworkin, "Arduous Virtue," p. 1253.
[622] See e.g. ibid., p. 1252.
[623] Ibid., p. 1253 ff. 5. Dworkin's use of the word "historicist" is questionable. Historicism refers to a doctrine that denies the distinction between reason, inasmuch as it claims to discover fixed and universally knowable truths, and opinion, which is contextual and historically situated. Essentially, historicism states that human thought cannot transcend the cultural horizon in which it arises. It is thus relativistic. As far as I know, neither Bork nor Scalia are historicists in this sense, though as Graham Walker has shown, Dworkin actually is (Graham Walker, *Moral Foundations of Constitutional Thought* (Princeton: Princeton University Press, 1990), pp. 42-44). Perhaps a more proper label for the "historicists" is positivists. That is, they insist that only the actual enacted will of political majorities can qualify as law, and preclude any appeals beyond that will to more fundamental sources of meaning or authority. It is easy to see why positivism holds attraction to conservatives in an era in which the legal profession

clauses of the Constitution away from the deadening grip of "historicism," of mere contextualism, and hand them over to clarification by moral reasoning, particular reasoning informed by contemporary political philosophy.

This has given rise to criticisms that Dworkin's jurisprudence always happens to produce "happy endings,"[624] that is, rulings that affirm progressive principles and policies and that reject conservative ones. After all, if abstraction is meant to prevent the contextualization of a law's meaning, then by the same token abstraction would seem to cut against a political outlook that views social change with suspicion. Dworkin has responded to this criticism in a number of ways, some more convincing than others.

First, Dworkin argues that, simply as a factual matter, his method does not always produce decisions he happens to like. He cites the examples of the Supreme Court protecting the right to flag-burning, pornography and Nazi marches.[625] This is a less convincing response, however, because the criticism is not that Dworkin likes what plaintiffs in these cases do, but the expansive (almost absolutist) view of the First Amendment that the Court takes in these cases.

Second, he argues that all judges do "moral readings" of the Constitution, whether they admit to it or not.[626] For example, when a judge decides that "equal protection of the laws" does not prohibit a ban on racial segregation in schools, he is *choosing* to read the Fourteenth Amendment in accordance with its lowest level of abstraction (expectations of its framers) rather than its highest level of abstraction, with nothing in the text itself to require that choice. Whether this is true or not, however, depends, crucially, on whether one accepts his claim that those who

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makes claims about an "unwritten" constitution, or about fundamental values not found within the four corners of the written Constitution.

[624] Dworkin, *Freedom's Law*, p. 36.

[625] Ibid.

[626] Ibib., pp. 34.

wrote the Fourteenth Amendment intend to express principles of "breathtaking scope and power," one that could be interpreted against their own expectations. (We should note that not all scholars agree with Dworkin's other premise here, which is that the generation that wrote and ratified the Fourteenth Amendment expected it to be consistent with school segregation).[627]

Another way to get at this problem is as follows. Can we really have a semantic intent that is independent of our expectations in the way that Dworkin suggests? As a statement about human communication, it seems counterintuitive to say that one speaks deliberately and consciously in such a manner that one's words will hopefully one day be interpreted against one's expectations. It is one thing to say that the framers of the Eighth Amendment spoke more abstractly than was necessary to proscribe punishments they thought were cruel and unusual because they appreciated that there may be other punishments, ones they hadn't considered, that may also be cruel and unusual. It is quite another thing, however, to say that they spoke abstractly because they hoped or expected or assumed that punishments they thought were *not* cruel and unusual would one day be deemed to be so. One does not need the latter interpretation, for instance, in order to strike down solitary confinement, but one does need such an interpretation to strike down the death penalty. Dworkin seems to ignore the difference between the two types of intent. However conducive such a theory may be to his broader political project, it is not a very convincing account of how humans convey meaning.

More importantly, Dworkin seems to neglect the crucial way in which legislation differs from other forms of communication, for instance literature. At issue is why some words create enforceable norms of conduct while others, for instance those that make up a science fiction novel, do not. "Originalism," explains Steven Smith, "insists that judges should be constrained to

[627] See e.g. Michael McConnell, "Originalism and the Desegregation Decisions," 81 *Virginia Law Review* 947 (1995).

obey enacted law not because constraint is good for its own sake, nor because there is anything magical about the way words are arranged in a statute, but because a judicial obligation to obey enacted law is the means by which the power of the political community to make effective group decisions is realized."[628] Put simply, law is binding only because it is a collective action by the political community, and collective actions of this nature are inconceivable without some concrete expectations to motivate them. Since the power of judicial review rests on the assumption that the Constitution is law, the judge who dismisses original expectations as irrelevant is sawing off the branch on which he sits. Dworkin "effectively separates the statute from the source of its authority."[629] This is not to deny that some statutory enactments are ambiguous and require careful arguments about the content of the collective decision. It is, rather, to suggest that the expectations of those who enacted a law are integral to the words they used, such that to sever the two would beg the question of why *these* words should have any legal effect at all.

There is one final difficulty with Dworkin's distinction between semantics and expectations, and that is that after banishing expectations from the judicial enterprise Dworkin then smuggles it back in through the back door. We saw a similar problem in Eskridge's theory of DSI, which rejects intentionalism but maintains that "statutory drafters… realize that, in an important sense, statutory meaning is not fixed until it is applied to concrete problems."[630] Although he claims to reject an evolving, "living" notion of law, and although he at times insists that there is something that clauses like "cruel and unusual" really mean, Dworkin nevertheless believes that the U.S. Constitution "set[s] out very abstract statements of the [preconditions of

[628] Steven D. Smith, "Law Without Mind," 88 Michigan Law Review 104, 111-112 (1989).
[629] Ibid.
[630] Ibid.

democracy]… and leave[s] it to contemporary institutions to interpret these generation by generation."[631] Does this imply, then, that there is no essential content behind the moral concepts in the U.S. Constitution? That their meaning is fundamentally conventional? Dworkin is notoriously ambiguous on this point, and the ambiguity is one of the great weaknesses of his judicial philosophy since it suggests that if moral interpretation is internal to legal interpretation, not only Dworkin but also the framers of the Constitution are relativists (a problem we shall return to).[632] To our point about original expectations though, just whom does Dworkin have in mind when he says "leave[s] it"? Is he anthropomorphizing the constitutional text? Or might he be implying—as I think he is—that it was the framers of the Constitution who intended—in the sense of *expected*—that their abstract language be explicated by judges "generation by generation"? It seems that Dworkin no less than Eskridge can do without the legitimacy that accrues from following original expectations.

Whether or to what extent judges are bound by the expectations of those who enact a law is another way of stating the core problem of judicial review in a democracy, or what Alexander Bickel has called the "counter-majoritarian difficulty."[633] Dworkin willingly concedes that judges should be under *some* form of constraint, that they should interpret according to *some* method. He calls his own version of judicial constraint "integrity," and he means by this that judges should resort to moral reasoning only within the bounds of text, history, tradition and precedent. "Lawyers and judges faced with a contemporary constitutional issue must try to construct a coherent, principled, and persuasive interpretation of the text of particular clauses, the

[631] Dworkin, *Freedom's Law*, p. 33.
[632] See e.g. Keith E. Whittington, "Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation," *The Review of Politics* 62 (2000): 197-229, 206-207.
[633] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962), pp. 17-23.

structure of the Constitution as a whole, and our history under the Constitution--an interpretation that both unifies these distinct sources, so far as this is possible, and directs future adjudication." Indeed, "constitutional integrity might require a result that could not be justified by, and might even contradict, the best interpretation of the constitutional text considered apart from the history of its enforcement."[634] But again, at issue is just how constraining this method really is.

Dworkin's ultimate response to the anti-democratic charge, which he calls the "majoritarian premise," is of utmost importance to our subject here. The legitimacy of judicial review in a democracy depends on how one understands the modifier *constitutional* in constitutional democracy, in other words on how one proposes to resolve "the counter-majoritarian difficulty." In Bickel's view, democracy means "the will of the representatives of the actual people here and now," and so there is *in principle* a tension between democracy and judicial review, inasmuch as the latter is used to thwart "the will of the representatives."[635] But increasingly during the 1980's and 1990's, liberal legal scholars began to argue that the "counter-majoritarian difficulty" begs the question because it construes democracy as simple majoritarianism.

To take one leading example, Bruce Ackerman has argued for a "dualist" notion of democracy.[636] In this view, the architects of the Constitution never intended to give Congress a credible claim to be the voice of "We the People." Publius' claim in *Federalist 63*, that modern representative government consists in "the total exclusion of the people in their collective capacity" from its institutions,[637] is, in Ackerman's view, not taken seriously enough. The

[634] Dworkin, "Arduous Virtue," pp. 1249-1250.
[635] Bickel, *The Least Dangerous Branch*, pp. 16-17.
[636] See generally Bruce Ackerman, *We the People, Vol. I-III* (Cambridge: Belknap Press, 1991 (I), 1998 (II), 2014 (III)); Ackerman, "The Storrs Lectures: Discovering the Constitution," 93 *The Yale Law Journal* 1013 (1984).
[637] James Madison or Alexander Hamilton, Federalist Paper No. 63, March 1, 1788 (https://avalon.law.yale.edu/18th_century/fed63.asp).

framers created a system that could reasonably manage the destructive passions of citizens by playing faction against faction. Ackerman calls this "normal politics." From time to time, however, the system would have to be jolted into a higher (but temporary) level of consciousness, which Ackerman calls "constitutional politics."[638] These have produced a number of "constitutional moments," including the Civil Rights amendments, the New Deal, and the civil rights revolution of the 1960's. If we are to understand what the framers had in mind, therefore, "we must recognize that there can be no hope of capturing the living reality of popular sovereignty during periods of normal politics."[639] Ackerman is expressing here the deep-rooted aversion in progressive thought to the cacophonous, locally-oriented, self-interested basis of American democracy endorsed by Publius in Federalist No. 10.[640] He seems to have in mind a notion of democracy that assumes a more purified and unified collective will, one not corrupted by private interests or associations, and interpreted through enlightened elites, in this case judges.[641] Because the representative branches of government are most responsive to narrow self-interest or faction, it is to the courts, through their exercise of judicial review, that, in Ackerman's view, the framers looked in hope of a "final institutional expedient" for "consolidat[ing] the revolutionary achievements of the people."[642] Judges are the guardians of the revolution's highest ideals against the corruption of these ideals by merely representative or

[638] Ackerman's point being that We the People remain mum during "normal politics," and this, to repeat, by design. Madison's "separation of powers operates as a complex machine which encourages each official to question the extent to which other constitutional officials are successfully representing the People's true political wishes. Thus, while each officeholder will predictably insist that he speaks with the authentic accents of the People themselves, representatives in other institutions will typically find it in their interest to deny that their rivals have indeed represented the People in a fully satisfactory way." Ackerman, "Discovering the Constitution," p. 1028.
[639] Ibid., p. 1022.
[640] James Madison, Federalist Paper No. 10, November 23, 1787 (https://avalon.law.yale.edu/18th_century/fed10.asp).
[641] Cf. Woodrow Wilson's theory of the "interpretation," which makes a similar case but entrusts interpretation of the "true will of the people" to the president. See Jeffrey Tulis, *The Rhetorical Presidency*, Ch. 5.
[642] Ackerman, "Discovering the Constitution," pp. 1029-1030.

"normal" politics. We the People remain the agent of history, but it is through the judicial guardians that we exercise that agency and speak from time to time on issues of fundamental importance. Contrary to Bickel, Ackerman holds that popular sovereignty and judicial review are not merely compatible but synonymous in a deep sense.

Views such as Ackerman's are characteristic of what Laura Kalman has called the "republican revival" in the legal profession. This this she means the legal profession's assumption of responsibility for deliberation over principles and policies, once the preserve of the people acting their representatives in the legislature. Influential "liberal law professors," Kalman writes, "marketed republicanism as a theory that could solve the counter-majoritarian difficulty, revive Warren Court liberalism, provide progressives with even more than they received from the Warren Court, and had the Founders' imprimatur."[643] They could "receive more" because unlike Warren Court liberals, they did not assume a fundamental tension between individual rights and majority rule, or for that matter between individual rights and public policy. Because they regarded themselves are the true guardians of popular sovereignty, the "neorepublicans" did not think that judicial review had to be exercised with moral trepidation. Liberating judges from the pangs of guilt that accompany judicial review is one of the deeper aims of Dworkinian jurisprudence.

Like Ackerman, Dworkin believes that he can solve the counter-majoritarian difficulty by denying its premise. The gist of Dworkin's position is that there are two meanings of democracy, one that he reduces to "the majoritarian premise" and another that he calls the "constitutional conception of democracy."[644] The former view accepts that political majorities can and must be

[643] Kalman, *Strange Career*, p. 160.
[644] As Michael McConnell has pointed out, Dworkin's method of argumentation draws heavily and frequently on "black and white reasoning." Dworkin raises a problem, presents two mutually exclusive and collectively exhaustive solutions, refutes one of them, and then assumes he has proven the other. In this case, Dworkin is juxtaposing a view

thwarted from time to time, but assumes nevertheless that "something regrettable has happened, a moral cost has been paid" when this happens.[645] The latter view sees nothing wrong *a priori* with judges acting against majorities since majority rule is justified in the first place only after a number of conditions have been met.[646] The real question, then, is what these preconditions are, or more importantly, who gets to define them? Here Dworkin appears, at least on the surface, to be less convinced than Ackerman that the role must fall to judges. Dworkin stresses that the question of whether the Constitution deserves a "moral reading" is wholly independent from the question of which institution should have final authority to say what, substantively speaking, the preconditions of democracy are. In theory, "constitutional democracy" need not mean judicial superintendence of democracy.[647]

Nevertheless, it is Dworkin's position that in the American context, judges do in fact have that authority. Crucially, this is not an argument he intends to defend on principle, at least not officially. The institutional question of whether legislatures or courts should have the final word on the "preconditions" has been settled, he insists, by "practice."[648] The undoubted and undoubtable legitimacy of *Brown v. Board of Education*, coupled with the assumption that if were not for the Supreme Court segregation would still plague us today, functions, in Dworkin's view, as an answer given collectively and irrevocably by the American people to the institutional

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of simple majoritarianism, which he himself concedes very few people would find attractive (Freedom's Law 16), and the "constitutional conception of democracy," which equates the checks on simply majoritarianism with robustly defined and enforced individual rights. But there is a third option: republicanism, and specifically the republicanism of *The Federalist*. This regime envisions as the key safeguard to men's natural equality of liberty certain *structural* features of government: separation of powers (or more precisely, separate institutions sharing powers), checks and balances (fueled by the dangerous potentialities of human ambition or "self-interest"), and representation (according to a moderate trusteeship understanding). Judicial review is certainly not unimportant for the Federalists, but it is not at the center of their ideal of free self-government.

[645] Dworkin, *Freedom's Law*, pp. 16-17.

[646] Ibid., p. 24. Dworkin's claims about democracy having "preconditions" is hardly a controversial one. By depicting his critics as somehow subscribing to simple-minded majoritarianism he is surely creating a straw man.

[647] Ibid., p. 12.

[648] Ibid.

question. Dworkin sounds eerily like the pragmatists to whom he contrasts himself,[649] when he says: "I see no alternative but to use a result-driven rather than a procedure-driven standard for deciding [the institutional question]. The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions really are, and to secure stable compliance with those conditions."[650]

Dworkin's position is thus not too far from that of Eskridge. Both seem to suggest a dynamic wherein the legal profession nudges public opinion in a particular direction (for instance by issuing landmark court decision) and then takes indications of "evolution" in that public opinion as *ex post facto* justification for the initial nudge. Neither is willing to defend outright and openly the moral or epistemic superiority of judges over legislators, preferring instead to wrap that assumption of superiority in the garbs of public opinion (or more precisely, of democratic majority sentiment as interpreted and refined by progressive elites). Dworkin's position assumes, perhaps correctly, that *Brown* has entrenched itself so deeply into the American consensus that to dispute it is to place oneself beyond the bounds of legitimate political debate. His critical engagement with Bork, for instance, is premised primarily on his conviction that Bork's method cannot justify *Brown*.[651] Dworkin's frequent us of *Brown* as a club with which to beat down his opponents seems calculated more to embarrass and delegitimize than to refute them. This is not necessarily a critique of that tactic, for if Dworkin is right that the institutional question has no theoretical answer but must be answered in "practice," then what he is doing when he appeals to the authority of public opinion is answering it.

[649] Dworkin, "Arduous Virtue," pp. 1265-1266.
[650] Dworkin, *Freedom's Law*, p. 34.
[651] Ibid., Ch. 14.

This leaves Dworkin in an odd position of justifying moral realism on the basis of public opinion, which is to say, convention. Do the moral clauses of the Constitution have real content to them, content that must be discerned by political philosophy? Or are they empty vessels to be filled according to evolving moral standards (public opinion)? Is *Brown* legitimate because it was rightly decided, or because it has become accepted as legitimate by an American consensus? Here again we find the tension between Dworkin of Fit and Dworkin of Right Answers. Behind Dworkin's solution to the institutional question there seems to lie a deeper, theoretical claim about the status of public opinion in a democracy. This claim is more explicit in dynamic statutory interpretation, where Eskridge speaks of a shifting consensus surrounding affirmative action as grounds for the legal profession to move the law beyond and against original expectations.[652] Despite Dworkin's denunciations of "historicism" and his profession that judges need to work out what principles like equal protection really mean, an unmistakable streak of conventionalism underwrites his legal and political philosophy. That is why some commentators have come to the conclusion that, despite the strong moralistic bent of his arguments, there is not much to distinguish Dworkin's position from relativism.[653]

If Dworkin's conception of American "constitutional democracy" and the robust role it assigns to judges rests on public opinion surrounding *Brown*, one can very well wonder whence Dworkin's confidence in the stability of that opinion. Dworkin seems to harbor a deep faith in the inevitability and irreversibility of moral progress, but also in the capacity of judges to discern its direction. Yet it is precisely this faith that his "historicist" adversaries do not share, and it is just for that reason that they insist on a more constraining methodology. In their exchange over textualism and the Eighth Amendment, Dworkin charges Scalia with having conceded that

[652] Eskridge, "Dynamic Statutory Interpretation," pp. 1492-1493.
[653] Walker, *Moral Foundations*, pp. 42-46.

semantic intent can only consist in the meaning of words at the time of enactment, a concession that Dworkin takes as fatal to his interlocutor's position. But Dworkin overlooks a key part of Scalia's reply. If "cruel and unusual" meant "whatever may be considered cruel from one generation to the next," Scalia says, the amendment "would be no protection against the moral perceptions of a future, *more brutal*, generation."[654] Plainly, Scalia does not share the faith that abstraction equals more judicial discretion equals progress. Why assume that progressive inevitable? And even if it is, why assume, especially in light of decisions like *Dredd Scott*, that judges (or lawyers) are uniquely qualified to divine the direction of progress? Because he contemplates the possibility of civilizational decline, Scalia thinks it the lesser of two evils to restrict judges to linguistic conventions at the time of enactment. Thus, Dworkin mistakes Scalia's skepticism for a studied reactionism. As soon as one disputes Dworkin's assumption about the irreversible march of progress and of judges as its most capable prophets, it becomes necessary to come up with a different and more view of constitutional government, one that anchors itself not in a shifting moral consensus but something more stable, such as human nature.

Given his assumption that progress requires expansive judicial powers, one might expect from Dworkin a spirited defense of judges' philosophic qualities. But Dworkin knows better than to assume that those ostensibly authorized to do moral inquiry as part of legal interpretation will necessarily do it well. Perhaps another reason for Dworkin's appeal to "practice" has to do, therefore, with a limitation imposed upon him by his own understanding of semantic intent. Recall that in order to avoid the charge of "historicism," there must be something that words like "cruel and unusual" *really* mean, a non-historically bound reality to moral concepts. Judges,

[654] Scalia, "Reply to Dworkin," in *A Matter of Interpretation*, p. 145. My emphasis.

lawyers and legal scholars cannot "avoid philosophical discussion of the concepts" such as "will, intention, responsibility, meaning, justice and other ideas that are frequent sources of philosophical complexity and confusion." And it would be "irresponsible" of them to pretend as though philosophers had not gained deeper and better insight into the meaning of these words since the time of their enactment. But as Dworkin also recognizes, "most lawyers and judges, and indeed most legal scholars, have no time for serious study of technical philosophy."[655] Therefore, the very thing that justifies the interpretive enterprise turns out to be something that judges are no experts at, or at least no better than serious thinkers who are not lawyers. Dworkin's appeal to "practice" is, then, a kind of argument from authority. Judges are best endowed for moral reasoning because their superiority in the regard has been accepted in "practice."

It is just this faith in the consensus surrounding *Brown* and its implications for the legal profession that, I think, has underwritten civil rights policy in the area of transgender students. And it is why transgender advocates inside and outside of government frequently use the race analogy, which implicitly equates any skeptic of transgender regulation to a staunch supporter of racial segregation (recall Loretta Lynch's speech on North Carolina's "bathroom bill"). The tailwind that *Brown* gave the legal profession also helps to explain the near total absence of philosophical or scientific analysis of the substantive questions behind transgender accommodations in schools. Thus, the analogy to race plays a compensatory role in civil rights regulation, allowing advocates and officials to fend off challenges and criticisms on the grounds that to dispute transgender regulations is *ipso facto* to dispute the legitimacy of the original civil

[655] Dworkin, *Freedom's Law*, p. 304.

rights cause. In that sense, they, like Dworkin's broader enterprise, are running on the fumes of *Brown*.

In sum, this section argues that there is a plausible, if not irrefutable, explanation for how transgender regulations can be linked to original legislative intent. The assumption seems to be that those who enacted Title IX could have said discrimination "on the basis of biological sex" but instead said "sex," thus choosing to speak at a higher—perhaps the highest—degree of abstraction. Any attempt to narrow the meaning of "sex" in Title IX would thus run afoul of what Congress said, and by extension, of its more authoritative, and far more abstract, intent. Thus what "Congress intended" was for those who interpret and enforce its law "to strike at *the entire* spectrum" of "stereotypes." The suggestion here is not that the judges in cases like *Whitaker v. Kenosha* consulted Dworkin's works just prior to writing their decision. Instead, it is that Dworkin's jurisprudence seems to best characterize how judges and administrators have in fact have thought about the vague mandate against discrimination "on the basis of sex." Nor have we yet specified what substantive commitment lies behind and motivates the art of abstraction as Dworkin conceives of it. That is the topic to which we now turn.

III: What Are Transgender Rights Really About?

The transgender rights project has not depended solely on an argument about fidelity to original legislative intent. It has also relied on a substantive understanding of what civil rights and, more broadly, liberalism, are ultimately about. Here too, Dworkin's legal and moral philosophy seems pertinent due to his belief that at the heart of the Bill of Rights (in which he includes the Civil War amendments) is a general right to "equal concern and respect."[656] The language of concern and respect, which Dworkin borrows from John Rawls (and ultimately from Kant), suggests a

[656] See e.g. Dworkin, *Taking Rights Seriously*, p. xii, xiv-xv, and Ch. 6.

dignity-centered reading of the Constitution. In one of the most famous defenses of this reading, Justice William J. Brennan, Jr., whom Dworkin considers "one of the most liberal and explicit practitioners of the moral reading of the Constitution in modern times,"[657] calls the Constitution a "sublime oration on the dignity of man."[658] In Dworkinian fashion, Brennan praises the Constitution's "majestic generalities and ennobling pronouncements,"[659] viewing them as the basis for a sweeping conception of judicial review. And although Dworkin may not have stated his own position in quite these words, Brennan declares that the "demands of dignity will never cease to evolve."[660]

Indeed, one way in which they have "evolved" is that they are now said to require that people be recognized in accordance with their gender identity. As Catherine Lhamon, the head of OCR when it issued its first guidelines on transgender students, put it after leaving office, "[t]he bathroom question never was just about a bathroom. It is about who that child is at school and how that child will be perceived and seen."[661] The Court of Appeals for the Fourth Circuit was even more elaborate. It characterized the fundamental issue in *G.G. v. Gloucester* as "governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity." And it explained its ruling as "part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected."[662]

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[657] Dworkin, *Freedom's Law*, p. 5.
[658] Brennan, "Contemporary Ratification," at 438.
[659] Ibid., p. 433.
[660] Ibid., p. 443.
[661] "74 Interview: Catherine Lhamon Takes On Trump with Probe into Cutbacks on Student Civil Rights," June 27, 2017 (https://www.the74million.org/article/74-interview-catherine-lhamon-takes-on-trump-with-probe-into-cutbacks-on-student-civil-rights/).
[662] Order in *G.G. v. Gloucester County School Board*, #16-733, April 7, 2017, amended April 18, 2017 (www.ca4.uscourts.gov/Opinions/Published/161733R1.P.pdf).

In the law reviews, where transgender rights strategies are elaborated and sharpened, Supreme Court precedents like *Planned Parenthood v. Casey*[663] and *Obergefell v. Hodges*[664] are routinely cited in support of such ideas as "gender autonomy,"[665] "a right to define and express one's identity,"[666] and "a right to define one's own concept of existence."[667] Presumably, "a right to define one's own concept of existence" is what the judges of the Fourth Circuit meant when they spoke of validating the "existence and experiences" of transgender people. Here the underlying ideal seems to be that of authenticity. The remainder of this section explains how these three threads—dignity, recognition and authenticity—come together in transgender regulation under Title IX.

When Dworkin calls for "a fusion of constitutional law and moral theory," he is well aware of the legal profession's aversion to the liberal canon on rights. He promises, however, that "better philosophy is now available," alluding to Rawls' theory of justice as fairness.[668] Especially appealing to Dworkin is Rawls' "original position," in which individuals cannot know anything about their personal characteristics or what their own conception of the good will be, and so, rationally and self-interestedly, they agree to live under principles of justice that treat all such (or at least a wide variety) of conceptions with neutrality. Rawls' theory, says Dworkin, is "well designed to enforce the abstract right to equal concern and respect, which must be understood to be the fundamental concept of Rawls' deep theory."[669] Dworkin even calls this a

[663] *Planned Parenthood of Southeastern Pennsylvania, et al v. Robert P. Casey*, 505 U.S. 833 (1992).
[664] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[665] David Cruz, "Transgender Rights After Obergefell," 84 *University of Missouri-Kansas City* 693 (Spring 2016).
[666] Ibid,, p. 696. Citing opening line of the Court in *Obergefell v. Hodges*.
[667] Feldblum, "The Right to Define One's Own Concept of Existence," p. 124.
[668] Dworkin, *Taking Rights Seriously*, p. 149.
[669] Ibid., pp. 180-181.

"natural right."[670] Because "law as integrity" has this fundamental point of contact with "justice as fairness," Dworkin is at times thought of Rawls in black robes.

Yet, as Susan Shell has pointed out, the "Kantianiasm" of Rawls and Dworkin is actually based on a "curious inversion" of Kant,[671] indeed one that cuts unmistakably, if not at first obviously, against Kant's liberal ennoblement. Understanding the basic differences between them should help move us closer to the other two themes of this section, recognition and authenticity.

To start, whereas Rawls and Dworkin seek to dispense with metaphysics as a condition of moral obligation, metaphysics is essential to Kant's theory of autonomy. Kant's philosophy of dignity and autonomy on the distinctions he draws between nature and freedom, inclination and reason, phenomena and noumena. Human dignity is anchored in our capacity as rational agents to act out of duty to the rational will against the pull of natural inclination. This is what Kant means by autonomy. Crucially, the "nomos" here refers to the dictates of universalizing reason, not to the idiosyncratic expression of inner feeling or experience. The respect that persons are due is on account of their having this shared human capacity for reason. Dignity functions as a kind of floor, a minimum that every person is due on account of his very humanity. That is what Kant means when he says that persons should never be treated *only* as means to the ends of others, but always *also* as ends in themselves. The contrast to this is Hobbes' contention that a man's worth is his price—that is, his value to others.

Put another way, moral praise and blame are entirely consistent with Kantian dignity and are, in themselves, no violation of the principle of respect for persons. The idea that dignity and

[670] Ibid., p. 182.
[671] Susan Shell, "'Kantianism' and Constitutional Rights," in Robert A. Licht ed., *Old Rights & New* (Washington, D.C.: AEI Press, 1993), p. 152.

respect require neutrality—which, is to say, official indifference—with regard to different conceptions of the human good would have struck Kant as anathema, particularly because the image of autonomy he was trying to get his fellow Europeans to appreciate is, obviously, based on a conception of the good. "Probably no secular philosopher," writes Shell, "has been surer than Kant that there is a best way of life, a single model by which to set one's store, open in principle to all human beings."[672]

Kant's philosophy of autonomy rests on the supposition that moral law must "carry with it absolute necessity." This means that the moral law cannot be derived from any accidental or "empirical" features of human existence, things such as individual or even collective "experience," but instead must be arrived at "solely *a priori* in the concepts of pure reason."[673] Kant considers a "metaphysic of morals" to be "indispensably necessary… because morals themselves remain exposed to corruption of all sorts as long as this guiding thread is lacking, this ultimate norm for correct moral judgment."[674]

The metaphysics behind Kant's liberalism are, however, precisely what contemporary thinkers like Rawls and Dworkin wish to avoid.[675] The simple reason is that metaphysical ideas underwrite different conceptions of the good, and it is with regard to these conceptions that the state, according to the Neo-Kantians, ought, out of respect for dignity and autonomy, to remain neutral. By elevating one conception of the good over others, Rawls and Dworkin each insist, the state fails to treat all people with equal concern and respect. The deeper assumption here, and the crucial break from Kant, is that respect is socially derived, and dignity dependent upon it.

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[672] Ibid., p. 159.
[673] Immanuel Kant, *Groundwork of the Metaphysic of Morals*, trans. H. J. Paton (New York: Harper & Row, 1964), p. 57 [389].
[674] Ibid. [390].
[675] John Rawls, "Justice as Fairness: Political not Metaphysical," *Philosophy & Public Affairs*, Vol. 14, No. 3 (Summer, 1985), pp. 223-251; Dworkin, *Law's Empire*, pp. 80-81.

Individuals have different "plans of life," says Rawls, and they will not pursue them if they do not first have a sense that they are worth pursuing. Thus, the equal worthiness of plans of life will be agreed to by individuals behind the veil of ignorance. And in practice, this means that all plans of life have an equal claim to the respect of everyone else. Further, because self-esteem (or the bases of self-esteem) seems to be a condition of pursuing one's plan of life, it, too, must be guaranteed by the principles of justice. In short, dignity is something we have or don't have, according to whether we are actually esteem by others. Kant's view is just the opposite: respect is what we are owed *because* we have dignity (i.e. a capacity for acting out of duty to the categorical imperative).

The difference is subtle but important. The individual in Kant's theory of autonomy, though socially embedded and dependent, is morally *in*dependent. Indeed, it is precisely our moral independence—that is, our lack of any need for the esteem of others as a constitutive condition for our dignity—that makes us, as individuals, the possessors of infinite and inviolable worth. In effect, Rawls and Dworkin have restored the Hobbesian observation that "a man's worth is his price," if by "price" we mean the amount of esteem we get from others. Under the guise of a more robust (because more neutral and egalitarian) theory of autonomy, Rawls and Dworkin leave the individual in a state of utter moral and psychological dependence.

What is more, because Rawls considers self-esteem and hence dignity to be socially derived, it follows that all of the human characteristics that might contribute to self-esteem must themselves be subjected to the principles of justice. Human or "social" justice must correct the injustices of nature,[676] its unequal distribution, that is, of talents and abilities. This way of thinking stands classical liberal contract theory on its head, an example of which is James

[676] Rawls, *Theory of Justice*, pp. 73-74.

Madison's argument in Federalist 10 that "the first object of government" is "protection of different and unequal faculties of acquiring property."[677]

Justice as fairness thus serves to correct nature's harsh inegalitarianism, its cosmic unfairness. This helps to explain a dominant thrust behind the transgender movement's argument about "cis-normativity." If nature distributes the coincidence of chromosomal-reproductive sex and gender identity unequally across individuals, and if nature makes it nigh impossible for a person to suppress their "internal sense" of who they are, then it is the duty of the liberal state to correct this injustice by defining male and female by gender identity, for this would use "social justice" to correct nature's arbitrary distribution. Individuals behind the veil of ignorance do not know whether their gender identity will coincide with their anatomical structure, and so, acting self-interestedly and defensively, they will only agree to a scheme of rights that distributes the "social bases of self-esteem" in such a way that does not disadvantage those who receive the short end of nature's stick. The injustice of nature finds correction through the human institution of "recognition." We agree, that is, to recognize each other in accordance with our gender identities, a condition that is in principle open to all equally. The moral impetus behind this recognition is the demand for respect. To fail to recognize another's identity is to fail to show him respect, and thus to fail to recognize his inherent worth or dignity as a human being.

How has this profound shift in the meaning of dignity and autonomy come to pass? And why is it important for liberalism? To answer the first question, the break from Kant reaches its fullest expression in Nietzsche's critique of rationalism. Reason, according to Nietzsche, is not the universalistic antithesis culture, but is itself part of a culture, and a decadent one at that.

[677] James Madison, Federalist Paper No. 10, November 23, 1787 (https://avalon.law.yale.edu/18th_century/fed10.asp).

Reason is a "perspective."[678] Nietzsche thus claims to have eviscerated the metaphysical grounding of Kantian idealism, and with it, the certainty and nobility of the moral law.

Nietzsche's anti-rationalism was welcomed on the left as a powerful tool against ethnocentric imperialism and oppression. "Reason" was the perspective of white, European men, and by subscribing to Western rationalist culture, nonhegemonic cultures have learned to look at themselves through the eyes of their oppressors. A new politics of dignity was therefore needed, one that located dignity in experience and feeling, in what is particular to us, the oppressed. Dignity is to be found, in other words, in the "empirical" phenomena that Kant defined moral autonomy against. In the late nineteenth century and throughout the twentieth the demand for dignity manifested itself at the collective level in various nationalist movements (left and right), and more recently (and primarily in the West) at the individual level in a politics of identity or recognition.

Charles Taylor and Francis Fukuyama have both written incisive commentaries on the politics of recognition, and these can be of help to us here.[679] By "identity" Taylor understands "a person's understanding of who they are, of their fundamental defining characteristics as a human being." The central premise driving the politics of recognition is not simply that our identity is the thing most fundamental thing about us, but also that it is "partly shaped by recognition or its absence, often by the *mis*recognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or

[678] Nietzsche, *The Will to Power*, p. 267.
[679] Charles Taylor, "The Politics of Recognition," in Amy Guttman ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994). Francis Fukuyama, *Identity: The Demand for Dignity and the Politics of Resentment* (New York: Farrar, Straus and Giroux, 2018).

misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being."[680]

A politics of identity arises when individuals come to think of their identity as inauthentic, indeed as forcibly imposed on them by others who see them in a demeaning light. The demand for recognition is a demand to be seen, and thus to see one's self, in a way that does not lessen one's worth. We encountered this idea in Simone de Beauvoir's notion of "lived experience," which, to recall, represents a challenge to purportedly "objective" science as male-tinted perspective in order to encourage women to develop their own, liberating body of knowledge. The harm from seeing oneself through the eyes of another is existential; hence Andre Davis' claim that the plaintiff in *G.G. v. Gloucester* was asking the government to "validat[e]" the "existence" of transgender people. When Susan Stryker writes that transgender rights is ultimately about "what counts as legitimate knowledge," what she seems to have in mind is that for transgender people to regain their sense of self-worth, it is necessary for them to reject all previous modes or knowledge or "discourses," especially those that tell them that they are somehow defective, and instead build a new body of knowledge (or "knowledges") on the basis of their own "lived experiences."

Although the idea of identity in the sense spoken of today would have been incomprehensible to premodern societies, the more basic assumption that humans desire or even need[681] recognition is hardly a modern invention. According to Fukuyama, the ancients recognized something like the demand for recognition in thymos, the spirited part of the soul.

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[680] Taylor, "The Politics of Recognition," p. 25.

[681] Rousseau, whose philosophy Taylor and Fukuyama argue is the source of the modern notions of identity and recognition, very clearly does *not* consider recognition a natural "need." Rather, it is a desire that arises after human dependencies have already been created and thereafter becomes a need, with devastating consequences to the individual and society. Jean-Jacques Rousseau, *Discourse on the Origin and Foundations of Inequality*, in Roger D. Masters ed. and Roger D. and Judith R. Masters trans., *Jean-Jacques Rousseau: The First and Second Discourses* (Boston: St. Martin's Press, 1964), pp. 126, 134-135, 137, 148-149.

Thymos, however, is implicitly denied in modern science, which seems to conceive only of lowest (appetites/drives/passions) and highest (reason) parts of the soul or psyche.[682] That is partly why the politics of recognition poses a problem especially for societies transformed by the European enlightenment. Humans prior to the eighteenth century or thereabout received recognition by virtue of their place in stable, social hierarchies. Honor in these societies was a form of recognition. But honor is inegalitiarian, and so democratization of European societies required the replacement of honor with dignity, a more equal form of recognition that is due to all human beings by virtue of their humanity.[683] The culmination of this line of thought is the political philosophy of Hegel.

The question that both Taylor and Fukuyama grapple with is how identity became a *problem*, and a *political* problem at that. What makes the modern notion of identity different from the premodern one, in Taylor's view, is the possibility of its frustration. Premodern identity was something one was born with or into, something one had by virtue of one's fixed social role. Identity could not be withheld or taken away. Due to developments in social conditions and thought, identity became dis-embedded, individualized, and contingent. The demand for dignity took on collectivist hues in the nineteenth and twentieth centuries, and with the exception of contemporary ethno-nationalist movements it has since transformed itself into an individualistic project, usually in the genres of race, gender and sexuality. Modern identitarian thinking "places a supreme value on authenticity, on the validation of that inner being that is not being allowed to express itself."[684] Identity assumes an inside and an outside, the inside being an indubitable source of goodness (*pace* traditional Christianity), and the outside (society) a source of moral

[682] I am thankful to Professor Nasser Behnegar for pointing this out to me.
[683] Taylor, "The Politics of Recognition," p. 27.
[684] Fukuyama, *Identity*, p. 25.

corruption and suffering. Authenticity assumes that the deep self can only reach its potential, can only become what it truly is, in and through struggle with the outside, i.e. with social institutions. In its more political expression, identity calls for a total transformation of social institutions as the only way to bring an end to the self's alienation from the source of its own goodness.[685]

Taylor and Fukuyama each trace this strand of culture and politics to Rousseau.[686] After all, Rousseau is the first modern thinker to argue that man is naturally good and acquires his wickedness from bad social institutions. Modern identity, writes Taylor, begins from the idea that humans are naturally "endowed with a moral sense, an intuitive feeling of what is right and wrong." Feeling thus becomes the touchstone of morality. "The notion of authenticity," however, "develops out of a displacement of the moral accent in this idea."[687] Whereas for Rousseau the point of morality's "inner voice" was to guide us more surely to right and wrong, his legatees gradually left behind the end for the means. Being in touch with one's inner "sentiment of existence" became a good in itself, indeed the only true good. Taylor calls this the "massive subjective turn of modern culture."[688]

In Rousseau, the threat to our "inner voice" and indeed moral corruption itself come from our dependence on others.[689] In all societies except the ideal republic, social institutions make us live in the opinion of others. When dealing with others we think only of ourselves, and in our understanding of ourselves we think only of others.[690] Thus we are good neither for ourselves nor for others. Rousseau proposes two solutions to this predicament, austere republican virtue, which

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[685] For one interesting discussion of this intellectual tradition, see Bernard Yack, *The Longing for Total Revolution: Philosophic Sources of Social Discontent from Rousseau to Marx and Nietzsche* (Princeton: Princeton University Press, 1986).
[686] Taylor, "The Politics of Recognition," p. 29; Fukuyama, *Identity*, pp. 29-34.
[687] Taylor, "The Politics of Recognition," p. 28.
[688] Ibid., p. 29.
[689] Rousseau, *Discourse on Inequality*, p. 126.
[690] This is a paraphrase of Allan Bloom, "Introduction," in Jean-Jacques Rousseau, *Emile: or, On Education*, Bloom trans. (New York: Basic Books, 1979), p. 5.

require harsh "denaturing," or a solitary life in accordance with the inner voice of nature. Both options seek to restore unity of soul, and therewith justice and happiness. Because of his emphasis on the importance of unity of outside and inside, Rousseau is known as the champion of sincerity.[691]

One can cease to be a hypocrite and yet remain a conformist. Unity of soul (or sincerity) alone does not bring the kind of inner transformation demanded by the ideal of authenticity, though it may be a precondition. The deep self is not constituted by some shared human experience, be it a Rousseauan "sentiment of existence" or a Kantian rational will. Rather, it is a being that becomes what it is in and through creative expression. "In articulating it, I am also defining myself."[692] And because each self is unique and irreplaceable, to tap into one's true self means to find one's own, original mode of existence and expression, a mode that by definition will come into conflict with the outside, i.e. with societal norms and institutions.[693] So the distinction fundamental to morality, that between good versus evil, is displaced by a new set of distinctions, creative versus non-creative, authentic versus inauthentic. Kantian autonomy gives way to expressive individualism. It is now good to be creative or authentic, bad to be conformity and inauthentic; good to express oneself, bad to hold it in. "Those selves who are content with

[691] On this theme see Arthur Melzer, "The Origin of the Counter-Enlightenment: Rousseau and the New Religion of Sincerity," *American Political Science Review* 90, No. 2 (June, 1996).
[692] Taylor, "The Politics of Recognition," p. 31.
[693] Accommodation to society's rules is, as Fukuyama explains, a permanent and necessary consequence of man's social nature. "All societies have had rebellious teenagers and misfits who didn't want to accept [society's] rules, but in this struggle, society almost always wins out by forcing inner selves to conform to external norms." Fukuyama, *Identity*, p. 35. The doctrine of identity, however, treats society's rules as prima facie injurious and unjust. It understands the process of civilization as preventing the corruption of children's inner goodness and facilitating its expression, rather than inculcating in them the ability and willingness to repress their inherently anti-social urges and desires. This is, in a sense, what we were getting at when we spoke of the tension between self-realization and institutionalism at the heart of the stereotype theory of law (Chapter 4). Inasmuch as it has been transformed by the Rousseauan idea of natural goodness and its progressive-Deweyist offshoots, modern education requires social institutions to justify themselves before the bar of authentic and expression individuality, not the other way around. See James Hunter, *The Death of Character*, Ch. 4. "Therapeutic culture" gives this enterprise added urgency by characterizing (and exaggerating) the repressive nature of social institutions as deeply and irreversibly wounding.

convention—or too weak to oppose it—will allow themselves to be defined, passively and inauthentically."[694]

The modern notion of identity calls on me to discover "my own way of being" and tells me that this way must be "inwardly generated." Yet, as Taylor points out, "there is no such thing as inward generation, monologically understood." Human life is "fundamentally dialogical [in] character. We become full human agents, capable of understanding ourselves, and hence of defining our identity, through our acquisition of rich human languages of expression."[695] Identity is thus forced to win recognition of what it is through expressive exchange, but "the attempt can fail."[696] And because the modern notion of identity aims at nothing less than existential security, the need for recognition "considerably raise[s] the stakes" of modern politics.[697]

Expressive individualism need not be compatible with liberal equality. Nietzsche, for example, calls on the creative few to assert their new values and lord it over the weak and the slavish. But in America expressive individualism has acquired the accent of the oppressed, who insist that they too have the right to be authentic. This means that they deserve to see themselves through their own eyes, through their own "lived experience," and not through the perspective of the hegemonic culture. An appeal to justice must appear at this point, since why should the powerful cede any ground here? The claim must be something like that one has a right, in the name of "equal concern and respect," to be recognized in one's authentic identity.

Yet, as Taylor points out, there is a deep tension running through this type of argument. For it is one thing to challenge the judgment that a particular culture or identity is inferior, and to insist that such judgment be suspended until such time as an adequate understanding of that

[694] Harvey C. Mansfield, "Responsibility Versus Self-Expression," in Licht ed., *Old Rights & New*, p. 103.
[695] Taylor, "The Politics of Recognition," p. 32.
[696] Ibid., p. 35.
[697] Ibid., p. 36.

culture or identity is acquired. It is quite another thing, however, to demand as a matter of right the recognition of that culture or identity as possessing inherent worth. "A favorable judgment on demand is nonsense," writes Taylor, because "the judgment of value… cannot be dictated by a principle of ethics." But the problem is even worse, since

> the giving of such a judgment on demand is an act of breathtaking condescension. No one can really mean it as a genuine act of respect. It is more in the nature of a pretend act of respect given on the insistence of its supposed beneficiary. Objectively, such an act involves contempt for the latter's intelligence. To be an object of such an act of respect demeans. The proponents of neo-Nietzschean theories hope to escape this whole nexus of hypocrisy by turning the entire issue into one of power and counterpower. Then the question is no more one of respect, but of taking sides, of solidarity. But this is hardly a satisfactory solution, because in taking sides they miss the driving force of this kind of politics, which is precisely the search for recognition and respect.[698]

This seems to me an accurate description of the paradox that the transgender movement finds itself in. By espousing a notion of "lived experience" and thus "raising the profile of subjectivity as such," the movement implicitly denies the possibility of a metaphysical grounding for respect and therein for dignity. Dignity must somehow be won through the esteem of others, and this esteem is demanded as a matter of right—that is, the right that others recognize me according to a particular understanding of maleness and femaleness. But the demand, if we follow Taylor, is "nonsense" *not* (or not necessarily) because its premise (that male and female are matters of identity) is false, but because the thing being demanded does not depend on a "principle of ethics." The fundamental meaning of maleness and femaleness cannot be settled through constitutional or statutory interpretation, even if that interpretation centers on notions of dignity and autonomy. Once you subscribe to historicism, Richard Rorty has noted, "there is no way to bring self-creation together with justice at the level of theory."[699] What is more, in adopting the Neo-Kantian understanding of dignity and respect, the transgender movement makes itself vulnerable to profound condescension—a problem that transgender people are probably all too

[698] Ibid., pp. 69-70.
[699] Richard Rorty, *Contingency, Irony, and Solidarity* (New York: Cambridge University Press, 1989), p. xiv.

familiar with. How else to understand the Fourth Circuit's assertion that G.G.'s very "existence" and "humanity" depends on his "recognition" as male by the federal government?

Assuming Judge Andre Davis is right about the "redefining and broadening" of civil rights, then that notion of rights can easily fall into a trap. By leaving dignity contingent on respect and recognition, and the latter without any objective (i.e. non-conventional) conception of the good to which it can appeal, the politics of recognition is forced to demand a form of justice that it cannot itself justify. Fukuyama consequently believes there is a "clear line" from Nietzschean nihilism to Justice Anthony Kennedy's description of liberty as "the right to define one's own concept of existence."[700]

IV: Therapeutic Pragmatism

Although authenticity is a persistent theme in transgender rights discourse, I doubt that anyone but the most committed postmodernists of the transgender movement would agree that there is a "straight line" from *Beyond Good and Evil* to Dear Colleague Letters. The language of the transgender rights movement is undoubtedly a language of compassion, and that is probably why cultural progressives (and some conservatives) have embraced it so quickly and comprehensively.[701] And so before we conclude, I want to consider an alternative explanation for transgender rights, which is at the same time another way of thinking about the transformation of autonomy from its origin in Kantian rationalism to its current self-expressivist form.

I have in mind here the American philosophical tradition of pragmatism, a tradition that connects early progressive thinkers like William James, Charles Pierce and John Dewey with

[700] Fukuyama, *Identity*, p. 55.
[701] There is a vast political psychology literature too broad to cite here. A good source by a leading scholar in this field is Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Vintage Book, 2013).

more contemporary figures like Richard Rorty and Judge Richard Posner. Here I will focus on the latter two inasmuch as they help illuminate what courts and agencies have been doing in fact, even if they have not quite articulated their reasons in the ways discussed below.

Broadly speaking, pragmatism is the school of thought that eschews metaphysics and subordinates questions of first principle to considerations of "what works." In other words, it eschews foundationalist claims about truth and endeavors instead to regard *as* true that which, through experimentation, is found to produce the desired result. Pragmatism is essentially a theory of progress. It reports that too firm an adherence to first principles of metaphysics threatens to limit flexibility and adaptability, and therefore also progress.

A usual criticism raised against pragmatism is that it is not *really* pragmatist in the way that it says, since "what works" depends on what we define "working" to mean, and *this* question can only be resolved through the kind of foundationalist inquiry that pragmatism wants to exclude. Dworkin himself makes this critique,[702] notwithstanding his own aversion to "bizarre metaphysical" claims.

The only internally consistent answer to this critique, so far as I know, is the one offered by Richard Rorty. Liberalism, says Rorty, is at bottom an outlook that condemns cruelty as the worst thing we can do,[703] and because cruelty is almost always the result of people taking their beliefs too seriously, pragmatism is well suited to liberalism. Indeed, Rorty suggests that the great thing about liberalism is that it constantly opens up new venues for compassion,[704] the transgender story being a case in point. Thus far, Rorty is not too different from the Neo-

[702] Dworkin, "Arduous Virtue," pp. 1265-1266.
[703] Rorty, *Contingency,* p. xv-xvi, 74. Quoting Judith Shklar, "Putting Cruelty First," *Daedalus* 111, No. 3 (1982): 17-27.
[704] Ibid., p. xvi.

Kantians inasmuch as the latter seem to endorse relativism as a means of promoting hyper-tolerance (perhaps indifference) with regard to different "plans of life" and call for "neutrality."

To continue with Rorty, if we like tolerance, then the best way to promote it is by being anti-foundationalists and not taking truth-claims too seriously. The key word here, however, is "if." Rorty concedes that he cannot offer a philosophic defense of pragmatism, for to do so would land him in self-contradiction. After suggesting that "truth is made rather than found," he makes the following claim:

> The difficulty faced by a philosopher who, like myself, is sympathetic to this suggestion… is to avoid hinting that this suggestion gets something right, that my sort of philosophy corresponds to the way things really are. For this talk of correspondence brings back just the idea my sort of philosopher wants to get rid of, the idea that the world or the self has an intrinsic nature… To say that we should drop the idea of truth as out there waiting to be discovered is not to say that we have discovered that, out there, there is no truth.[705]

Indeed, Rorty acknowledges that he has no theoretical argument for why we shouldn't be cruel.[706] Rortian pragmatism therefore says: *if* you want a society of maximum tolerance, then pragmatism is best suited to get you there. But *whether* such a society is good or desirable is beyond the ability of pragmatism--and perhaps philosophy in general--to answer in any definitive way. It is this extra step that Dworkin and Rawls take only with great hesitation, if they take it at all. Rorty cannot be accused as easily of assuming his own conclusion, for he states outright what he takes to be the "priority of democracy to philosophy."[707] Whatever one thinks of Rorty's "postmodern bourgeois liberalism,"[708] he speaks with arresting candor and admirable consistency.

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[705] Rorty, *Contingency*, pp. 7-8.
[706] Ibid., p. xv.
[707] Rorty, "The Priority of Democracy to Philosophy," in Merrill D. Peterson and Robert C. Vaughn ed., *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History* (New York: Cambridge University Press, 1988), pp. 257-282.
[708] Rorty, "Postmodernist Bourgeois Liberalism," *The Journal of Philosophy* 80, no. 10 (1983): 583-89.

Richard Posner comes close to this level of honesty in his defense of "pragmatic adjudication." The pragmatic judge should make no pretense of interpreting a law when what he's really doing is rewriting it, argues Posner. The judge can and will use the Constitution, common law and statutes as "a kind of putty that can be used to fill embarrassing holes in the legal framework,"[709] but if departure from any of these three sources of law is required in light of changed social circumstances, he should do so without hesitation.

Of essence to the judicial enterprise, at least at the level of the appellate tribunals, is using the law as a form of results-orientation public policy. Unlike the positivist who begins and even ends with the law, the pragmatist begins and ends with the facts and uses the law as a source of guidance in applying those facts to policymaking. Courts are policymakers, plain and simple, and this means that judges will be confronted with social science evidence. The fact judges may not have a full grasp of the social science needed to produce the "best result" is a feature, not a bug, of pragmatic adjudication. Judges "must rely on their intuitions."[710] One might object that if "intuition" or "gut instinct" is ultimately what guides the judge, pragmatic adjudication comes perilously close to emotivism, or the theory that moral judgments are ultimately matters of feeling. Posner half-concedes the point: although often the pragmatist's decision "is bound in the end to be an emotional rather than a closely reasoned" one, "emotion is not pure glandular speculation. It is influenced by experience, information, and imagination, and can thus be disciplined by fact." Although, as we noted in our critique of Eskridge, Posner recognizes that precisely pragmatism may require judges to be rigid rule-followers, he nevertheless thinks that, as policymakers, judges are not a bad supplement to legislatures and may in some ways be superior. The screening process for the appointment of (appellate) judges ensures that these

[709] Posner, "Pragmatic Adjudication," p. 244.
[710] Ibid., p. 242.

policymakers will have higher-than-average levels of wisdom and sobriety, a natural aristocracy of sorts.

Pragmatic adjudication does not entirely dispense with formalities like legal reasoning and reliance on precedent. These help to produce stability and predictability in the system, which a pragmatist may well recognize as worthwhile goals. But they are not the only goals or even the most important ones. Just as Dworkin wishes to free judges from the moral pangs of the counter-majoritarian difficulty, so Posner wishes to alleviate the judge's "philosophic doubts" about results-based reasoning. "The pragmatic judge is not always a modest judge."[711]

In a concurrence to the Seventh Circuit's opinion in *Hively v. Ivy Tech*, which held that Title VII forbids discrimination on the basis of sexual orientation as a form of discrimination "because of sex," Posner gently chided his colleagues for pretending that they were faithfully interpreting rather than rewriting the Civil Rights Act of 1964. A "broader" (i.e. more abstract) understanding of "sex" is necessary, Posner argued, in order to find in favor of the plaintiff, but no such meaning could plausibly be imputed to Congress. Posner avowedly rejects the Dworkinian argument of the majority that "Congress in 1964 may not have realized or understood the full scope of the words it chose. This could be understood to imply that the statute forbade discrimination against homosexuals but the framers and ratifiers of the statute were not smart enough to realize that."[712] Posner prefers to admit candidly that "today we are rewriting Title VII."

What justifies this rewriting, in Posner's view, is the sea change in society's "attitudes towards homosexuals" since the 1960's. "We understand the words of Title VII differently not

[711] Ibid.
[712] *Hively v. Ivy Tech Community College*, 853 F.3d 339, 357 (7th Cir. 2017), J. Posner Concurring. Internal quotations omitted.

because we're smarter than the statute's framers and ratifiers but because we live in a different era, a different culture."[713] Posner's argument here is both historicist and majoritarian. That is, he seeks to dampen the hubris of his colleagues, who think they have attained deeper insight into the nature of injustice, by pointing out that we are all confined to our particular, temporary horizons of truth and meaning. And he "knows" that the plaintiff has suffered discrimination because of how public opinion has shifted on sexual morality.

In another ruling, in which he authored an opinion of the court that struck down same-sex marriage bans in two states, Posner based his argument on an extensive discussion of the state of medical knowledge in regard to the etiology of homosexuality. Because people do not choose their sexual orientation, it is a "source of continuing pain" for gays and lesbians to not be able to marry.[714] Posner then, in true pragmatic fashion, proceeded to weigh the policy pros and cons of marriage laws, acknowledging, among other things, that "given that homosexual sex is non-procreative, homosexuality may, like menopause, by reducing procreation by some members of society free them to provide child-caring assistance to their procreative relatives, thus increasing the survival and hence procreative prospects of these relatives."[715]

Although the frankness of Rorty and Posner is, to put it mildly, not on display in the transgender cases, those cases do exhibit an unmistakable streak of compassion-based or "therapeutic" pragmatism. Judges recognize, correctly, that students with gender dysphoria suffer psychologically and socially. Using their "gut instinct" (which they are forced to do in the absence of compelling scientific evidence about gender transition therapies), judges also assume that forcing schools to treat these students in accordance with their gender identity will help.

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[713] Ibid.
[714] *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014).
[715] Ibid., at 657-658.

Against the concrete and tangible suffering of the transgender plaintiff, judges are asked to weigh the abstract and intangible harms of other students' loss of privacy and feelings of insecurity. Perhaps also, civil rights officials believe that unless they force schools to amend their access policies, school policies will come between the clinicians and their gender dysphoric patients. The point is: compassion-driven policymaking first, legal reasoning second.

A telling example of this is a case arising out of the Maine Supreme Court, *Doe v. Clenchy* in 2014.[716] The court's reason for siding with the transgender plaintiff against her school had nothing to do with stereotypes, a word that was never even mentioned in the ruling. Instead, the court saw a close analogy between the student's request to use the girls' restrooms and Section 504 of the Rehabilitation Act of 1973,[717] the first major federal legislation dealing with civil rights for the disabled in education and other programs. In fact, the agreement that the student and her school had come to prior to the lawsuit was called, in local school parlance, a "504 plan." The court interpreted the Maine Human Rights Act, which prohibits discrimination on the basis of sexual orientation, to apply also to transgender status. It then clarified, however, that its finding of discrimination "rests heavily on [the student's] gender identity and gender dysphoria diagnosis, both of which were acknowledged and accepted by the school."[718] To successfully state a claim of discrimination, future plaintiffs must be able to that their "psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity."[719] There is obviously an interesting

[716] *Doe v. Clenchy*, 2011 Me. Super. LEXIS 70 (Superior Court of Maine, Penobscot County April 1, 2011, Decided).
[717] Ibid., pp. 2-3, ff. 2, 4.
[718] Ibid., p. 13.
[719] Ibid., p. 14.

parallel to *Brown v. Board of Education*'s reasoning here, but the broader point is the court's laser-like focus on relating its decision to the therapeutic harms of deciding otherwise.

For the most part, courts and agencies are content to mention the clinical needs of the plaintiffs and the stigmatic harms they face from misrecognition. Crucial here, however, are the transgender movement's insistence on understanding gender identity as innate and immutable, as well as its assumption that the true self is sentient and expressive. These assumptions, taken together, underwrite regulators' belief that it would be cruel to expect any student to have to repress their "internal sense" of who they are. Regulators, in short, seem to be guided by a strong sense of compassion, and as Posner would put it, while these decisions may ultimately be based more on emotion than on reasoning, that emotion is refined by experience, knowledge and good sense.

Conclusion

I have tried to suggest two theories of law that help explain how courts and agencies have inferred transgender regulations from the terse mandate of Title IX. Neither one of them is a perfect match, but each captures something essential to the transgender story that dynamic statutory interpretation seems to leave out. The claim that in passing Titles VII and IX "Congress intended to strike at *the entire* spectrum of disparate treatment of men and women resulting from sex stereotypes" may be too broad, but it seems reasonable to say that without *some* theory of stereotyping, the prohibition against discrimination "because of sex" would lose almost all of its teeth. The arguments made by Ruth Bader Ginsburg as a law professor, advocate and Justice of the Court are reasonable ones, though far from flawless. Still, if one is inclined to accept Dworkin's distinction between semantic and expectation originalism and to ascribe transgender regulation to the former, one must also consider the deeper weaknesses of Dworkin's position.

Perhaps the most fatal of these has to do with Dworkin's unwillingness to ground his moral reading of the Constitution—and, we may presume, of civil rights laws—in moral realism. Precisely his claim that moral theorizing is internal to legal interpretation makes his position conventionalist at best, nihilistic at worst. We arrived at a similar conclusion when examining the other thrust of Dworkin's jurisprudence, his claim that the fundamental principle behind the Constitution is a right to equal concern and respect.

As for therapeutic pragmatism, Judge Posner's approach seems not altogether ill-suited to the kind of disputes that have arisen between transgender adolescents and their school districts. In the absence of good scientific data on gender transition therapies, and given the clinical recommendations of those who treat the gender dysphoric patients, judges reasonably trust their gut instinct and side with plaintiffs. On the other hand, a Posnerian approach would also call for judicial humility about the grounds for such decisions—for instance, not declaring age-old beliefs still widely held by scientists and non-scientists alike to be "stereotypes," or affirming that the interpretation of Title IX given by the Seventh Circuit in *Whitaker v. Kenosha* is, frankly, a rewriting of the statute.

Conclusion

Regulations rarely emerge out of the blue. The 2016 Dear Colleague Letter (DCL) on transgender students was the culmination of a six-year initiative by the White House and the Department of Education to tackle what the administration had called a "pandemic" of bullying sweeping across the nation's schools.[720] Notwithstanding complaints by some observers that this was "hyperbole" designed to justify federal aggrandizement,[721] the concern about bullying was not wholly unjustified. Two important sociological and technological trends in recent decades have created new challenges for parents and schools. One is the advent of social media and smartphone technology. While these have made it possible for vulnerable and isolated teenagers to find meaningful and supportive connections, they have also, and for the same reason, made it infinitely easier for teenagers to launch vicious campaigns of harassment and intimidation against one another. And they have made it infinitely harder for parents and teachers to detect and intervene in these campaigns before harmless teasing metastasizes into tragedy.

The other key trend is the rise of what Gregg Lukianoff and Jonathan Haidt have called "safetyism." By this they mean "a culture or belief system in which safety has become a sacred value, which means that people become unwilling to make trade-offs demanded by other practical and moral concerns."[722] Safetyism is a natural extension of the therapeutic ethos we discussed in previous chapters, with its emphasis on the emotive and vulnerable self. Drawing on Nick Haslam's notion of "concept creep,"[723] Lukianoff and Haidt argue that as more and more

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[720] U.S. Department of Justice Response to the U.S. Commission on Civil Rights' Interrogatories and Document Requests at 1 (April 18, 2011).
[721] U.S. Commission on Civil Rights, "Peer-to-Peer Violence and Bullying," Dissents of Commissioners Todd Gaziano and Peter Kirsanow (in which Gail Heriot joined), p. 134.
[722] Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind: How Good Intentions and Bad Ideas are Setting Up a Generation for Failure* (New York: Penguin Press, 2018), p. 30.
[723] Nick Haslam, "Concept Creep: Psychology's Expanding Concepts of Harm and Pathology," *Psychological Inquiry* 27 (2016): 1-17.

areas of life are recast in the therapeutic language of safety, the demand for intervention by authorities—whether parents, teachers, or government officials—in the name of emotional and physical protection grows and grows. That is why in gender activist circles and especially on college campuses, failure to recognized a person's "lived experience" is characterized not simply as a philosophical or moral failure, but as an actual threat to a person's safety.[724] One of the most important manifestations—as well as causes—of safetyism, Lukianoff and Haidt find, is overprotective parenting.[725]

According to Jean Twenge, these trends have played a key role in shaping the attitudes and expectations of members of the "iGeneration,"[726] which refers to those born after 1995, in other words to practically all of the complainants in the transgender rights decisions since 2010. Members of this generation, says Twenge, are "obsessed with safety," which they define to include "emotional safety."[727] They are spending more time alone (read: with screens), which means that they are more vulnerable to "cyberbullying," and at the same time, they are less emotionally and psychologically resilient, and rely more than previous generations on figures of authority such as parents and administrators to solve their personal conflicts for them. "Teens are physically safer than ever, yet they are more mentally vulnerable."[728] The situation is particular troubling among girls, where rates of depression and suicide have skyrocketed.[729]

Thus, the Obama administration's anti-bullying initiative was responding to genuine, if not yet fully articulated and understood, sociological changes. These include not just in the hyperconnectivity and vulnerability of teenagers, but also "concept creep" and its effects on

[724] Lukianoff and Haidt, *The Coddling*, pp. 24-25.
[725] Ibid., Ch. 8 and Ch. 9.
[726] The term is from Jean M. Twenge, *iGen: Why Today's Super-Connected Kids Are Growing Up Less Rebellious, More Tolerant, Less Happy—And Completely Unprepared for Adulthood* (New York: Atria, 2017).
[727] Ibid., p. 3.
[728] Ibid.
[729] Lukianoff and Haidt, *The Coddling*, p. 149.

American institutions. "Concept creep" refers to the way in which the meaning of words like "bullying," "trauma," "harm," and "abuse" is expanded "vertically," to apply to less severe phenomena, and "horizontally," to capture analogous but not quite similar situations.[730] The term "cyber-bullying" is itself a kind of concept creep, since it blurs or at any rate trivializes the distinction between physical aggression and verbal harassment. Concept creep underwrites the expansion of government regulation in areas once considered private, and it does so in the name of "health and safety." To take one notable example, an elementary school in San Francisco included teasing, eye-rolling and even being ignored as examples of "bullying,"[731] with the implication being that it was now up to school staff to regulate, in the name of basic safety, the subtlest and most private forms of interpersonal communication.

Again, the technological context is important. Being teased on the playground by another student can sting, but the same behavior undertaken by fifty students on Facebook can be devastating even to resilient teenagers. "Even though any particular comment on its own may have caused you little or no pain," write Paul Bloom and Matthew Jordan in the *New York Times*, "the aggregate effect is far more severe." The Oxford philosopher Derek Parfit has called this problem "the Harmless Torturer."[732] As the effects of "harmless" harassment carry over into personal academic performance and school culture, they create new policy dilemmas for administrators and new pressures on government officials to do something.

The Obama administration's decision in 2010 to define offensive and hurtful speech as "bullying" was a necessary precursor for its departure from the Supreme Court's view of

[730] Haslam, "Concept Creep," p. 2.
[731] Hans Bader, "The Ever-Expanding Concept of 'Bullying' Casts an Ominous Shadow Over Free Speech," *Competitive Enterprise Institute*, January 20, 2012 (https://cei.org/blog/ever-expanding-concept-bullying-casts-ominous-shadow-over-free-speech).
[732] Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), p. 80.

"bullying." The Court has consistently held that offensive and hurtful speech is not only protected by the First Amendment, but is also essential for building resilience in adolescents and preparing them for democratic citizenship. Once the Obama administration committed itself to the idea that "bullying" involved any form of emotional discomfort, and to the idea that this discomfort can prevent a student from realizing his basic right to education, the 2016 DCL on transgender students seemed all but inevitable. After all, it takes no great leap of imagination to appreciate why the failure to treat a gender nonconforming student in accordance with his gender identity can result in psychological harm.

The administration's anti-bullying effort was driven in part by a growing awareness that LGBT students, who have always struggled to feel welcome at their schools, now faced particularly challenging situations in an age of social media. With organizations like the Gay, Lesbian and Straight Education Network pleading with federal regulators to craft a policy response to the disproportionate (and often tragic) bullying of LGBT students, the Obama administration felt compelled to take bold action, even if that meant straying from Supreme Court precedent. At bottom, the transgender regulations of Title IX were always mainly a good faith effort to reduce the hardships facing transgender students, especially (though not only) from the direction of their peers.

Nevertheless, despite or perhaps because of their good intentions, federal regulators have led civil rights policy into a jungle of confusion and question-begging. At the heart of the problem is their reluctance to grapple in a serious way with basic questions about what makes us sexed beings. When they argue that there is no such thing as "biological sex," civil rights officials rely on academic theories that were originally developed to show that there is no such thing as gender identity either. When they insist that gender identity is an innate and essential

property of persons, they invariably rely on generalizations about what boys and girls typically do, say, think or desire—in short, on stereotypes.

Does this mark a failure to apply the arguments from intersex and gender identity properly, or might it reflect deeper problems within regulators' assumptions about human nature? Implicit throughout this dissertation has been the claim that the division of humans into two distinct categories of being, male and female, is rooted in a teleological understanding of nature, one that modern science does not and probably cannot refute. In fact, modern science relies on teleological thinking for its very ability to distinguish between order and disorder, health and sickness, normal and abnormal. It would be one thing if regulators were to say, as some gender theorists have, that people should be free to "perform" a gender identity in order to demonstrate its utterly inauthentic and dehumanizing conventionality. But what they have said, instead, is that justice demands that society recognize transgender girls as authentic girls and transgender boys as authentic boys, and that it do so according to an essentialist theory of gender.

Is it a problem for the transgender rights project that sympathetic regulators routinely and often explicitly rely on the very stereotypes they condemn when handing down rulings in favor of transgender plaintiffs? Does it matter that judges and administrators cannot (and often will not) explain why the privacy interest implicated in the custom of separating locker rooms has nothing whatsoever to do with physical anatomy? Should we care that the Obama administration contradicted itself in its own definition of male and female, using one definition for restrooms and another for sports? What to make of the fact that by pressing down on one area of Title IX regulation (changings rooms and sex education classes), federal regulators have created potential civil rights infractions in other areas (competitive fairness for biological females in sports)? Is it wise for the civil rights state to make assumptions about the certain direction of medical science

and clinical treatment when research is only in its infancy (and may suggest opposite trends)? To what extent, for that matter, does transgender civil rights depend on the state of that science?

One reason for these deeper confusions, I have implied, is political. There is a long standing and widely accepted social custom of separating certain spaces and activities by male and female. Perhaps fearing that it would deprive them of mainstream support, civil rights groups have not called that custom into question. Nor, therefore, have government officials felt any urgency to do the same. Yet that custom would seem to presuppose precisely what regulators deny, which is that male and female are distinguished (at least in part) by physical, anatomical, reproduction-related characteristics. Arguably the leading legal thinker on sex stereotypes, Justice Ruth Bader Ginsburg, has not only said so herself, but has called *un*constitutional the view now being promoted in the name of anti-stereotyping. Did Ginsburg fail to carry the internal logic of her own position to its ultimate conclusion? Or do changes in the stereotype theory of law reflect the corruption of Ginsburg's ideas? If the latter, what does that tell us about an academic theory once unleashed into the world of affairs? What does it tell us about the legal profession's implicit claim to understand the direction of "progress"?

Not unlike the law on sexual harassment, courts have declared civil rights to be incompatible with a social practice without explaining why it is *discrimination*. If the Seventh Circuit Court of Appeals is right to suggest that being seen in the nude by a member of the other sex is no different than being seen in the nude by a member of one's own sex, there would seem to be no good reason to separate restrooms and changing rooms in the first place. Indeed, under that understanding of sex and privacy, it would be arbitrary and even discriminatory to deny *anyone* access to *any* facility for *any* reason. The only way to prevent that outcome, as Judge Paul Niemeyer implied in his dissent in *G.G. v. Gloucester*, is to force schools to be arbiters of

who *really is* male or female, and this they cannot do without resorting to stereotypes. Put simply, any form of gender gatekeeping seems inconsistent with the doctrine of anti-stereotyping.

Another reason for the intellectual confusions behind transgender regulation, one explored at length in this dissertation, is the recasting of what is essentially a philosophical or theological[733] question as a matter of law, and specifically of "rights." Statutory mandates like those in Title VII and Title IX derive their moral and political force from their proximity to the Equal Protection Clause of the Fourteenth Amendment. The right to "equal protection under the laws" has come to mean, in practice, the right to define, assert and have others recognize (and hopefully internalize and agree with) one's own "concept of existence." Yet, a "concept of existence" is precisely the sort of thing that liberalism, with its separation of public from private, seeks to keep away from the reach of the state. And the right to have others recognize that concept through regulation cannot be realized with significant tradeoffs with other fundamental rights. Transgender regulations are a logical extension of the feminist idea that the private is political. But this also means that matters of the most intimate and private nature, for instance one's core "inner sense" of who one is, must take on acute political significance. They must become, literally, *res publica*. To transgender advocates, the state's guarantee of a person's right to be recognized and esteemed for who he truly is, irrespective of social beliefs about his body, is a precondition for human dignity and autonomy, and therewith for liberal democracy; to critics of the transgender movement, this politicization of our inner lives threatens to erode the public-

[733] I mention theology here because there is a tradition of thought that derives its understanding of male and female and of human nature more broadly from a notion of divine creation as revealed in Scripture. By "philosophical," I mean an account of maleness and femaleness that does not rely on revelation, but only what can be discovered by unassisted human reason.

private dichotomy, and with it, the fundamental bulwarks of liberty properly understood.[734] But as we have suggested in Chapter 6, the former's conception of the dependence of dignity on recognition makes for a difficulty act of reconciliation with the premises of liberalism.

The legalization of moral and philosophical questions about human nature has depended, on the surface, on an argument about stereotypes. This argument operates at a high degree of abstraction and usually employs equally abstract analogies to race, women's and gay rights. Abstraction and analogy are the lawyers' art in a common law system. Yet, it is through the cracks of these imperfectly constructed analogies that almost all of the important and difficulty questions arise. Is the racial segregation of the Virginia Military Institution the same as its gender segregation? As I tried to show in Chapter 4, that is a hard position to maintain. After insisting that the law must look at VMI from the perspective of the unrepresentative (indeed rare) woman, Ginsburg herself said that accommodations and changes to VMI's facilities and physical training programs would have to be made. It seemed not to dawn on her that in making this concession, she was begging the question on which the whole lawsuit turned. Never having been defined adequately by the courts, the concept "stereotype" seems to preclude careful thinking about the *why* certain patterns of human life, certain physical capacities or structures of psycho-anatomical coordination, occur with more regularly than others. Is the fact that most humans with male-typical biology also have a male identity a mere accident, a distribution of some natural quality no less arbitrary than, say, hair color, and one that can (and should) be rectified by human justice? Or might it reflect a deeper structure of causality, indeed of reality, one that law and politics ignore at their (our) own peril? Just what understanding of "nature" lies behind the

[734] Brief of Scholars of Philosophy, Theology, Law, Politics, History, Literature, and the Sciences as Amici Curiae in Support of Petitioner, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, No. 16-2424 (2020).

stereotype theory of law? These were the deeper questions posed and explored, though perhaps not given definitive answers to, in Chapters 2 and 3.

How we understand human nature will have massive consequences for how we define and pursue human flourishing. It will also, and for that same reason, shape how social institutions function in order to facilitate that flourishing, and the role that government will have to play in this drama. The importance of human nature to the theory and practice of modern liberal democracy is a vast topic on which there is a mountain of literature. I am among those who are dubious that liberalism can do without such a notion. The Rousseauan idea of "sentiment of existence," which theorists like Charles Taylor and Francis Fukuyama have argued underwrite the modern politics of recognition, was conceived as effort to find a new center of moral gravity for human life in an otherwise alienating and dehumanizing liberalism. It is Rousseau's attempt to the fill the spiritual and moral void left by the decline of public religion and genuine, republican citizenship. Kant tried to double-down on Rousseau's solution by making morality utterly independent of actual customs and institutions. But with the subjectivist in Western culture turn toward authenticity, the very thing that was supposed to fill the moral void has rendered that void ever deeper and darker.

Against this background, transgenderism must be understood as both an extension of Rousseau's internal revolt within liberalism to correct for its deficiencies, and repudiation of liberalism altogether in anticipation of a postmodernist—indeed, "post-truth"—world. That, I suspect, is what makes the transgender movement at once so appealing and so frightening to many people.

By way of conclusion, I would like to offer a few practical observations. Precisely because I believe that transgenderism exposes some of the deepest fault lines of modern life, I

am under no illusion that the debate over transgender rights will be "solved" any time soon. Nevertheless, that debate can certainly be made more lucid and honest, and a number of policy goals can, one hopes, find a broad enough consensus.

For starters, it seems to me useful to remind ourselves of the promises and limitations of the therapeutic approach to civil rights. Psychology justifies its existence in terms of its practical usefulness to the promotion of human happiness, which it generally understands in a secular and negative sense to mean the absence of psychic distress or unease. This means that psychology is predisposed to focus on the behavioral and experiential facets of human life, which is both a strength (inasmuch as science is about mastery of nature) and a weakness (inasmuch as nature evades our control). Psychology, in other words, is inclined by its own logic to treat persistent and irrepressible behavior as prima facie evidence of some deeper causality that it itself cannot control. Such an approach is not unreasonable in itself, but it does suggest one crucial precaution: an argument that stands by its reliance on behavior falls by that very reliance. If, in the case of gender identification, behavior turns out *not* to be persistent and consistent and unchanging in the way that advocates say, then by their own logic the evidence for a deeper causal mechanism is weakened, and with it the case for defaulting to "gender affirmative" clinical treatment. Even researchers who are most aggressive in trying to shift the scientific consensus on gender have conceded that there is at present no conclusive evidence that sex is "in the brain." Add to this the fact that what little evidence we have do have suggests (though does not prove) that cross-gender identification in children will in most cases subside naturally later on, and that some gender transition therapies have irreversible side-effects, and it seems reasonable that institutions should be given adequate flexibility and autonomy in responding as they see fit to gender variant children. A civil rights framing of the transgender issue may make

sense where schools obstinately refuse to make any accommodations for transgender students, but the downside is the subordination of as-yet-unsettled scientific questions to an absolutizing and uncompromising "rights talk."

The danger of politicized medicine is precisely one that transgender and intersex advocates have worked so hard to bring to our attention. Alice Dreger is surely correct in observing that medicine on occasion needs corrections from "social justice" movements. But it hardly follows that anything demanded in the name of social justice is therefore a scientific correction. I have yet to understand how a social movement that accuses conventional medical consensus of being shot through with "discourses of normativity" can, at the same time, point innocently to sudden changes of opinion among medical experts as irrefutable evidence of what "science says." If the pathologization of transgenderism was the result of Victorian-era moral panics about sex and social hygiene, why can't *de*-pathologization be a consequence of moral panics over inauthenticity and bullying? My point here is *not* that transgenderism is a pathology. Rather, it is that, to the extent the question must be settled by empirical research, the jury is still out.

This brings us to a second practical recommendation. The distinction we have drawn between wave two and wave three transgender rights, between an understanding of discrimination that is agnostic in its understanding of "sex" and one that requires the elevation of subjectivity to the status of unassailable knowledge, may help point the way toward a reasonable compromise. Consider: if Mary was "assigned male at birth" but now identifies as female, you don't have to agree that she is in fact a woman in order to not fire her for failing to live up to your standards of what men should look like. Transgender people still face this form of discrimination, and there is no reason why *in principle* addressing it *must* mean also changing the

society's fundamental assumptions about human nature and "what counts as legitimate knowledge." To repeat, the Obama administration did not venture into the waters of sexual ontology because its officials were questioning "what counts as legitimate knowledge," but because they wanted schools to do more to reduce bullying.

I accept that the compromise I am suggesting here is likely to be rejected by some transgender advocates, who argue—not implausibly—that the source of their mistreatment at the hands of others is the underlying belief that they are inauthentic, i.e. deluding others and perhaps themselves. On the other hand, if the transgender movement tries to tether all advances in antidiscrimination policy to the most extreme version of its argument, it may find that it is left, ultimately, with nothing. The mantra of the Trump era has been that transgender rights, and therefore transgender people, are under attack. It is a curious fact, however, that when courts were extending employment protections to transgender plaintiffs, there was no similar countermobilization of feminists and conservatives. The exclusion of transgender and queer issues from the gay rights movement during the 1990's and 2000's may, in retrospect, strike transgender advocates as unjust. Yet it is doubtful whether these organizations would have succeeded in changing the nation's laws on marriage had they not taken a more pragmatic, incremental approach, one that depends on building ties of social familiarity and understanding, and that avoids as much as is reasonable all-or-nothing-battles over "rights." Effective social change, as opposed to a mere appearance of change, rarely comes in short and sudden bursts.

As stressed in Chapter 4, one of the dominant motifs of the stereotype theory of law is its implicit hostility to institutionalism broadly conceived. There is a profound divide within modern liberalism between those who think of untutored human nature as antithetical to the well-ordered society and therefore of needing formation from institutions, and those who think of humans as

fundamentally good and therefore of institutions as needing to facilitate rather than mold the expression of the naturally good self. (My own view is similar to Hannah Arendt's when she says: "every generation, civilization is overrun by barbarians—we call them 'children.'")

Still, it behooves us to remember that in the United States, suspicion toward institutions has a more immediate and compelling justification. It was, after all, precisely in the name of protecting one such institution in the South (and the legacy of that institution later on) that the civil rights movement had arisen in the first place. But as is often the case with historical corrections, the pendulum can swing too far in the opposite direction. Is it obvious that allowing a school district to decide whether to admit black children is no different than allowing a school to decide whether, under what circumstances, and subject to what constraints and procedures, to allow students to use facilities and play on the sports teams designated for the gender other than the one listed on their birth certificate? Attorney General Loretta Lynch seemed to think so, yet her own administration conceded, in its Dear Colleague Letter, that schools should have some discretion to decide who counts as male or female in athletics. Is the cultural composition of a community that is served by a local school district—its particular sensibilities in regard to matters of sex, sexuality, modesty and privacy—utterly irrelevant to how we define what "equal opportunity" requires? Just how far ought institutional discretion be suspended, local officials met with federal skepticism, resources rechanneled, educational programs revised and revamped, community concerns ignored, and students and parents "retrained," in order to ensure that even a single teenager at school can "define his own conception of existence" and have that conception recognized and affirmed by everyone else? Even if it is true that gender nonconforming teenagers are vulnerable to vicious campaigns of harassment in school and online, should schools not have some measure of flexibility in crafting policy responses in light of their own unique

circumstances? The tension between expressive individualism and institutionalism is one that liberal societies must learn to deal with sensitively and reasonably, without dissolving the equation too far in either direction. This is an issue that reaches far beyond the plight of transgender students, but the transgender issue illustrates it in a particularly vivid way.

Last but by no means least, the preceding chapters give occasion to reflect on the legal profession and its role within American democracy. In part, that profession has taken it upon itself to educate the rest of us about sex because of some of the deeper, structural features of the American political system. As the opening chapter of this study pointed out, the nature of the modern regulatory state is such that the distinction between law and policy is exceedingly hard to define, let alone defend. If Congress says no discrimination "on the basis of sex" and leaves it to courts and agencies to define these words, then any defining of sex is simultaneously an act of legal and of philosophical interpretation. We should not be surprised that the esoteric question of what makes us sexed beings becomes entangled with the abstruse question of when agency guidance documents merit judicial deference under the *Auer* doctrine of administrative law. Adriane Vermeule has written of "law's abnegation," by which he means that Congress delegation leads to judicial deference to administrative discretion by the logic of the rule of law itself. But it seems to me that one could, at least in the transgender context, also argue the opposite case, that disputes that call out for substantive expertise are recast as legal questions to be solved by bureaucrats and judges with training in law—call it the "experts' abnegation."

While I am skeptical that any definitive conclusions will be reached (let alone agreed upon) over the next few years on the topic of human sexual nature, it seems to me that *especially* given the obvious non-legal nature of this question, it would have been appropriate for the Fourth Circuit to require that OCR at the very least go through notice and comment rulemaking. This

would have forced the agency to grapple with a variety of philosophical and scientific perspectives and with the possible consequences that attend different definitions of male and female. In reality though, and *pace* the official rationale in *Gloucester*, the Fourth Circuit did not defer to OCR. It first came on its own to the conclusion that "sex" *can* mean gender identity, and only then, on the basis of that assumption, deferred to the agency. In other words, it assumed that the meaning of "sex" *is* a legal question, pure and simple. As I have argued, a key part of why this has happened is the fact that many lawyers, empowered perhaps by the theories of Ronald Dworkin, have come to believe that if a mandate can be articulated at a high enough level of abstraction, there is almost nothing that cannot be attributed to the authors of a law, even they lived at a time that had no idea of the dilemmas facing regulators today. One can be forgiven for wondering whether, in claiming that the framers of the Fourteenth Amendment "intended" the question of what makes humans male or female to be settled through judicial interpretations of the Equal Protection Clause, is an example not merely of the outsized influence of academic theories on legal adjudication, but of class hubris as well.

It is no secret that Western societies are undergoing anti-elitist convulsions, disparagingly labeled "populism" by some. Nor is there much doubt that these convulsions may have hugely destabilizing consequences for our life in common. An important question to ask is whether some degree of moderation in the pace of "progress" may not be necessary in order to balance the often-meritorious claims of the dispossessed against other goals like civic comity, social trust, and faith in institutions. As someone with a deep appreciate for the importance of institutions and the threat to those institutions posed by populist leaders, I am forced to ask myself whether the inflammatory character of contemporary politics in America and abroad is not in some measure a consequence of elite overreach. In fact, I would hardly be making a novel

argument. This is a theme that has found thoughtful and articulate proponents on both sides of the political spectrum.[735] Although there are important differences between versions of this argument on the left and the right, there is, it seems to me, also a basic agreement that American society has become too stratified, that "opportunity hoarding" (or "dream hoarding," as one book has called it)[736] has created not merely class divisions, but entrenched ones, and perhaps worst of all, that meritocracy breeds a sense of class entitlement by those at the top, no matter how much they are willing to tweet about their own "privilege."

What is more, these class divisions are no longer separable from cultural rifts. Class war and culture war have become almost indistinguishable. The sense of economic deprivation and dislocation on the bottom has, for many Americans, been accompanied by a sense of cultural contempt expressed by their social betters. A working-class man sees the factory where he has worked for years move out of his town to pursue cheaper labor in China. Another sees his community infused with foreign (and probably undocumented) workers who undercut the locals in wages. Until recently, these two men were the dispossessed, the heroes of progressive politics, the "little guys" for which government largesse was said to be necessary. Now they have become "deplorable," either because they fail to see the wonderful benefits to American society (read: the middle and upper classes) from unskilled immigration, or because they object to the cosmopolitanism of "free trade." "A decade ago," wrote Peter Beinart in *The Atlantic* shortly after Trump was elected, "liberals [including Bernie Sanders] publicly questioned immigration in

[735] An example on the left is Yascha Mounk, *The People v. Democracy: Why Our Freedom Is in Danger and How to Save It* (Cambridge: Harvard University Press, 2018). Mounk identifies the threat to liberal democracy from populism ("democracy without rights") and from technocratic elitism ("rights without democracy"). An example on the right is Christopher Caldwell, *The Age of Entitlement: America Since the Sixties* (New York: Simon & Schuster, 2020). As Caldwell calls it, the civil rights revolution of the 1960's represents a profound challenge to basic constitutional norms of free government, but this could have been moderated if not for a regime of aggressive affirmative action imposed (not always honestly) on the American public.

[736] Richard R. Reeves, *Dream Hoarders: How the American Upper Middle Class is Leaving Everyone Else in the Dust, Why That is a Problem, and What to Do About It* (Washington, D.C.: Brookings, 2017).

ways that would shock many progressives today."[737] The shift came rapidly and almost without warning, not unlike the demand that "biological sex" be thrown in the dustbin of history. Economic dislocation has proceeded in lockstep with cultural dislocation; in fact, the two seem intimately connected. The point is not merely that some (but not all) of the economic grievances and some (but not all) of the cultural grievances grouped under "populism" are legitimate ones. Nor is it only that there is something profoundly imprudent about the way in which elites have tried to bring "progress" to America. It is that the very fact of this imprudence itself suggests the presence of deeper, more troubling, structural problems in contemporary democracy.

The regulatory developments discussed in this dissertation would have been unthinkable were it not for highly educated, culturally confident, and strategically connected elites operating in "issue networks" to influence and change public policy. That is not to suggest that transgender people are themselves elites, although some certainly are. (Throughout the dissertation I have been careful to distinguish between transgender advocates, many of whom are not transgender, and transgender people, many of whom are not advocates.) And it is certainly not to suggest that transgender people are politically and economically power, though some probably are. Rather, it is to say that transgender regulations are symptomatic of deeper transformations in the American political and constitutional system, structural changes that "populism" has come to define itself and react against. These include (but are not limited to): the replacement of iron triangles with comparatively less visible, cross-institutional "issue networks"[738] that LGBT advocates have been adept at using; related to that, the "new liberalism" and the public interest movement; the close affinity between academia, which leans heavily to the left of American public opinion, and

[737] Peter Beinart, "How the Democrats Lost Their Way on Immigration," *The Atlantic*, July/August, 2017.
[738] On this point see Hugh Heclo, "Issue Networks and the Executive Establishment," in *The New American Political System*, Anthony King ed. (Washington, D.C.: AEI, 1978), Ch. 3.

the Democratic Party;[739] and what has come to be known as "woke capitalism" (or what I would call the "San Francisco Compromise"), in which vast and entrenched economic inequalities are justified so long as those at the top echelons of corporate success reflect America's social "diversity" (women, non-whites, and sexual minorities).[740] The very idea that being male or female should have nothing to do with the physical body would appear to be a belief far more easily subscribed to by a class whose conception of labor is more intellectual than physical, and whose religiosity—to the extent it still exists[741]—is hard to distinguish from secular humanitarianism.[742]

A prerogative of the meritocratic class—to which, assuredly, I belong—is, apparently, to be able to insist on two contradictory things at once. It can claim that truth is to be found in science and reason, and in the antagonism of these to common sense, that is, to the knowledge of the average citizen whose worldview is conditioned by tradition and prejudice (in short, "stereotypes"). And in the same breath, it can denounce as bigoted anyone who questions the idea that truth is fundamentally subjective, a "lived fact." To many Americans, especially those who intuitively understand common sense to be a more democratic form of knowledge and

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[739] For a recent, researched, and detailed description of this phenomenon see Jon A. Shields and Joshua M. Dunn, Sr., *Passing on the Right: Conservative Professors in the Progressive University* (New York: Oxford University Press, 2016).

[740] The literature on the Democratic Party's move away from economic progressivism toward social progressivism (and meritocratic capitalism) is, again, too vast to cite here. A highly readable account is Thomas Frank, *Listen, Liberal* (cited earlier). Another is Richard Rorty, *Achieving Our Country* (Cambridge: Harvard University Press, 1999), which bemoans the left's abandonment of economic justice for academic multiculturalism and all but predicts the rise of Trump.

[741] Pew Research Center, "America's Changing Religious Landscape: Christians Decline Sharply as Share of Population; Unaffiliated and Other Faiths Continue to Grow," May 12, 2015.

[742] I have in mind here the "Sheilaism" described in Robert N. Bellah et al *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 1985), Ch. 9, which is a form of what Tocqueville called "pantheism" (*Democracy in America*, pp. 425-426) or the sacralization of immanence, of one's "internal sense" or moral voice. For a decidedly more Catholic perspective see Daniel J. Mahoney, *The Idol of Our Age: How the Religion of Humanity Subverts Christianity* (New York: Encounter Book, 2018). See also Christian Smith and Melinda Denton, *Soul Searching: The Religious and Spiritual Lives of American Teenagers* (New York: Oxford University Press, 2009), documenting the rise among American teenagers of what the authors call "Moralistic Therapeutic Deism" (MTD). In short, MTD is a form of spirituality that deemphasizes sin, repentance, obedience to God and divine grace, in favor of "feeling good, happy, secure, at peace" (pp. 163-164).

whose common sense furnishes them with a picture of the world in which "people and things have their well-known places, and do certain expected things,"[743] this seems like a contradiction. To these Americans, the ethos of "'lived facts' for me but not for thee" is a stunning example of class privilege and bicoastal contempt. "If people in New York City can have their 'lived facts' about such fundamental issues as who is male and who is female, why can't I have my 'lived facts' about climate change, guns, and immigration?" We should not be surprised to find that in due time they will have their "lived facts," or rather their "alternative facts," as well as their own champion to peddle them.

[743] Lippmann, *Public Opinion*, p. 95.