

THE DIFFERENCE DILEMMA IN MASCULINITY STUDIES:
THE CREATION OF GENDER CATEGORIES IN
ANTIDISCRIMINATION LAW

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The work presented in this article is part of a larger project on
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ABSTRACT

The legal struggle for sex equality has a storied history: from the failure of the Equal Rights Amendment, to the passage of the Civil Rights Act of 1964, which banned workplace discrimination on the basis of sex, to recent cases grappling with whether unequal treatment on the basis of sexual orientation is sex discrimination. In 2019, the project of emancipation from patriarchy remains unfulfilled, with gender subordination as ubiquitous as ever. And the history of the legal struggle for sex equality demonstrates that there is not a clear path to the goal.

The distinction between formal and substantive equality figures heavily in this history. An examination of the formal-vs.-substantive equality question must include a look at old debates about: sameness and difference; essentialism; and gender stereotypes. Yet, the analysis could also benefit from an introduction of some relatively new insights from masculinity studies and thinking about them in the context of these long-standing challenges. This article argues that anti-discrimination law, more than any other area of law, is explicitly defining the parameters of masculinity. This article will look at three areas of anti-discrimination law—pregnancy, “lack of interest,” and gender stereotyping cases—and illustrate how this occurs. Furthermore, this article argues that looking at these areas of anti-discrimination law through a masculinity studies lens reveals things about them that have been largely under scrutinized. My aim is to show how the courts, when addressing questions of sex equality and anti-discrimination, are actively engaged not only in addressing issues of sexual equality but in policing and actually creating masculinity.

INTRODUCTION

In February 2019, a U.S. district court in Texas ruled that the federal government's male-only draft registration system violated the constitutional requirement that men and women be treated equally.¹ The court rejected arguments that the Supreme Court had found persuasive thirty-eight years ago when it upheld the system, finding, instead, that men and women are similarly situated for purposes of a draft given the fact that women are now eligible for all military service roles, including combat positions.² Less than a month later, the twenty-eight members of the U.S. women's national soccer team filed a lawsuit against U.S. Soccer Federation alleging gender discrimination in violation of Chapter VII of the 1964 Civil Rights Act.³ These two high profile examples have occurred within weeks of this writing. In a culture where the majority of people agree (at least on the record) that sex equality is a good thing, these cases illustrate the persistence of sex discrimination claims in our society. The tension between having a populace that ostensibly desires sex equality and the pervasiveness of sex discrimination claims, illustrates both the lack of common understanding regarding what sex equality entails and the fact that, even if sex equality was

¹ *Nat'l Coalition for Men v. Selective Service Sys.*, 355 F.Supp.3d 568 (S.D. Tex. 2019).

² *Id.* at 580–82.

³ *Morgan, et al. v. U.S. Soccer Fed.*, Case No. 2:19-CV-01717 (C.D. Cal. Mar. 8, 2019).

universally understood, the law is somewhat awkwardly situated to deliver on the promise.

The legal struggle for sex equality has a storied history: from the failure of the Equal Rights Amendment, to the passage of the Civil Rights Act of 1964, which banned workplace discrimination on the basis of sex, to recent cases grappling with whether unequal treatment on the basis of sexual orientation is sex discrimination.⁴ In 2019, the project of emancipation from patriarchy remains unfulfilled, with gender subordination as ubiquitous as ever. And the history of the legal struggle for sex equality demonstrates that there is not a clear path to the goal and that achieving it entails much more than ridding the world of all the sexists.

The distinction between formal and substantive equality figures heavily in this history.

An examination of the formal-vs.-substantive-equality question must include a look at old debates about sameness and difference, essentialism, and gender stereotypes. Yet, the analysis could also benefit from an introduction of some relatively new insights from masculinity studies and thinking about them in the context of these long-standing challenges. This article argues that anti-

⁴ Compare *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) (holding that sexual orientation discrimination claims were actionable under Title VII as a subset of sex discrimination) with *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017) (declined to recognize a sex discrimination claim based on sexual orientation).

discrimination law, more than any other area of law, is explicitly defining the parameters of masculinity. This article will look at three areas of anti-discrimination law—pregnancy, “lack of interest,” and gender stereotyping cases—and illustrate how this occurs. Furthermore, this article argues that looking at these areas of anti-discrimination law through the lens of masculinity studies reveals issues that have been largely under scrutinized.

Part I reviews the concepts of formal and substantive equality, which provide the foundation needed to engage with key ideas in both anti-discrimination law and masculinity studies. Part II discusses how disagreements in the equality debates have led to issues of essentialism, which in turn have produced overly rigid and unaccommodating normative gender categories. Part III introduces some key ideas in masculinity studies which will be applied to three areas of anti-discrimination law in part IV. The aim of this article is to show how the courts, when addressing questions of sex equality and anti-discrimination, are actively engaged not only in addressing issues of sexual equality but in policing and actually creating masculinity.

In 1964, Title VII first prohibited employers from discriminating on the basis of sex: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's race, color, religion, sex, or national origin.”⁵ But, fifty years later, the meaning of discriminating “because of [an] individual's sex” remains unclear.⁶ The intuitive and plain reading of the text suggests a prohibition on inter-sex discrimination (treating men and women differently), but the statute has since been interpreted to also prohibit intra-sex discrimination. The intra-sex struggle for workplace equality has meant wrestling with common sense assumptions about who “women” are. Thus, while the law struggles to end sex discrimination, it is simultaneously engaged in defining who women are, and what femininity and masculinity mean.

I. FORMAL AND SUBSTANTIVE EQUALITY

Feminist legal theorists have long debated the most effective strategy for achieving equality for women. Liberal feminists traditionally have supported an equal treatment model that seeks formal equality before the law. Formal equality means that the law treats similarly situated people exactly the same; one's sex should not determine how one is treated. A formal equality model emphasizes the similarities between men and women and views special treatment of women as patronizing and paternalistic. Liberal feminists argue that, in all ways that should matter legally,

⁵ 42 U.S.C. § 2000e-2(a)(1).

⁶ *Id.*

particularly with respect to employment, women do not differ from men. Thus, formal equality means treating men and women the same.⁷

Cultural feminists, conversely, have argued that equal opportunities have not led to equal results because men and women are different in foundational ways.⁸ Because the rules of the game were established by men, success for women has been measured by women's ability to achieve male norms. Moreover, biological differences between men and women—particularly with respect to pregnancy⁹—suggest that equality can only be achieved with special treatment in certain circumstances. Cultural feminists also have underscored the different emotional and cognitive traits observed in men and women, in general—*e.g.*, men as competitive and women as compassionate.¹⁰ Given these cultural and biological factors, substantive equality can only be achieved when such differences are recognized and accommodated by the law.

While both sameness (formal equality) and difference (substantive equality) deal with comparisons to a male norm and are relational concepts to a male referent, feminist thinkers like

⁷ See generally NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 16–18 (2006).

⁸ *Id.* at 18–22.

⁹ The formal/substantive equality debate manifested in a number of cases dealing with pregnancy in the employment context, see *infra* at Section IV.A, and in the so-called “lack of interest” cases dealing with women's supposed partiality to less competitive professional positions, see *infra* at Section IV.B.

¹⁰ Levit & Verchick, *supra* note 7, at 18–22.

Catharine MacKinnon view true substantive equality not as achieving equality to a male norm but rather as liberation from male domination.¹¹ MacKinnon's work was a radical attack on the liberal feminists of the time and rejected the notion of encouraging special treatment for women when they are not "like men" and equal treatment when they are.¹² For liberal feminists, sex equality is an attainable end, achieved by correcting the imbalance of power and resources between women and men, which is at the root of sex inequality and discrimination.¹³ With the focus on equality of opportunity, the law is ideally situated to help achieve sex equality, a vital tool for accessing power and resources and achieving more opportunity, an inherent part of the solution, not of the problem. Thus, the overarching structure is not questioned; the world is fine, the rules of the game are fine, except for the fact that women are underrepresented in all positions of power.

MacKinnon challenged the intuitive worth and attainability of the founding principles of liberalism such as individualism, rationalism, and equality, particularly as these manifested in the law.¹⁴ While liberal political thought conceives of the subject as

¹¹ CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES AND LIFE AND LAW* 34 (1987) ("Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him.").

¹² DAVID KENNEDY, *THE CANON OF AMERICAN LEGAL THOUGHT* 833 (2006).

¹³ Levit & Verchick, *supra* note 7, at 16–18.

¹⁴ See generally Kennedy, *supra* note 12.

ontologically prior to and separate from relations of power, MacKinnon's subject is a product of male domination and power: "true feminism sees the male point of view as fundamental to the male power to create the world in its own image . . . [feminism] comprehends that what counts as truth is produced in the interest of those with power to shape reality."¹⁵ The pervasiveness and all-encompassing nature of patriarchy makes the sex hierarchy "ontologically and epistemologically nearly perfect."¹⁶

To be a woman, in MacKinnon's view, was to be known by men through institutions (*e.g.*, the law) and ideas designed from a male point of view.¹⁷ Thus, does the category "women" and the concept of sexual difference even exist outside of patriarchy? Indeed, MacKinnon emphasizes the component of power that serves to produce sexual difference.¹⁸ Male domination, exercised through sexuality and embodied in gender,¹⁹ both represses women and

¹⁵ Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, SIGNS Vol. 8, No. 4, 635-658, 640 (Summer 1983).

¹⁶ JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 43(2006).

¹⁷ MacKinnon, *supra* note 15, at 655.

¹⁸ MacKinnon refers to Foucault in a footnote: "Although Foucault understands that sexuality must be discussed at the same time as method, power, class, and the law, he does not systematically comprehend the specificity of gender—women's and men's relation to these factors—as a primary category for comprehending them. As one result, he cannot distinguish between the silence about sexuality that Victorianism has made into a noisy discourse and the silence that has *been* women's sexuality under conditions of subordination by and to men." Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, SIGNS Vol. 7, No. 3, 515-544, 526, n.22 (Spring 1982).

¹⁹ *Id.* at 533.

creates sexual difference, exhibiting the productive nature of power. This reversal of the causal connection—taking sexuality (power) as a starting point, which causes gender, which, in turn, causes sexual difference rather than starting with sexual difference—was a radical step which named sexual difference as not natural or inevitable but as an effect of power.²⁰

Though this theory, alternatively called radical or power feminism, MacKinnon offers a blueprint to move beyond patriarchy, but it is not easy to step outside the existing framework or even conceptualize an alternative women's point of view.

Feminism criticizes this male totality without an account of our capacity to do so or to imagine or realize a more whole truth. Feminism affirms women's point of view by revealing, criticizing, and explaining its impossibility. This is not a dialectical paradox. It is a methodological expression of women's situation, in which the struggle for consciousness is a struggle for world: for a sexuality, a history, a culture, a community, a form of power, an experience of the sacred.²¹

For MacKinnon, the key to that transcendence is a foregrounding of women's experience.²² Emancipation from patriarchy is possible

²⁰ Halley, *supra* note 16, at 42. Halley's argument is that under the auspice of it being a reflection of sexual difference men, in fact, use sexuality to render them dominant and thus create the very sexual difference they claim sexuality is only reflecting.

²¹ MacKinnon, *supra* note 15, at 637.

²² MacKinnon famously articulated the relationship between sexuality and gender inequality: "Sexuality, then, is a form of power. Gender as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality." *Supra* note 18, at 533.

through what MacKinnon labelled “consciousness raising,”²³ a transformation of consciousness of women, by women, and for women working without pressure from the patriarchy.²⁴ However, the consciousness being used to identify shared experience is itself a product of male domination: “the practice of a politics of all women in the face of its theoretical impossibility is creating a new process of theorizing and a new form of theory.”²⁵ Nevertheless, emancipation from the hegemony of masculine epistemology remains the goal: to find a way of thinking about women’s experience, and a way to think, that is not subject to that same epistemology of male power. Experience, and the way experience is interpreted, becomes central to the political project of feminism: “women’s distinctive experience as women occurs within that sphere that has been socially lived as the personal—private, emotional, interiorized, particular, individuated, intimate—so that what it is to *know* the *politics* of woman’s situation is to know women’s personal lives.”²⁶

²³ MacKinnon describes consciousness raising as: “the major technique of analysis, structure of organization, method of practice, and theory of social change of the women’s movement. In consciousness raising, often in groups, the impact of male dominance is concretely uncovered and analyzed through the collective speaking of women’s experience, from the perspective of that experience.” *Supra* note 18, at 519–20.

²⁴ Halley, *supra* note 16, at 43.

²⁵ MacKinnon, *supra* note 21, at 638.

²⁶ MacKinnon, *supra* note 18, at 535.

MacKinnon's emancipatory project does not claim that a place beyond patriarchy is readily achievable. Indeed, the problems with any "search for origins" have been well examined.²⁷ Such an endeavor risks reifying an authentic, pre-patriarchal femininity that fails to "formulate an account of gender as a complex cultural construction"²⁸ and should "be cautious to not promote a politically problematic reification of women's experience."²⁹ Gayle Rubin has suggested that prior to patriarchy, "each child contains all of the sexual possibilities available to human expression,"³⁰ but, again, this position suggests a belief in origins, an idea of a utopic pansexual pre-formed subject.

Against the backdrop of the law's liberal identity, one questions whether it is feasible for the law to adopt a different approach when dealing with questions of sex and gender or whether sexual difference is so foundational to liberalism (and thus our legal system) to render it unrecognizable and self-contradictory without sexual difference. Subjects do not pre-exist our social world, but are

²⁷ See JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 36 (1990). The "search for origins" means the search for a female subject that pre-exists what Butler talks about as "the law." "The law" in this context refers to the law of the father or of patriarchy. So the "search for origins" is the search for a pre-patriarchal female subject. The "search for origins" though, also addresses a search for a place that is pre-desire, pre-power relations, or pre-racism. Each of these searches is for a subject that pre-exists the culture it exists within, and one in which cultural events can be pinpointed that are responsible for the present situation.

²⁸ *Id.*

²⁹ *Id.* at 35.

³⁰ GAYLE S. RUBIN, DEVIATIONS 51 (Duke University Press, 2011).

fashioned within it, constituted by formations of power and regimes of truth.³¹ Specifically, subjects cannot exist in the world unproblematically and wholly opposed to formations of power that exist outside of them; there is no pre-ideological or apolitical subject. If this point is taken seriously then there are evidently no conceptions of femininity or masculinity that exist outside of power. Rather, “subjects and power relations are imbricated and co-constitutive,”³² and so, masculinity and femininity are never simply constrained or freed by the law but rather formed by it. True equality, beyond either formal or substantive models, will only be accessible if power relations are given more than peripheral consideration and seen as both foundational to, and as a producer of, the existing social order.

II. WHAT DIFFERENCES MATTER

Arguments for sex equality in anti-discrimination law initially determine whether to employ a formal or substantive equality model. Importantly, the decision exists within a historical framework constituted “by universalist discourses of individualism (with their theories of rights and citizenship) that evoke ‘sexual

³¹ Ben Golder, *Introduction*, in *RE-READING FOUCAULT: ON LAW, POWER AND RIGHTS* 8.

³² *Id.* at 9.

difference' to naturalize the exclusion of women."³³ The interconnectedness of sexual difference and liberalism is foregrounded. The debate is about what to do about the differences that existed between women and men and where these differences came from. On the one hand, the debate focuses on the question of whether differences between men and women are biological or socially constructed,³⁴ and conversely, on how the differences between men and women ought to be addressed legally and politically. In other words, the question is how the distinctive consciousness of women should be addressed and where it comes from.

The debate manifests most remarkably when addressing issues of public policy (*e.g.*, whether sexual difference ought to be considered in educational or employment contexts). Some argue that sexual difference should be irrelevant while others insist that appeals of women ought to be made in terms of the needs, interests,

³³ JOAN W. SCOTT, ONLY PARADOXES TO OFFER: FRENCH FEMINISTS AND THE RIGHTS OF MAN 16 (1996).

³⁴ While this debate/controversy has been central in feminist circles in many respects, some commentators have suggested that ultimately the debate may be less important than it seems: "For feminist legal theory, a lot less turns on the essentialist/social constructionist controversy in cultural feminism than you would suppose from the amazing amount of ink that has been spilled on the question. We can have a sensible policy agenda for or against human activities and attitudes that are biological; for instance we are against death and have many policies that push against this inevitable, gruesomely embodied, natural event." Halley, *supra* note 16, at 59.

and characteristics of women as a group.³⁵ Each of these positions affirms a cultural component to women's identity, a specific women's culture, and assumes that sexual difference is an immutable, apolitical fact. Indeed, the terms of the argument incredulously suggest that to be treated equally, women need to be the same as men. Joan Scott has described the manner in which the terms of debate get framed:

Are women the same as men? And is this sameness the only basis upon which equality can be claimed? Or are they different and, because or in spite of their difference, entitled to equal treatment? Either position attributes fixed and opposing identities to women and men, implicitly endorsing the premise that there can be an authoritative definition for sexual difference.³⁶

As noted above, the debate is often characterized as being between cultural feminists and liberal feminists. The cultural feminists suggest a change to society in which character traits labeled female (*e.g.*, compassion, empathy, and collaboration) are revalued and treated as at least on par with those masculine traits which are so valued by society (*e.g.*, aggression, competitiveness, and ambition). The liberal feminists argue that, but for the lack of power and resources resulting from a lack of opportunity, women would not be subordinate to men.³⁷ In other words, does the system

³⁵ Joan Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, in *FEMINIST SOCIAL THOUGHT: A READER* 761 (Diana T. Meyers, ed., 1997).

³⁶ Scott, *supra* note 33, at x.

³⁷ Levit & Verchick, *supra* note 7, at 16–22.

need to be changed to accommodate female character traits, or, with equal opportunity, is the system as we know it potentially accommodating to females?

Furthermore, the sameness versus difference distinction invites the almost rhetorical question: the same or different from what? The answer being the same or different from men. So, beyond the incomprehensiveness of the question itself, the overarching structure it exists within has already subordinated women's story, constructed it as dependent on man's story. In the words of Janet Halley:

the very idea that justice for women depends on a comparison of their life situation with that of men limits equality theories to the terms set by male dominance; and indeed, the oscillation from equal to special treatment and back again is a classic symptom not of women's interests but of the way in which they are trapped within the double binds of feminine subordination within abstract justice.³⁸

Halley's observation invites the question: what is abstract about the justice being strived for. The law likes palatable and implementable solutions, problems that are resolvable. The law is not in the business of empathy or compassion; the law is a problem solver. The justice that the law likes is not abstract. Nonetheless, justice is abstract in that it is not attainable in such straight forward a way. The sameness/difference paradigm renders the search for justice simply a question of deciding upon the correct strategy.³⁹ The idea

³⁸ Halley, *supra* note 16, at 80.

³⁹ Scott, *supra* note 33, at 17 ("By writing the history of feminism as if it were simply a matter of choosing the right strategy—equality or difference—we

is that justice is attainable, potentially imminent, if only practitioners are able to make the right decision, implying that there is a right and a wrong decision, that there are no systemic impediments nor alternatives to equality beyond the sameness/difference model. The idea, that to attain equality a decision must be made with respect to sameness/difference, is a false choice.⁴⁰

The reification of a male/female binary also serves to eliminate or, at best, to reduce differences that exist between individuals on each side of the duality. Within this dualist paradigm women and men tend to be constructed in more absolutist terms, in which differences within the groups give way to differences between the groups. Resisting essentialist categories of sexual difference does not deny sexual difference per se but does suggest that normative rules based on sexual difference are unhelpful and misguided.⁴¹

The struggle remains one of resisting categorical constructions of women that aspire for some ultimate truth.

imply that one or another of these options was actually available, that closure or resolution was and is ultimately attainable.”).

⁴⁰ Diana Tietjens Meyers, *Introduction to Joan Scott, Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, in FEMINIST SOCIAL THOUGHT: A READER 757.

⁴¹ Scott, *supra* note 35, at 767 (“An insistence on differences undercuts the tendency to absolutist and, in the case of sexual difference, essentialist categories. In contrast, absolutist categorizations of difference end up always enforcing normative rules.”).

However, this disavowal of categorical truths does not mean an uncritical embrace of what Joan Scott called “happy pluralism”⁴² that replaces the unhappy dualism, but rather a questioning and rethinking of the relationship between equality and difference. It means striving to loosen the “double binds of female subordination within abstract justice.”⁴³ Resisting categorical differences does not mean one is saying that men and women are the same.

Categorization is necessary both for human communication and political movement. A world of infinite particulars loses all relevance and prohibits any collective existence. Nonetheless, the ontological underpinnings that condition the creation of sexual categories and the effects and usefulness of the categories themselves should be unpacked to unveil the categorical imperatives and the alterations that can be made to strategically render them either more inclusive or exclusive. In other words, the category “woman” should not be a discourse that perpetuates the invisibility and marginalization of women who experience intersectional oppression. For example, black women experience oppression qualitatively different than white women because of the intersectional effect of patriarchy and white supremacy.⁴⁴ Yet,

⁴² *Id.* at 768.

⁴³ Halley, *supra* note 16, at 80.

⁴⁴ Angela Harris, Race and Essentialism in Legal Theory, 42 STAN. L. REV. 581, 583 (1990).

again, one can never reduce black women's experience to a singular truth either. Thus, to a certain degree, a category is always already a fiction with boundaries that can never be fixed or certain. Yet, identifying within a category and working and organizing within that category remains a powerful tool for social justice.

Angela Harris calls gender essentialism the notion that a unitary, "essential" women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.⁴⁵ Essentialism, though, is not confined to gender. Essentialism is most commonly understood "as a belief in the real, true essence of things, the invariability and fixed properties which define the 'whatness' of a given entity."⁴⁶ The true "essence" that essentialism espouses is that which is most irreducible, unchanging, and therefore, constitutive of a person or a thing. Essentialism is understood in opposition to difference—as "that which seeks to deny or annul the very radicality of difference."⁴⁷ Difference is trumped by sameness as essentialist discourses struggle to discern an overarching sameness that enables and allows for social and moral behavior that is responsible and creates order in

⁴⁵ *Id.*

⁴⁶ DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE* xi (1989).

⁴⁷ *Id.* at xii.

the world. Without the annulment of differences, this argument suggests social order is unattainable.

Harris uses the example of Jorge Luis Borges's character Ireneo Funes, to illustrate the shortcomings of particularism.⁴⁸ Funes was an ordinary young man until the age of nineteen, when he was thrown by a horse and left paralyzed, but possessed with perfect perception and a perfect memory. Funes's perfect memory and perfect perception granted him a life filled with an infinite number of unique experiences, but also left him with an inability to categorize: "To think is to ignore (or forget) differences, to generalize, to abstract. In the teeming world of Ireneo Funes, there was nothing but particulars."⁴⁹ In the context of Funes, the inability to generalize is constructed as a limitation. Funes is trapped within walls of particularity and individuality that foreclose any possible dialogue with others, for there is not only a lack of common language, there is a lack of commonality in all details of life.

The ability to overlook difference and to make abstractions, to generalize and to categorize, allows for a world in which shared thought is possible. To Funes, language is only a private system of classification. The notion that it can serve to create and reinforce a community is incomprehensible to him. Thus, while any process of

⁴⁸ Harris, *supra* note 44, at 583.

⁴⁹ *Id.*

categorization, in our case sexual difference, will privilege certain voices and silence others, categorization is necessary for both human communication and social progress. A critique of categorization for failure to take into account difference disregards the potential benefits of “generalized” or “essentialist” discourses.

Essentialism is not, in and of itself, good or bad, progressive or reactionary, beneficial or dangerous. Discourses which fail to account for differences and use language to categorize should not be ignored or rejected simply because they hark back to essentialist constructions of gender. Further, simply employing the category “women” does not render the category necessarily essentialist. It is possible to use the category without falling into the pitfalls of essentialism: “Analyzing women ‘as women’ says nothing about whether an analysis is essentialist. It all depends on *how* you analyze them ‘as women’: on whether what makes a woman be a woman, analytically, is deemed inherent in their bodies or is produced through their socially lived conditions.”⁵⁰

The need to categorize compels the re-examination of the rationales and epistemological building blocks that justify the use of the categories themselves. Categories are useful, effective and necessary, but they should be “explicitly tentative, relational, and

⁵⁰ CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 86 (2005) (emphasis in original).

unstable,”⁵¹ which is all the more important in a discipline like law, where “abstraction and frozen categories are the norm.”⁵² The project becomes one, not of simply deconstructing categories and highlighting the contingency, fictionality, and historical inconsistency of their boundaries but of reshaping and altering categories to recognizing their potential usefulness. The basis of the knowledge that provides strength and naturalizes the innateness of the category should be re-evaluated and problematized. Unpacking the foundations of these categories enables one to recraft them, or at least offers insight into how to approach the problem of interrogating the cultural category of gender, for example, so it becomes more accommodating to and less oppressive of already marginalized individuals.

The point of this inquiry is not to cast aside the use of categories, or even, necessarily, the use of gender categories but to struggle to make sexual categorizations less dogmatic, and more inclusive, contingent, and tentative. Categories must be employed to enable communication and facilitate social change, but the innateness of the categories must be challenged. The boundaries of the categories must be denaturalized and manipulated to be more inclusive. And the use of the category must be considered in and of

⁵¹ Harris, *supra* note 44, at 586.

⁵² *Id.* at 587.

itself. Rather than focusing on how the substance of the category subjugates others, we should evaluate the usefulness of the analytical category in the first place. Unveiling what is accepted as *natural* in the construction of gender allows for these premises to be challenged and for the category to be manipulated so that marginalized subject positions will gain membership into the category. The innateness and stability of gender categories cannot be untangled and disrupted unless the theories of knowledge and underlying assumptions which legitimize it are contested.

Constructions of gender that perpetuate essentialist systems of knowledge necessarily exclude certain voices and privilege others. Thus, recognizing which voices are privileged and which are silenced is vital for the pursuit of equality since categorization always entails some degree of generalizing. The voices silenced within the category of “woman” “turn out to be the same voices silenced by the mainstream legal voice:”⁵³ people of color, working class people, and queer and gender nonconforming folks. These subject positions are further entrenched as *particular* voices, which are subjective and irrational and therefore not reliable.

Gender categorizations are themselves exclusionary and potentially disempowering. Yet, these problematic aspects of gender categorizations must be balanced with strategic goals of achieving

⁵³ *Id.* at 586.

social justice for women, goals which are unattainable devoid of the existence of the categories. The need to struggle with these tensions—to balance the universal/particular, objective/subjective, mind/body, culture/natural, and reason/emotion dichotomies; to understand the ontological and epistemological premises that grant these theories authority; to gauge and measure the effects of the categorical imperatives; to unveil what ideological agendas are furthered through the rigidity of the gender binaries; and finally, to account for the subject positions that are further marginalized and oppressed by the imposition of these gender binaries: is paramount if progressive social advocacy is to disrupt naturalized and hegemonic discursive categories.

III. MASCULINITY STUDIES

Masculinity studies encountered essentialism within the context of men as a social category existing as an oppressor and a homogenous group, which, it was argued, failed to account for the diversity and complexity of men's lives. In feminist theory, the anti-essentialist critique rarely found its way to the men who were broadly cast as one-dimensional misogynists. This reductionist approach brushed over critical differences among men, like race, class and sexuality, which radically altered the experience of being a man in the world. Masculinity studies was forced to address a

patriarchal system in which it was assumed that all men benefited equally from male supremacy.⁵⁴

Feminist anti-essentialists have criticized the biologicistic basis of certain strands of feminism that have a one-dimensional view of women, which present victimhood as an almost immutable condition, counterpoised against a similarly reductivist view of men as oppressors.⁵⁵ Indeed, characterizing the male experience in this way ultimately hinders attempts at empowering women and is equally as androcentric as the theories it is attempting to supersede. In masculinity studies, the essentializing of male identity as all-powerful oppressors who benefit equally from patriarchy has been called into question, as masculinity has been denaturalized. Obviously, an essentialized view of men fails to account for differences in race, class, and sexuality that drastically impact the way men experience patriarchy. Nonetheless, while differences exist among men and while certain men benefit from patriarchy more than others, all men do benefit from patriarchy in some sense. This benefit has been called the “patriarchal dividend”: the advantage men in general gain from the subordination of women and

⁵⁴ R.W. CONNELL, MASCULINITIES 68–71 (2005)

⁵⁵ Margaret Thornton, *Neoliberal Melancholia: The Case of Feminist Legal Scholarship*, AUSTRALIAN FEMINIST L.J. 20, 10 (2004).

from being complicit in the hegemonic project without the tensions or risks of being on the front line of patriarchy.⁵⁶

Essentialism also appears under the guise of values and cultural attributes that are encoded as masculine. Autonomy, reason, individualism, aggressiveness, and self-sufficiency serve as the basic tenets of liberal legalism and are generally thought of within Western political culture as quintessentially masculine. Thus, while essentialism on the one hand reduces the complexity of men's experience, it also genders otherwise gender-neutral cultural characteristics. It is this challenge to naturalistic assumptions about masculinity which recalibrates the debate as being more about politics and less about revealing hidden gendered assumptions that permeate the social world. In other words, when the naturalistic assumptions about masculinity are exposed, the political and ideological components can be challenged. For instance, the task becomes no longer to locate where in the social world reason is being privileged over emotion but rather to begin to disentangle the forces that bind masculinity to reason in the first place and to expose their political nature. Consequentially, connections that appear commonsensical when the naturalistic assumptions are applied are exposed as teleological when they are removed. For instance, Carol Smart deconstructs the connection between rationality, men, and

⁵⁶ Connell, *supra* note 54, at 79.

lawyering: “So law is not rational because men *are* rational, but law is constituted as rational as are men, and men as the subjects of the discourse of masculinity come to experience themselves as rational—hence suited to a career in law.”⁵⁷

Central to the manner in which essentialism has been dealt with in masculinities studies is the concept of hegemonic masculinity. The concept of hegemonic masculinity helped explain how the diversity of men’s lives could be addressed, while at the same time recognizing the existence of a culturally exalted form of masculinity, one that is revered above others.⁵⁸ The term suggests that there is a particular way (or ways) of doing masculinity at any particular time in any particular society that is (are) privileged over others. By borrowing the Gramscian term hegemony, the emphasis is put on how the hegemonic ways of doing masculinity become taken for granted and on the cultural and political processes that coerce the doing of masculinity in those particular ways.⁵⁹ This hegemonic masculinity, while culturally ubiquitous and exalted, remains inaccessible to the majority of men, and thus creates a certain sense of inadequacy of powerlessness. Michael Kimmel explains what this exalted form of masculinity is: “within the

⁵⁷ CAROL SMART, *FEMINISM AND THE POWER OF LAW* 87 (1989).

⁵⁸ Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 *HARV. J. L. & GENDER* 431, 455 (2010).

⁵⁹ See generally ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* (Hoare & Smith, eds. 1971).

dominant culture, the masculinity that defines white, middle-class, early-middle-aged, heterosexual men is the masculinity that sets the standards for other men, against which other men are measured and, more often than not, found wanting.”⁶⁰ The inaccessibility of this standard to many men sheds light on why individual men, while recognizing that as a group men hold power in the world, often feel a sense of powerlessness, whether based on issues of race, class, and/or sexual orientation.

Within feminist theory, there is a symmetry between the way women experience the world both as a group, on a public level, and as individuals, on a private level. Women see a social order that is mostly dominated by men, and this is reflected in how they privately experience the world. There is an expectation that a similar symmetry exists for men, but the experience, in fact, is often asymmetrical. While men recognize the power their group enjoys in the social order, but this often fails to translate to how men feel as individuals. Thus, when men as a group are characterized as “oppressors” and the social order is characterized as patriarchal, it fails to fully resonate with many men. It is this asymmetry/symmetry disconnect between the sexes that leads to communication breakdowns.⁶¹

⁶⁰ MICHAEL S. KIMMEL, *THE GENDER OF DESIRE* 30 (2005).

⁶¹ *Id.* at 39–42; *see also* NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* (2010).

The idea of hegemonic masculinity is to account for the ubiquity, persistence and similarities between certain ways of doing masculinity, without backing into the trap of essentializing what it means to be a man. It becomes more difficult to determine what the revered forms of masculinity have in common, and how to account for their hegemonic status, as opposed to recognizing differences among different forms of hegemonic masculinities. For instance, revered forms of masculinity exist within difference communities at the same time: working class masculinity and white-collar masculinity are very different, as are white and black masculinity. This strategy is dubious in the first place because it suggests that there is something within black masculinity or working-class masculinity that is unique to all members of the respective social categories. Important intra-group variations are obscured in favor of attempting to account for differences based on conventional categories of race, sexuality, religion, and class. Hegemonic masculinity also has a normative component in that part of the definition is that it legitimates the global subordination of women. The implication here is that there is not a “good” or “progressive” way of doing masculinity that can be part of the struggle against patriarchy. If society reveres a particular form of masculinity, then it necessarily is a form of masculinity that legitimates male supremacy. However, if one of the subordinated forms of

masculinity becomes revered and becomes the new hegemonic form, that new form could itself become oppressive.⁶²

Historically, the masculine subject position has been the default. The invisible but ever-present subject refused to be named, thus rendering male domination even more insidious. One goal of masculinity studies was to finally make the invisible and unaccountable subject the object. Not only were men also gendered, but so too were structures, institutions, relationships, and discourses. Since then, a rich history of scholarship has emerged dealing with the relationship between masculinity and law, from varied perspectives and ideological viewpoints.⁶³ Yet, the critical study of masculinity within a legal context remains woefully marginal to mainstream legal study.

Discrimination and patriarchy were conceptualized as problems of *equal treatment*—problems tailor-made for the law to tackle. But once patriarchy emerged as structural and equality, not simply as something formal, solutions proved more elusive. The

⁶² Michael Schwalbe articulates the logical conclusions of the apparent contradictoriness of the concept: “Thus, whatever it is that makes a configuration of practice a masculinity, it is not necessarily body type, gender identity, or oppressive consequences. Neither actor, intention, goal, nor consequences seems to define a practice as a masculinity...But if a masculinity can be all of these things, then it has no clear referent. By pointing to everything, the concept points to nothing in particular.” MICHAEL SCHWALBE, *MANHOOD ACTS: GENDER AND THE PRACTICES OF DOMINATION* 40–41 (2014).

⁶³ See, e.g., Connell, *supra* note 54; JACK S. KAHN, *AN INTRODUCTION TO MASCULINITIES* (2009); MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* (2000); RICHARD COLLIER, *MEN, LAW AND GENDER: ESSAYS ON THE ‘MAN’ OF LAW* (2010).

depressing conclusion that patriarchy was built into the discursive arrangements of society complicated the goal of emancipation. However, because the law has historically served as a relatively receptive tool for rights-based arguments and because success can be measured in more tangible ways in the legal arena (after all, one can win a case), the law continues to be viewed by many as an attractive avenue for addressing the problems of patriarchy. Notwithstanding ingrained problems of perspective that permeate the law, for advocates, it remains a space to fight patriarchy rather than one that perpetuates it. Rights-based arguments were, in fact, in many ways, conceptualized to appeal to an individuated, neoliberal, legal system based on the *reasoned elaboration* of principles and policies.⁶⁴

Like feminist theory, masculinity studies is an emancipatory project. Masculinity studies places great emphasis on issues of power. Indeed, as MacKinnon observed, if masculinity is anything at all, it is a system of power.⁶⁵ Much work has been done looking at the functioning of power, but power has been considered less as a discursive force and more as the foundation of patriarchy. While feminist theory focuses on redistributing power and, crucially, about how power operates; masculinity studies often acts as if the

⁶⁴ See Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 965 (1994).

⁶⁵ Male dominance “is perhaps the most pervasive and tenacious system of power in history.” MacKinnon, *supra* note 15, at 638.

“how” question is already answered and the only remaining issue is redistribution. Power, from the perspective of the law, is often considered as a force to regulate or redistribute, when the law ought to spend more time self-consciously reflecting on the impact of its own power. The law serves as a technology of sex that reifies masculinity and sexual difference by constructing masculinity as a biological given rather than a discursive category that is part of a neoliberal political agenda. Nevertheless, the mainstream understanding of the relationship between the law and masculinity focuses on how the law is needed to control and rein in masculinity. The notion that the law is actually privileging and perpetuating a particular form of masculinity is not taken seriously in mainstream legal analysis.⁶⁶ Masculinity studies, on the other hand, opens the door to a view of the law as a contributor to, if not outright creator of, existing power relations and not simply a regulator of pre-existing ones.

Notwithstanding the ostensibly progressive agenda of masculinity studies, it undoubtedly has had multiple effects.

⁶⁶ It is, though, considered very seriously in masculinities studies. An example of where this dynamic plays out is in criminal law where a “heat of passion” defense reduces a charge of murder to manslaughter, and “heat of passion” involves “men killing women who have bruised their masculine esteem by denigrating their sexual prowess or becoming involved with other partners.” As McGinley and Cooper have pointed out “it seems that defending one’s masculinity against women is reasonable enough to cut years off your sentence. Here, then is an example of law mirroring, if not reinforcing or even creating, a culture in which we assume ‘boys will be boys.’” Ann C. McGinley & Frank Rudy Cooper, *Identities Cubed: Perspectives on Multidimensional Masculinities Theory*, 13 Nev. L.J. 326, 338 (2013).

Masculinity studies has tended to favor a critique of masculinity itself, as opposed to gender categories themselves. And it has tended to favor a relatively narrow critique of patriarchy, without challenging the overarching political and social structures that facilitate patriarchy. While masculinity studies has tended to view itself as emancipatory, in many ways, it simply reifies established ideas about sexual difference. Thus, masculinity studies is often in danger of falling into essentialist rabbit holes and privileging experience over theoretical inquiry and over a comprehensive critique of the relationship between masculinity and power. This relationship—between masculinity and power—has always been at the forefront of how the law engages with patriarchy.

IV. ANTIDISCRIMINATION LAW CASES

The law's explicit creation of the boundaries of masculinity, ironically, is exemplified in a collection of cases dealing with discrimination against women in the employment context.⁶⁷ Through these cases, the law engages with existence and relevance of group-based (sex) differences. However, the source and stability of such differences has received less attention.⁶⁸ An examination of

⁶⁷ See Tyson Smith and Michael Kimmel, *The Hidden Discourse of Masculinity in Gender Discrimination Law*, SIGNS, Vol. 30, No. 3, 1827–49 (2005) (“In the United States, the relationship among difference, sameness, and equality has also been the foundation of efforts to rectify discrimination based on race and sex.”)

⁶⁸ Vicki Schultz has shown how new evidence reveals that many group-based differences typically said to explain and justify inequalities at work are actually

the source of accepted sex differences requires resisting the tenacity and questioning the origins of existing gender stereotypes.

By perpetuating or playing a part in the creation of sexual difference, the law prescribes sex roles, but also tells men and women what they should want: “These phenomena operate on the deepest levels of human consciousness and institutional logic, altering people’s perceptions and behavior in fundamental ways that appear to confirm the stereotype’s truth.”⁶⁹ Differences between men and women that are used to justify discrimination are not natural or immutable but have been created by the employer and society as a whole, including the law. For example, an employer that offers more parental leave to mothers than fathers is incentivizing the mother to be the primary caregiver and, thus, creating the difference: mother, not fathers, should be or want to be the primary caregivers of children. Arguing that sexual difference is not foundational or immutable does not deny the existence of difference but rather denaturalizes it by questioning its origins and *raison d’etre*. The discussion of antidiscrimination cases that follows considers whether the differences are the cause or consequence of

produced through institutional practices that foster an unnecessary, negative sense of difference among employees. Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1082 (2015).

⁶⁹ *Id.* at 1046.

the unequal treatment and why it matters when courts decline to question the origins of difference.⁷⁰

A. *Pregnancy*

Laws around pregnancy in the employment sphere serve as a paradigmatic example of fundamental disagreements about accommodating difference. Pregnancy cases—where pregnant women and new mothers brought claims against current or prospective employers for discrimination when they were treated differently from men and non-pregnant women—were the first major area of law that dealt with the intra-gender (as opposed to inter-gender) disparate treatment of women in the realm of Title VII of the Civil Rights Act.

In one early Supreme Court case, plaintiff employees claimed that defendant General Electric (GE) violated Title VII by failing to extend disability benefits to women who took time off work on account of pregnancy. The Court concluded that, because GE's benefits plan did not treat *all* women differently than all men, the claim was not actionable as sex discrimination: “[the plan] does not exclude anyone from benefit eligibility because of gender” and there was no showing that “the exclusion of pregnancy disability benefits from [GE's] plan was a pretext for discriminating against

⁷⁰ *Id.* at 1107.

women.”⁷¹ Two years later in response to the ruling, Congress enacted the Pregnancy Discrimination Act (PDA), which explicitly prohibited sex discrimination on the base of pregnancy.⁷²

The question, first before the Court and then before Congress, was framed as: whether pregnant women merited special treatment in the workforce. On the one side, cultural feminists argued that biological differences between men and women justified different leave policies and that treating women differently by making accommodations for pregnancy promoted the goal of workplace equality.⁷³ On the other side, equal treatment proponents argued that special treatment for pregnant women reinforced harmful stereotypes of women needing protective legislation in order to be able to compete with men in the workplace.⁷⁴

About a decade after the enactment of the PDA, the Supreme Court again took up the question of pregnancy and sex discrimination. Writing for the Court, Justice Thurgood Marshall rejected a challenge to a California state law that required employers to provide leave and reinstatement to employees disabled by pregnancy, finding that the law “promotes equal employment opportunity” and that “by ‘taking pregnancy into account,’

⁷¹ *General Electric Co. v. Gilbert*, 429 U.S. 125, 125–26 (1976).

⁷² 42 U.S.C. § 2000e(k) (92 Stat. 2076).

⁷³ Schultz, *supra* note 68, at 1068–70.

⁷⁴ *Id.* at 1073.

California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs."⁷⁵

Critics of the California law, including feminists, argued that guaranteeing maternity leave for women did not further equality but rather constituted sex discrimination itself, because if men and women were not treated the same, then they were being treated unequally (and unfairly). Yet, as the Funes parable instructs, no two things are ever exactly the same, and the way we categorize things, by identifying similarities and difference, is necessary and matters.⁷⁶ Indeed, such categorization is what determines equality. Equality is not the antithesis of difference. "[I]f individuals or groups were identical or the same there would be no need to ask for equality."⁷⁷ In this way, difference is a prerequisite of equality. Thus, part of the process that the law engages in when determining whether discrimination occurs is a determination of which differences matter. The law assumes that biological differences exist between men and women, and that, therefore, unlawful discrimination occurs if the differences are immutable and not a product of personal choice.

⁷⁵ *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1978).

⁷⁶ See discussion *supra* Part II.

⁷⁷ Scott, *supra* note 35, at 765.

Under the special treatment model,⁷⁸ pregnancy is seen as an immutable difference between men and women. This perspective manifests on both sides of the political spectrum, with opposite outcomes. Conservatives argue that women value family roles over work roles (essentially the reasoning followed by the court in *Gilbert*),⁷⁹ while proponents of the special treatment model on the left argue that, while pregnancy and motherhood do not necessarily alter women's work aspirations, they conflict with workplace norms and therefore deserve unique accommodation (essentially the reasoning followed by the court in *Cal Fed*).⁸⁰ In both versions pregnant women are viewed as different from other employees: "Conservatives used uniqueness arguments to defend denying pregnant women benefits given other employees, and liberals used them to defend giving pregnant women benefits denied others."⁸¹

Adherents to the equal treatment model don't necessarily oppose accommodation for pregnant women but argue that the accommodation should not be granted *based on sex*; a pregnant woman could, for example, receive an accommodation if her pregnancy symptoms were physically debilitating in some way.

⁷⁸ Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

⁷⁹ See *supra* note 71.

⁸⁰ See *supra* note 75.

⁸¹ Schultz, *supra* note 68, at 1082.

Pregnancy is not constructed as a foundational difference between men and women, not a difference that in and of itself renders men and women unequal. Rather, the way society and work are structured and the way people think about pregnancy combine to create an environment where pregnant women often are discriminated against in employment contexts. Such discrimination is not based on any immutable or biological difference but on man-made policies that purport to reflect a natural order that instead incentivizes women to stay home once they become pregnant by, among other things, relegating them to marginal jobs.⁸²

The equal treatment model⁸³ considers the factors that keep a pregnant woman from participating in the labor market—*e.g.*, physical impairments (nausea and fatigue) shared by other medical conditions: a medical event, sometimes involving surgery, that requires a period of recovery.⁸⁴ In this way, the disabling conditions that pregnancy may bring about are treated the same as disabling conditions experienced by any other employees, male or female.⁸⁵

⁸² *Id.* at 1071 (referencing Justice Brennan’s dissent in *General Electric Co. v. Gilbert*: “Brennan’s dissent acknowledged that the interrupted employment patterns exhibited by many American women did not simply reflect a choice to prioritize pregnancy and childbearing over paid work. Instead, those patterns were partly attributable to discriminatory employment policies that pressured or encouraged pregnant women to leave the labor force, thereby creating the very intermittency employers later cited to justify those policies.”).

⁸³ Williams, *supra* note 78.

⁸⁴ *Id.* at 1067.

⁸⁵ Williams, *supra* note 78, at 326–328 (“On a deeper level, the dispute is about whether pregnancy “naturally” makes women unequal and thus requires special legislative accommodation to it in order to equalize the sexes, or whether pregnancy can or should be visualized as one human experience which in many

There is a reluctance to characterize pregnancy, or the resulting symptoms, as disabling because this suggests that pregnancy is abnormal. Some criticism of characterizing pregnancy as a disability is based on normative judgments about what “disability” means, suggesting that the characterization implies something negative about pregnant women (and, for that matter, differently abled persons).⁸⁶ In this reading, regardless of the problems of its normative assessment, language in and of itself is constructed as performative. In a similar way, if one focuses on the performativity of language, by characterizing pregnancy as a difference based on sex, parents who do not experience pregnancy physically are excluded from the parenting experience. Indeed, pregnancy itself becomes fetishized at the expense of other (adoption, surrogacy, etc.) methods of family creation, which ultimately does a disservice to pregnant women as well.

The debate among feminist theorists regarding which model, equal treatment or special treatment, is a more effective tool in the struggle for equality implicates ideas about masculinity, femininity,

contexts, most notably the workplace, creates needs and problems similar to those arising from causes other than pregnancy, and which can be handled adequately on the same basis as are other physical conditions of employees. On the deepest level, the debate may reflect a demand by special treatment advocates that the law recognizes and honor a separate identity which women themselves consider special and important and, on the equal treatment side, a commitment to a vision of the human condition which seeks to uncover commonality rather than difference.”).

⁸⁶ Schultz, *supra* note 68, at 1073–75.

and gender roles, and, importantly, how and who we want policing those borders. The uniqueness of pregnancy and what it means to women, and how what it means to women is reflected in women's labor is being decided by judges. When rendering an opinion like *Gilbert* or *Cal Fed*, the court is speaking to what it means to be a woman, because the decision is not only speaking to the parameters of employment for all persons, or about treating men and women equally, but about characterizing and defining the supposed differences between men and women. Considering the personal nature and fluidity of sexual difference and identity, it feels odd to look to a staid and conservative institution like the law for guidance about what differences are foundational to women and how to perform one's gender identity.

The *Gilbert* and *Cal Fed* courts both draw clear demarcations between men and women, emphasize differences they characterize as insurmountable, and downplaying similarities, but these divisions are not necessary. Title VII exists to prevent discrimination, not to create an opportunity for judges to make pronouncements on what constitutes sexual difference. Accepting that there is nothing inherent or "natural" about these differences, the courts are deciding which differences to highlight and which to ignore. They are creating the categories and making decisions about what matters. Moreover, those decisions are not based on a blank

slate but rather represent an assessment of the categories that litigant employers have decided matter. In this way, employers themselves inform the creation of categories that they then use to justify discriminatory policies.⁸⁷ Against this backdrop, “[f]uture progress toward workplace sex equality will require renewed determination to challenge assumptions about difference that justify the status quo—this time, challenging not the reality but the self-reinforcing quality of alleged differences by focusing attention on how employers help *create* the differences they cite to justify discriminatory policies.”⁸⁸

Perhaps most importantly in the context of masculinity studies is how the pregnancy decisions evidence the performative power of the opinions. In his *Gilbert* dissent, Justice Brennan states: “These policy formulations . . . show that pregnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women’s comparatively transient role in the labor force.”⁸⁹ The focus on how employment policies affect the

⁸⁷ See *infra* discussion about Title VII gender stereotype cases.

⁸⁸ Schultz, *supra* note 68, at 1102.

⁸⁹ See *General Electric Co. v. Gilbert*, 429 U.S. at 158 (J. Brennan dissent). In discussing this passage in the Brennan’s dissent Schultz remarks: “Specifically, the Justices failed to consider whether, regardless of their supporters’ good intentions, laws singling out pregnant women for different treatment might lead to increased stereotyping, discrimination, and resentment against them and women generally, *entrenching even more deeply the unequal employment patterns and biased perceptions traditionally used to justify sex discrimination*” (emphasis added). Schultz, *supra* note 68, at 1080; see also *id.* at 1108 (“[Justice Brennan] who acknowledged early on that observed differences in women’s

way women engage with the labor market stands in stark contrast to conservative essentialist arguments that suggest that employment patterns simply reflect women's interests which are "naturally" and immutably different from men's and, thus, justification for policy. Justice Brennan shows that these policies, and the subsequent legitimization of them by the courts, do not merely reflect pre-existing sex differences, but are in fact creating them.

The acceptance by courts of the policies and their sex-based distinctions sends a pro-active signal to future policymakers as well as outlining sex roles for society at large. Thus, we see the law not simply passively gauging the worth of a pre-existing policy that claims to reflect differences between men and women but rather taking an active part in both creating the differences and suggesting that policy ought to exist in the first place. Challenging the importance of such differences is not the same as denying them; instead, "it means denaturalizing difference by questioning its origins and stability,"⁹⁰ nonetheless these pregnancy cases provide important lessons for masculinity studies—namely, the importance of not essentializing male experience and of recognizing the performative power of stereotypes, especially those about

work patterns or preferences can be produced by the employment disparities they are thought to explain.").

⁹⁰ Schultz, *supra* note 68, at 1107.

masculinity which historically have lurked under the radar and resisted having their naturalness challenged.

B. Lack of Interest

The sameness/difference debate shows up in sex discrimination cases where women have been denied certain types of employment, but employers argue that differences between women and men were the cause of rather than due to discrimination. In *Equal Employment Opportunities Commission (EEOC) v. Sears, Roebuck and Co.*, the EEOC alleged that Sears had discriminated against women by promoting only men for high-paying commission sales positions; Sears argued that its hiring practices simply reflected the interests of its employees and that, because women were naturally less competitive than men, they lacked interest in certain positions.⁹¹ The court rejected the claim, finding that “women [were] much less interested in commission sales at Sears than men,”⁹² and the decision was affirmed by the Court of Appeals for the Seventh Circuit.⁹³

⁹¹ 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d* 839 F.2d 302 (7th Cir. 1988). Vicki Schultz uses the term “lack of interest” to describe cases like *EEOC v. Sears*. Schultz, *supra* note 68, at 1005, 1047–66.

⁹² 628 F. Supp. at 1324.

⁹³ 839 F.2d 302, 320–21 (accepting evidence that “women were generally more interested in product lines like clothing, jewelry, and cosmetics that were usually sold on a noncommission basis, than they were in product lines involving commission selling like automotives, roofing, and furnaces. The contrary applied to men. . . . Various reasons for women’s lack of interest in commission selling included a fear or dislike of what they perceived as cut-throat competition, and increased pressure and risk associated with commission sales.

Again, the question underlying the case asks: whether women's interests are best served and sex equality furthered by policies that treat women and men identically, ignoring the social and cultural differences, or by those that treat them differently.⁹⁴ Under this "difference dilemma," as Martha Minnow has labelled it, "both focusing on and ignoring the difference risk recreating it."⁹⁵ To escape the dilemma, we need a new way to think about difference that resists the notion that equality and difference are in opposition.

The origins of the supposed differences between men and women claimed by Sears, that women are less competitive and prefer "friendly" noncommission positions, were not questioned by the court. Neither Sears nor the EEOC addressed systemic or structural roots of the differences and focused instead on autonomous individuals making decisions—supervisors deciding who to hire, female employees deciding which jobs to apply for. The fact that values and character traits identified as male (aggressiveness, competitiveness, individualism) are what society prizes and rewards with higher paying jobs is not challenged. Thus,

Noncommission selling, on the other hand, was associated with more social contact and friendship, less pressure and less risk.").

⁹⁴ Ruth Milkman, *Women's History and the Sears Case*, FEM. STUDIES, Vol. 12, No. 2 (Summer 1986).

⁹⁵ Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 160 (Spring 1985).

while “the aim is to give women a greater share of the pie, . . . the nature of the pie itself” is not called into question.⁹⁶

Indeed, the reliance on supposed sex differences to justify employment discrimination (as discussed above with respect to the pregnancy context), creates feedback loops that perpetuate and amplify the differences. In *Sears*, the differences (that women are less competitive than men) being relied upon to justify the discrimination are actually created by Sears’ own policies; by maintaining an all-male team of commission salespeople and policies (written and unwritten), Sears communicates to women that women are not competitive and wouldn’t be interested in the commission jobs. Certainly, women have no inherent interest in lower paying, less challenging, or more “stable” jobs. Instead, workplace aspirations of both men and women are rooted in responses to signals from the labor market itself.⁹⁷

The framing of the issue in *Sears* as a dichotomous choice without nuance: that the lack of women in commission sales jobs was due either to discrimination by Sears or a lack of interest by women, is one that resonates with the law. Neither the parties nor the court focused on whether the claimed differences in interest

⁹⁶ Elizabeth Comack, *Theoretical Approaches in the Sociology of Law: Theoretical Excursions*, in *LOCATING LAW: RACE/CLASS/GENDER CONNECTIONS* 46 (Comack, ed., 1999).

⁹⁷ Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 *HARV. L. REV.* 1749 (1990).

between men and women were a cultural creation or whether they were somehow natural and immutable. And if the differences are natural or immutable, the question becomes one of whether employers, and the law, have a duty to accommodate those differences. This question suggests that equality and difference are at odds, and that, in order for two things to be equal, they must be the same. Yet this formulation presents a false choice—that women can only be entitled to the same high-paying commission jobs at Sears as men if they can show they were the same as men with respect to aggressiveness and competitiveness.

Equality does not mean sameness, and difference does not mean inequality. As Joan Scott has observed: “when equality and difference are paired dichotomously, they structure an impossible choice . . . the only response is a double one: the unmasking of the power relationship constructed by posing equality as the antithesis of difference and the refusal of its consequent dichotomous construction of political choices.”⁹⁸ In other words, constructing the problem as one of equality versus difference allows for only two alternatives: either men and women are equal, and no differences exist, or they are different, and men and women are not equal. But, of course, men and women can be both equal *and* different.

⁹⁸ Scott, *supra* note 35, at 765.

In addition, by focusing on whether or not men and women are the same (have the same interests in particular jobs), the two categories are presented as internally homogenous: all women are assumed to share a common set of interests. By ignoring diversity within gender categories themselves, the question of whether men and women are the same or different becomes even more nonsensical. This failure to recognize diversity within a gender category is prevalent in masculinity studies, where there is a concern about men being characterized, within feminist theory, as one dimensional and treated as a monolithic group.⁹⁹

Even in *Sears*, which relied explicitly on a single characterization of women as a group, the court affirmed ideas of masculinity presented in Sears' policies, citing Sears' sales manual which described commission salespeople, who were all men, as: "special breed of cat, with a sharper intellect and more powerful personality than most other retail personnel . . . [one who] possesses a lot of drive and physical vigor, is socially dominant, and has an outgoing personality and the ability to approach easily persons they do not know."¹⁰⁰ While this description is not meant to describe all men, it does describe what successful men, those that deserve higher paying jobs, should be like, and creates a caricature of hegemonic

⁹⁹ See generally Connell, *supra* note 54.

¹⁰⁰ 628 F. Supp. at 1290.

masculinity that is alienating and ultimately harmful to individuals of all sexes.

By failing to question the origin of the sex differences at play in *Sears*, the court implicitly accepts those differences as natural.¹⁰¹ Thus, stereotypes about men: aggressiveness, competitiveness, appetite for risk, a willingness to be away from home for extended periods, are constructed as what men “naturally” are like. Masculinity studies challenges this sort of essentializing of men and explores how such construction of masculinity alienates those men who do not conform to the model. Similarly, the assignment of characteristics like humaneness, compassion, and nurturing to women results in the idea that these characteristics should be avoided by men, that men who exhibit them are not “real” men. A key part of the project of masculinity studies has been to unpack male identity and look at its origins. What has been determined is that “the two most defining elements of masculinity are imperative negatives: not to be a woman and not to be gay.”¹⁰² *Sears*, a decision that, on its face, has little to do with masculinity, thus, lays out a roadmap for how men can “not be a woman”—*i.e.*, be less humane, compassionate, and nurturing.

¹⁰¹ 628 F. Supp. 1264.

¹⁰² Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC’Y 209, 232 (2008).

In the thirty-odd years since *Sears* was decided and affirmed, lack of interest arguments have persisted, sometimes in more amorphous form. The success or failure of lack of interest arguments have tended to fall along political lines, with conservative courts being more receptive and liberal courts rejecting the arguments, resulting in a circuit split.¹⁰³ Even when the Supreme Court finally weighed in on a lack of interest case, it sidestepped the fundamental issue.

In 2011, the Supreme Court heard *Wal-Mart Stores, Inc. v. Dukes*,¹⁰⁴ a case with a strikingly similar fact pattern to that of *Sears*. Current and former women employees of Wal-Mart alleged that the discretion exercised by their local supervisors over pay and promotion matters resulted in discrimination against them in violation of Title VII.¹⁰⁵ While the lower courts ruled in favor of the employees, the Supreme Court ultimately refused to certify the women as a class and, thus, neatly sidestepped the issue of discrimination.¹⁰⁶ In a brilliant sleight of hand, the conservative majority (the opinion was decided 5-4 along party lines) refused to certify the group because the various women plaintiffs were not similar enough¹⁰⁷—turning the traditionally progressive attack on

¹⁰³ Schultz, *supra* note 68, at 1060.

¹⁰⁴ 564 U.S. 338 (2011).

¹⁰⁵ *Id.* at 343.

¹⁰⁶ *Id.* at 367.

¹⁰⁷ *Id.* at 356–57.

lack of interest arguments for their essentializing of women on its head. The Court, in contrast, suggested that certifying the group was in fact essentializing women's experiences; it found that the proposed class had "little in common but their sex and this lawsuit."¹⁰⁸

While conservative courts had before found that because women share certain "natural" interests, and different treatment based on those interests was lawful, the Court found the various women all so unique and different from each other and without a shared interest, that class certification couldn't be justified.¹⁰⁹ The court suggested that proof of discrimination at each of 3,400 stores would be needed to illustrate a pattern, notwithstanding evidence of company-wide discrimination.¹¹⁰ Advocacy work, let alone communication of any sort, is impossible if every experience is considered unique and ungeneralizable.¹¹¹

The Court's decision exemplifies the danger of using claims of essentialism to undercut attempts to deliver justice to women as a group: a critique prevalent in both feminist theory and masculinity studies. As MacKinnon has pointed out, "analyzing women 'as women' says nothing about whether an analysis is essentialist. It all

¹⁰⁸ *Id.* at 359–60.

¹⁰⁹ *Id.* at 358.

¹¹⁰ *Id.*

¹¹¹ *See supra* Part II, at 15.

depends on how you analyze them ‘as women’ on whether what makes a woman be a woman, analytically, is deemed inherent in their bodies or is produced through their social lived conditions.”¹¹² In *Sears*, women were grouped together and characterized as lacking interest in high-paying jobs because of something that was deemed inherent in their bodies.¹¹³ In *Wal-Mart*, women were grouped together because of the social lived condition that they shared—the experience of having been discriminated against by Wal-Mart due to their sex.¹¹⁴ Both feminist theory and masculinity studies suggest that an appropriate response to anti-essentialist critiques or critiques of sexual difference more generally is not a retreat from categorizing men and women as groups but rather a recognition of *how* the group is being characterized.

The highly politicized nature of the “lack of interest” opinions highlights the role the law plays in speaking to the question of how to think about the interests of women. Yet it seems self-evident that having judges set the parameters surrounding what makes a woman a woman is less than desirable. Like the feedback loop described by Justice Brennan in his *Gilbert* dissent,¹¹⁵ there is a self-reinforcing tendency to recourse to the law being the solution

¹¹² MacKinnon, *supra* note 50.

¹¹³ 628 F.Supp. at 1270–72.

¹¹⁴ 564 U.S. at 342–45.

¹¹⁵ 429 U.S. at 158 (J. Brennan dissent).

to the problems it encounters. The law insists that it is the way to address the issue and to solve the problem, and points to past successes to illustrate its future potential. However, with respect to defining individuals' interests and desires, in a charged political context that the law has proven time and again to be immersed within, holding out hope in the emancipatory power of the law is perhaps overly ambitious.

C. *Gender Stereotyping*

Arguably, the area of antidiscrimination law where the parameters of masculinity are being most clearly and explicitly delineated is a collection of cases dealing with Title VII employment discrimination claims relating to gender stereotyping. In 1989, the Supreme Court set forth the gender stereotyping doctrine with its decision in *Price Waterhouse v. Hopkins*.¹¹⁶ In that case, plaintiff Ann Hopkins claimed that her employer, Price Waterhouse, had denied her partnership because she did not conform to traditional gender stereotypes. An unquestionably qualified candidate, Hopkins was the only woman out of eighty-eight employees up for partnership.¹¹⁷ Despite her professional success (securing a multi-million-dollar contract) and assessment of her work as outstanding, she was considered an “overly aggressive...tough talking somewhat

¹¹⁶ 490 U.S. 228 (1989).

¹¹⁷ *Id.* at 232–37.

masculine hard-nosed” manager.¹¹⁸ She was characterized by her employer as unduly harsh, difficult to work with, and macho, and was told that she used too much profanity and was seen as overcompensating for being a woman. In performance evaluations, she was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and take a course at charm school.”¹¹⁹

The Court held that Hopkins had been illegally discriminated against because sexual stereotyping had played a part in Price Waterhouse’s evaluation of Hopkin’s candidacy for partner—*i.e.*, her behavior resembled what her employer and members of the court considered masculine.¹²⁰ Justice Brennan, writing for the majority, declared “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”¹²¹ *Price Waterhouse* expanded the scope of Title VII to prohibit discrimination not only based on a biological (immutable) conception of sex but also to prohibit any discrimination based on a person’s nonconformance with gender norms.

¹¹⁸ *Id.* at 234–35.

¹¹⁹ *Id.* at 235.

¹²⁰ *Id.* at 251–52.

¹²¹ *Id.* at 251.

In more recent cases dealing with sex stereotyping Title VII claims, litigants have argued that discrimination based on one's sexual orientation, while not a specifically enumerated category in Title VII, should be prohibited as discrimination "because of [an] individual's sex,"¹²² under the *Price Waterhouse* expansion of the concept to cover sex stereotyping. The resulting jurisprudence has been mixed, with a circuit split¹²³ that likely will end up at the Supreme Court.¹²⁴ While the debate continues as to whether sexual orientation should be included under the sex stereotyping rubric, another series of cases—those dealing with uniforms and personal grooming—cases has resisted finding its way under that umbrella.¹²⁵

In 2000, Darlene Jespersen, a bartender at Harrah's Casino, refused to comply with a company policy that female beverage

¹²² 42 U.S.C. § 2000e-2(a)(1).

¹²³ See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) ("sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination"); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) ("discrimination on the basis of sexual orientation is a form of sex discrimination"), with *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017) (Title VII does not prohibit discrimination based on sexual orientation); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (same).

¹²⁴ Porter Wells, "Courts Weighing LGBT Job Bias Claims While SCOTUS Dallies," BLOOMBERG LAW, Jan. 28, 2019, <https://news.bloomberglaw.com/us-law-week/courts-weighing-lgbt-job-bias-claims-while-scotus-dallies>.

¹²⁵ See, e.g., *Jespersen v. Harrah's Operating Co., Inc.*, 280 F. Supp. 2d 1189 (D.Nev. 2002), *aff'd* 392 F.3d 1076 (9th Cir. 2004), *aff'd en banc* 44 F.3d 1104 (2006); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (enforcing short hair guidelines for men is not discriminatory). See also Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992); Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769 (1987); Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317 (1997).

service employees wear full makeup (*i.e.*, foundation, blush, mascara, and lip color) at all times, and she was fired as a result.¹²⁶ Jespersen sued, alleging that the policy and her termination discriminated against her on the basis of sex. The district court rejected the claim, and the Ninth Circuit affirmed, finding that the policy did not create an unequal burden on female bartenders as opposed to male bartenders, who were required to comply with different grooming standards.¹²⁷ While the *Price Waterhouse* decision intuitively would seem to govern *Jespersen*, claims involving dress and appearance trigger an inter-gender formal equality unequal burden test. In order to prove discrimination, Jespersen would have had to show that the grooming standard imposed a greater burden on women than it did on men.¹²⁸ “Notwithstanding the direction in which *Price Waterhouse* seems to urge equality jurisprudence, many courts are reluctant to relinquish the conventions that femininity belongs to women and that masculinity belongs to men.”¹²⁹

Ann Hopkins was penalized because her biological sex (female) did not match her behavior, too masculine, according to her

¹²⁶ *Jespersen v. Harrah’s Operating Co., Inc.*, 280 F. Supp. 2d 1189, *aff’d* 44 F.3d 1104, *aff’d en banc* 44 F.3d 1104.

¹²⁷ *Id.*

¹²⁸ For a detailed discussion of why grooming policies are not challenged on gender stereotyping grounds see Devon Carbado, *Makeup and Women at Work*, __ HARV. CIV. RTS.-CIV. LIB. L. REV. __ (2006).

¹²⁹ Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 96 (1995).

employer's standards. Darlene Jespersen was penalized because her biological sex (female) did not match her behavior, not feminine enough, according to her employer's standards. In both instances, a woman failed to conform to the parameters of normative sex roles. As Katherine Franke explains, "the second order question, what does it mean to treat women unfairly, always has buried within it the first order question, what does it mean to be a woman?"¹³⁰ While the decisions in these cases have an obvious effect on the women who have suffered discrimination, they also legitimize ideas about normative sex roles and, thus, have an impact on other women, but also on men.

When applying a masculinity studies lens to the cases, we have as a starting point the fact that masculinity is a construct. Masculinity does not belong to either gender, but, as reflected in *Price Waterhouse* and *Jespersen*, as long as traits, attitudes, and behaviors are gendered, then women who are read as "too masculine" will be negatively valued. This characterization is similarly harmful to men because, to be a successful man, according to *Price Waterhouse*, one should be sufficiently aggressive, harsh, profane, and impolite. Further, men who do not attain or choose to not strive for this type of masculinity also will be negatively valued.

¹³⁰ *Id.*

The underlying discriminatory behavior at issue in both *Price Waterhouse* and *Jespersen* was explicit. *Price Waterhouse* is full of smoking guns and outrageous statements by colleagues regarding Ann Hopkins. And *Jespersen* involved a formal policy regulating women's bodies. Anti-discrimination law is well suited to address such exoteric, explicit problems. It is successful at identifying the "bad guy," but is not necessarily in a position to uncover subconscious biases when evidence of malicious intent is not present. When recalling one of the goals of masculinity studies—exposing and interrogating the default subject position held by men—we are reminded to examine what the cases are communicating implicitly and tacitly, to read between the lines, and to interrogate the norms that have been taken for granted. This is a major reason why anti-discrimination law, the blunt instrument that it is, is not ideally situated to address discrimination that is often more systemic than volitional.

When outright and explicit sexism and misogyny shift to uneasiness over evolving sexual categories and how masculinity and femininity are being performed differently than in the past, anti-discrimination law, with judges deciding how individuals should be expressing their gender, is likely not the best way to address the harms that result from such unease.¹³¹ Anti-discrimination law deals

¹³¹ Carbado, *supra* note 128, at 50 ("the entire edifice of sex discrimination law requires judges to make judgments about the extent to which employers can

with singular and explicit examples of wrong doing dealing with gender categories and roles that are intelligible to it, but, to borrow Franke's language, anti-discrimination law "provides little protection for gender outlaws."¹³² An individual only becomes a viable and culturally intelligible subject to the extent that one conforms one's gender performance to commonly accepted social norms.¹³³

Anti-discrimination law actively creates the parameters of what it means to be a man. In *Jespersen*,¹³⁴ the court did not simply legitimize normative gender categories; instead, it explicitly policed the border of gender expression, by finding a requirement to wear make-up reasonable and related to a bartender's employment. And while the court in *Price Waterhouse* did find discrimination, it based its judgment of that discrimination on a particular understanding of masculinity,¹³⁵ thus weighing in on what masculinity is. Recalling Justice Brennan's feedback loop,¹³⁶ by weighing in on what masculinity *is*, the Court is also taking an implicit stand on what

police expressions of gender. The question, then, is not whether we want judges to play a role in constituting gender, but rather how we want them to perform that role.").

¹³² Franke, *supra* note 129, at 99.

¹³³ *Id.*

¹³⁴ Carbado, *supra* note 131, at 55 ("The approach the court took in *Jespersen*'s obscured the fact that Harrah's grooming policy was quite literally producing normative masculinity and femininity and instantiating impermissible sex stereotyping.").

¹³⁵ 490 U.S. at 251–52.

¹³⁶ 429 U.S. at 158 (J. Brennan dissent).

masculinity *ought* to be. When courts continue to trade in sexual stereotypes, individuals of all sexes are harmed.

CONCLUSION

Masculinity studies has exposed the presence of a hegemonic masculinity: “the configuration of gender practice which embodies the currently accepted answer to the problem of the legitimacy of patriarchy, which guarantees (or is taken to guarantee) the dominant position of men and the subordination of women.”¹³⁷ Crucially, it is the successful claim to authority, rather than any sense of universalism, in that it is possessed equally by all men, which marks hegemonic masculinity. Hegemonic masculinity is always constructed in relation to various subordinated masculinities.¹³⁸ It is historically dependent and only ever a “currently accepted” strategy as opposed to an essence or truth. The lack of universalism, or stated differently, the rejection of any naturalistic component to masculinity (although society does read the “currently accepted form” of masculinity as “natural” at the time), renders the notion of hegemonic masculinity inherently

¹³⁷ Connell, *supra* note 54, at 77. Stephen Whitehead similarly describes the importance of the concept in terms regarding the balance between agency and essentialism: “The power of the term lies in the fact that the theorist can align themselves with the notion of patriarchy and male dominance, while mitigating any reductionist oversimplifications through the use of a concept that speaks of fluidity, multiplicity, difference and resistance, not only within the category women but also amongst men.” STEPHEN M. WHITEHEAD, *MEN AND MASCULINITIES* 91 (2002).

¹³⁸ R.W. CONNELL, *GENDER AND POWER* 173 (1987).

political. So, while lacking universalism in that sense, hegemonic masculinity is the “currently most honored way of being a man...and legitimates the global subordination of women to men.”¹³⁹ There is nothing natural or immutable to the forms of masculinity condoned and perpetuated by the law, the law is buying into ideas about what “normal” behavior is for men that simply increase sexual inequality. Judges are unequivocally policing the borders of gender in anti-discrimination law cases that explicitly decide whether or not individuals can be terminated from their jobs because of the way they perform their gender. Judges are saying what kinds of genders are legitimate when deciding what kind of gender performances are protected by the law. If the law continues to legitimize stereotypes (and not recognize that there are multiple ways to perform one’s identity) and remains unable adopt a more nuanced understanding of sexual difference, then regardless of whether the legal doctrine employed embraces difference or sameness (substantive or formal equality), the results will continue to re-enforce sexual inequalities.

¹³⁹ R.W. Connell & James M. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC’Y 6, 832 (2005).