Difference and Dominance: On Sex Discrimination

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Two questions that are seldom confronted underlie applications of the equality principle to issues of gender. One is, what is a gender question a question of? The other is, what is an inequality question a question of? I think it speaks to the way gender structures thought and perception that most legal and moral theory tacitly proceed from one answer: both are questions of sameness and difference. The mainstream doctrine of sex discrimination law that results is, in my view, largely responsible for the fact that sex equality law has been so utterly ineffective at getting women what we need and are socially prevented from having on the basis of a condition of birth: a chance at productive lives of reasonable physical security, self-expression, individuation, and minimal respect and dignity. Here, I expose and analyze the sameness/difference theory of sex equality, briefly show how it dominates sex discrimination law and policy, and underlies its discontents, and propose an alternative that may do something.

I

Equality is an equivalence and sex is a distinction, according to the approach to sex equality that has dominated politics, law, and social perception. The legal mandate of equal treatment which is both a systemic norm and a specific legal doctrine, is, then, a matter of treating likes alike and unlikes unlike, and the sexes are defined as such by their mutual unlikeness. Put another way, gender is socially constructed as difference epistemologically, and sex discrimination law bounds gender equality by difference doctrinally. A built-in tension exists between this concept of equality, which presupposes sameness and this concept of sex, which presupposes difference. Sex equality thus becomes a contradiction in terms, something of an oxymoron, which may suggest why we are having such a difficult time getting it.

Upon further scrutiny, two alternate paths to equality for women emerge within this dominant approach, paths that roughly correspond to the poles of this tension. The leading one is: be the same as men. This standard is termed gender-neutrality doctrinally and the single standard philosophically. It is testimony to how substance becomes form in law that this rule is considered formal equality. Because it mirrors the ideology of the social world, it is considered abstract, meaning transparent of substance; also for this reason, it is considered not only to be *the* standard, but *a* standard at all. It is so far the leading rule that the words

"equal to" are code for, equivalent to, the words "the same as"—referent for both unspecified.

To women who want equality yet find they are different, the doctrine provides an alternate route: be different from men. This equal recognition of difference is termed the special benefit rule or special protection rule legally, the double standard philosophically. It is in rather bad odor. Like pregnancy, which always brings it up, it is a bit disreputable, a doctrinal embarrassment. Considered an exception to true equality and not really a rule of law at all, it is the one place where the law of sex discrimination admits it is recognizing substance. With the Bona Fide Occupational Qualification, the unique physical characteristic exception under ERA policy,[1] compensatory legislation, and sex-conscious relief in particular litigation, affirmative action is thought to live here.

The philosophy underlying this approach is that sex *is* a difference, a division, a distinction, beneath which lies a stratum of human commonality, sameness. The moral thrust of the sameness standard is to grant women access to what men have access to: to the extent that women are no different from men, we deserve what they have. The differences standard, which is generally seen as patronizing but necessary to avoid absurdity, exists to value or compensate women for what we are or have become distinctively as women (by which is meant, unlike men) under existing conditions.

My concern is not with which of these paths to sex equality is preferable in the long run or more appropriate to any particular issue, although most discourse on sex discrimination revolves about these concerns as if they are all there is. My point is logically prior: to treat issues of sex equality as issues of sameness and difference *is to take a particular approach.* I call it the difference approach because it is obsessed with the sex difference. The dialogue it has scripted for us contains a main theme, "we're the same, we're the same, we're the same," and a counterpoint theme (in a higher register), "But we're different, but we're different, but we're different." Its underlying story is: on the first day, difference was; on the second day, a division was created upon it; on the third day, occasional dominance arose. Division may be rational or irrational. Dominance either seems or is justified. Difference *is.*

There is a politics to this. Concealed is the substantive way in which man has become the measure of all things. 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 from him, our womanhood judged by our distance from his measure. Gender-neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: manhood is the referent for both. Think about it like those anatomy models in medical school. The male body is the human body; all those extra things women have are studied in ob/gyn. It truly is a situation in which more is less. Approaching sex discrimination in this way, as if sex questions are difference questions and equality questions are sameness questions, merely provides two ways for the law to hold women to a male standard and call that sex equality.

II

Having been very hard on the difference answer to sex equality questions, I should say that it takes up a very important problem: how to get women access to everything we have been excluded from, while also valuing everything that women are or have been allowed to become or have developed as a consequence of our struggle either not to be excluded from most of life's pursuits or to be taken seriously under the terms that have been permitted to be our terms. It negotiates what we have managed m relation to men. Legally articulated as the need to conform normative standards to existing reality, the strongest doctrinal expression of its sameness idea would prohibit taking gender into account in any way.

The guiding impulse is: we're as good as you. Anything you can do, we can do. Just get out of the way. I have to confess a sincere affection for this approach. It has gotten women some access to employment,[2] education,[3] the public pursuits including academia,[4] the professions,[5] blue collar[6] work, to the military,[7] and more than nominal access to athletics.[8] It has moved to alter the dead ends that were all we were seen as good for, and what passed for women's lack of physical training, which was really serious training in passivity and enforced weakness. It makes you want to cry sometimes to realize how much women just want to do the work of this society, things other people don't even want to do, that it has to be a mission just to get to do it.

The issue of the military draft[9] has presented the sameness answer to the sex equality question in all its simplicity and equivocality. As a citizen, I should have to risk being killed just like you. The consequences of my resistance to this risk should count like yours count. The undercurrent is, what's the matter, don't you want me to learn to kill ... just like you? Sometimes I imagine this as a dialogue between women in the afterlife. The feminist says to the soldier, we fought for your equality. The soldier says to the feminist, oh, no, *we* fought for *your* equality.

Feminists have this nasty habit of counting bodies and refusing not to notice their gender. So we notice that, as applied, the sameness standard has mostly gotten men the benefit of those few things women have historically had—for all the good they did us. Almost every sex discrimination case that has been won at the Supreme Court level has been brought by a man.[10] Under gender-neutrality, the law of custody and divorce has been transformed, giving men an equal chance at custody of children and at alimony.[11] Men often look like better "parents" under gender-neutral rules like level of income and presence of nuclear family, because men make more money and (as they say) initiate the building of family units.[12] In effect, they get preferred because society advantages them before they get into court, and law is prohibited from taking that preference into account because that would mean taking gender into account. The group realities that make women more in need of alimony are not permitted to matter, because only individual factors, gender-neutrally considered, may matter. So the fact that women will live their lives, as individuals, as members of the group, women, with women's chances in a sex discriminatory society, may not count, or it is sex discrimination. The equality principle in this guise has come to mobilize the idea that the way to get things for women is to get them for men. Admittedly, men have gotten them. But have women? We still have not gotten even equal pay,[13] or

equal work,[14] far less equal pay for equal work,[15] and are close to losing separate enclaves like women's schools through this approach.[16]

Here is why. In reality, which this approach is not long on, virtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports, their health needs define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex. For each of their differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society. But whenever women are different from men and insist on just not having it held against us, every time a difference is used to keep us second class and we refuse to smile about it, equality law has a paradigm trauma and it's crisis time for the doctrine.

The problem is, what this doctrine has apparently meant by sex inequality is not what happens to us. The law of sex discrimination seems to be looking for only those ways women are kept down that have *not* wrapped themselves up as a difference, whether original, imposed, or imagined. Start with original: what to do about the fact that women actually have an ability men still lack, gestating children in utero. Pregnancy is therefore a difference. Difference doctrine says it is sex discrimination to give women what they need because only women need it. It is not sex discrimination not to give them what they need because then only women will not get what we need.[17] Move into imposed: what to do about the fact that most women are segregated into low-paying jobs where there are no men. Suspecting that the structure of the marketplace will be entirely subverted if comparable worth is put into effect, difference doctrine says that because there is no man to set a standard as against which women's treatment is a deviation, there may be no sex discrimination here, only sex difference. Never mind that there is no man to compare with because no man would do that job if he had a choice, and because he is a man, he does, so he doesn't.[18]

Now move into the so-called subtle reaches of the imposed category, the *de facto* area. Most jobs, in fact, require that the person gender-neutral that is qualified for these jobs will not be the primary caretaker of a preschool child.[19] Pointing out that this raises a concern of sex in a society in which it is women who are expected to care for the children is taken as day one of taking gender into account in the structuring of jobs. To do that would violate the rule against not noticing situated differences based on gender, so it is never noticed that day one of taking gender into account was the day the job was structured with that expectation. Imaginary sex differences I will concede the doctrine can handle.[20]

Clearly, there are many differences between women and men. I mean, can you imagine elevating one half of a population and denigrating the other half and producing a population in which everyone is the same? What the sameness standard fails to notice is that men's differences from women are equal to women's

differences from men. There is an equality there. Yet the sexes are not socially equal. What is missing in the difference approach is what Aristotle missed in his empiricist notion that equality means treating likes alike and unlikes unlike and nobody has questioned it since. Why should you have to be the same as a man to get what a man gets simply because he is one? Why does maleness provide an original entitlement, not questioned on the basis of *its* gender, so that it is women who want to make a case of unequal treatment in a world men have made in their image (this really the part Aristotle missed) who have to show in effect that they are a man in every relevant respect, unfortunately mistaken for a woman on the basis of an accident of birth?

This method shows in highest relief through the women gender-neutrality benefits, and there are some. Mostly they are women who have already been able to construct a biography that approximates the male norm, at least on paper. They are the qualified, the least of sex discrimination's victims. When they are denied a man's chance, it looks the most like sex bias. The more unequal society gets, the fewer such women are permitted to exist. The more unequal society gets, the *less* likely this doctrine is able to do anything about it, because unequal power creates both the appearance and the reality of sex differences along the same lines as it creates its sex inequalities.

Nor has the special benefits side of the difference approach compensated for the differential of being second class, like it is supposed to. The special benefits rule is the only place in mainstream doctrine where you get to identify as a woman and not have that mean giving up all claim to equal treatment—but it comes close. Under its double standard, women who stand to inherit something when their husbands die have gotten the exclusion of a small percentage of inheritance tax, to the tune of Justice Douglas waxing eloquent about the difficulties of all women's economic situation.[21] If we're going to be stigmatized as different, it would be nice to have the compensation fit the disparity. Similarly, women have gotten three more years than men before being advanced or kicked out of the military hierarchy as compensation for being precluded from combat, the usual way to advance.[22] Women have also gotten excluded from contact jobs in male-only prisons because we might be raped, the Court taking the viewpoint of the reasonable rapist on women's employment opportunities.[23] We are also protected out of jobs because of our fertility. The reason is that the job has health hazards, and somebody who might be a real person some day and, therefore, could sue (a fetus) might be hurt if women, who apparently are not real persons and therefore can't sue either for the hazard to our health or for the lost employment opportunity, are given jobs which subject our bodies to possible harm.[24] Excluding women is always an option if equality feels in tension with the pursuit itself. (They never seem to think of redefining the pursuit or excluding the men.) Take combat.[25] Somehow, it takes the glory out of the foxhole, the buddiness out of the trenches, to imagine us out there. You get the feeling they might rather end the draft, they might even rather not fight wars at all, than to have to do it with us.

The double standard of these results does not give women the dignity the single standard does, which is the dignity of corresponding to the male. Nor does it suppress the gender of its referent—which is, of course, the female gender. I must also confess some affection for this standard. The work of Carol Gilligan on gender differences

in moral reasoning[26] gives it a lot of dignity, more than it has ever had; more, frankly than I thought it ever could have. But in the end, the work achieves for moral reasoning what the special protection rule achieves in law: the affirmative rather than negative valuation of that which has accurately distinguished women from men by making it seem as though those attributes, with their consequences, really are somehow ours, rather than what male supremacy has attributed to us for its own use.

Women have been and done good things, and it is a good thing to affirm them. I think quilts are art. I think women have a history. I think we create culture. I also think that we have not only been excluded from making what has been considered art, our artifacts have been excluded from setting the standards by which art is art. Women have a history all right, but it is both a history of what was and of what was not allowed to be. So I am critical of affirming what we have been, which necessarily is what we have been permitted, as if it is women's, ours in the possessive, as if equality, in spite of everything, already ineluctably exists.

I am getting hard on this and am about to get harder on it. I do not think the way women reason morally is morality "in a different voice."[27] I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men. I think further that when you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated. Gone. You aren't just deprived of a language with which to articulate your distinctiveness, although you are; you are deprived of a life out of which articulation might come. Not being heard is not just a function of lack of recognition, not just that no one knows how to listen to you, although it is that. It is also silence of the deep kind, the silence of being prevented from having anything to say. Sometimes it is permanent. All I am saying is that the damage of sexism is real, and reifying that into differences is an insult to our possibilities.

So long as this is the way these issues are framed, demands for equality will always appear to be asking to have it both ways: the same when we are the same, different when we are different. But the fact of the matter is that this is the way men have it: equal and different too. They have it the same as women when they are the same and want it, and different from women when they are different or want to be, which usually they do. Equal and different too would only be parity.[28] But under male supremacy, while being told we get it both ways, both the specialness of the pedestal and an even chance at the race, the ability to be a woman and a person, too few women get much benefit of either.

III

There is an alternative approach, one which threads its way through existing law and is, I think, the reason equality law exists in the first place. It provides a second answer, a dissident answer in law and philosophy, to both the equality question and the gender question. An equality question is a question of the distribution of power. A gender question is also a question of power, specifically of male supremacy and female

subordination. Equality, in terms of what it is going to take to get it, is the antithesis of hierarchy. As hierarchy of power succeeds in constructing social reality and social perception, it produces categorical distinctions, differences. I term this the dominance approach.

On the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines was firmly, if imperfectly, in place. On the third day if not sooner, differences were demarcated, together with social systems to exaggerate them in perception and in fact, *because* the systematically differential delivery of benefits and deprivations required making no mistake about who is who. Comparatively speaking, man has been resting ever since. Gender might not even code as difference, might not mean distinction epistemologically, were it not for its consequences for social power. The sameness standard, under the difference approach misses what this gets: the fact that hierarchy of power produces real as well as fantasied differences, differences that are also inequalities. The differences standard under the difference approach also misses what this gets: that for women to affirm difference, when difference means dominance as it does with gender, is to affirm the qualities and characteristics of powerlessness.

This is the ground I have been standing on to criticize mainstream sex discrimination law. The goal is not to make legal categories to trace and trap the way things are. It is not to make rules that fit reality. It is critical of reality. The task is not to formulate, abstract standards that will produce determinate outcomes in particular cases. Its project is more substantive, more jurisprudential than formulaic, which is why it is difficult for the dominant discourse to dignify it as an approach to doctrine or to imagine it as a rule of law at all. It proposes to expose that to which women have had little choice but to be confined, in order to change it.

The dominance approach centers on the most sex-differential abuses of women as a gender, abuses which sex equality law in its difference mode could not confront. It is based on a reality about which little systematic was known before 1970, a reality that calls for a new conception of the problem of sex inequality. This new information includes not only the extent and intractability of sex segregation into poverty, which has been known before, but the range of issues termed violence against women, which has not been. It combines women's material desperation through the relegation to categories of work that pay little to nothing, with the massive amount of rape and attempted rape—44 percent of all women, about which virtually nothing is done.[29]; the sexual assault of children, 38 percent of girls and 10 percent of boys, which is apparently endemic to the patriarchal family [30]; the battery of women, systematic in our homes, one third to one quarter of them [31]; prostitution, women's fundamental economic option, what we do when all else fails, and for a good fifth of all women in this country that we know of, all else has failed at some point [32]; and pornography, an industry which trafficks in female flesh, making inequality into sex to the tune of $8 billion a year in profits largely to organized crime.[33]

These experiences have been silenced out of the difference doctrine of sex equality largely because they happen almost exclusively to women. Understand: for this reason, they are considered *not* to raise sex equality issues. Because this treatment is almost uniquely done to women, it is implicitly treated as a difference, the sex difference.

What it is, is the socially situated subjection of women. The whole point of women's social relegation to inferiority as a gender is that these abuses do not customarily happen to men. Men are not paid half of what women are paid for doing the same things on the basis of their equal difference. Everything they touch does not turn valueless because they touched it. When they are hit, a person has been assaulted. When they are sexually violated, it is not either simply tolerated or found entertaining or defended as a constitutional right, the necessary structure of the family, or the price civilization.

Does this differential describe the sex difference? Maybe so. It does describe the systematic relegation of an entire half of the population to a condition of inferiority and attribute it to their nature. If it were biological, maybe biological intervention should be considered. But there are men who do not rape women who have nothing wrong with their hormones. If it were evolutionary, men would have to evolve differently. But there are men who are made sick by pornography and do not eroticize their revulsion who are not underevolved. I think it is political and its politics construct the deep structure of society. This social status, in which we can be used and abused and trivialized and humiliated and bought and sold and passed around and patted on the head and put in place and told to smile so that we look as though we're enjoying it all, is not what some of us have in mind as the limits of sex equality.

This second approach—which is not abstract, which is at odds with socially imposed reality, and therefore does not look like a standard according to the standard for standards—became the implicit model for racial justice applied by the courts during the sixties. It has since eroded with the erosion of judicial commitment to racial equality. It was based on the realization that the condition of Blacks in particular was not fundamentally a matter of rational or irrational differentiation on the basis of race, but was fundamentally a matter of white supremacy[34], under which racial differences became invidious as a consequence. To consider gender in this way, observe again that men are as different from women as women are from men, but the sexes are not equally socially powerful. To be on the top of a hierarchy is certainly different from being on the bottom, but that is an obfuscatingly neutralized way of putting it, as a hierarchy is a great deal more than that. If gender were merely a question of difference, sex inequality would be a problem of mere sexism, of mistaken differentiation, of inaccurate categorization of individuals. This is what the difference approach thinks it is, and is therefore sensitive to. But if gender is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place, sex inequality questions are questions of systematic dominance, of male supremacy, which is not at all abstract and is anything but a mistake.

Looking at the difference approach and the dominance approach in light of each other clarifies some otherwise confusing tensions in sex equality debates. If you look at the world of the difference approach from the point of view of the dominance approach, it becomes clear that the difference approach adopts the point of view of male supremacy on the status of the sexes. Simply by treating the status quo as "the standard," it invisibly and uncritically accepts as its norm the arrangements under male supremacy. In this sense, the difference approach is masculinist, although it can be expressed in a female voice, and the dominance approach is feminist, in that

it sees and criticizes the inequalities of the social world from the standpoint of the subordination of women to men.

If you look at the world as the dominance approach imagines it, through the lens of the difference approach, that is, if you try to see real inequality through a lens that has difficulty seeing an inequality as an inequality if it also appears as a difference, demands for change in the distribution of power appear as demands for special protection. This is because the only tools that the difference paradigm offers to comprehend disparity equate the recognition of a gender line with an admission of lack of entitlement to equality under law. Since it confronts equality questions primarily as matters of empirical fit,[35] i.e., as matters of accurately shaping legal rules (implicitly modeled on the standard men set) to the way the world is (also implicitly modeled on the standard men set), any existing differences must be negated to merit equal treatment. As much for ethnicity as for gender, it is basic to mainstream discrimination doctrine to preclude true diversity among equals or true equality within diversity.

It further follows that, to the difference approach, any attempt to change the way the world actually is looks like a moral question requiring a separate judgment of how things ought to be. It imagines that civil rights poses the following disinterested question that can be resolved neutrally with regard to groups: against the weight of empirical difference, should we treat some as the equals of others, even when they may not be entitled to it because they are not up to standard? The dominance approach unmasks this construction of the problem as part of the problem of social inequality itself. To the dominance approach, the foundation of civil rights is not moral. If sex inequalities are approached as matters of imposed status, which are in need of change if a legal mandate of equality means anything at all, whether women should be treated unequally means simply whether women should be treated as less. Once exposed as a naked power question, there is no question as to whether it might be a good idea to treat women as less. There is, therefore, no separable question of what ought to be. The only question is what is and is not a gender question. Once no amount of difference justifies treating women as subhuman, eliminating that is what equality law is for. In this shift of paradigms, equality propositions become no longer propositions of good and evil, but of power, and powerlessness, no more disinterested in their origins or neutral in their arrival at conclusions than are the problems they address.

There came a time in Black people's movement for equality in this country when slavery stopped being a question of how it could be justified and became a question of how it could be ended. Racial disparities surely existed or racism would have been harmless, but at that point—a point not yet reached for issues of sex—no amount of group difference mattered any more. This is the same point at which a group's characteristics, including empirical attributes, become constitutive of the fully human, rather than being defined, as before, as exceptions to or by distinction from the fully human. It incarnates partial standards to one-sidedly measure one group's differences against a standard set by the other. The point at which one's particular qualities become part of the standard by which humanity is measured is a millennial moment.

To summarize the argument: seeing sex equality questions as matters of reasonable or unreasonable classification is part of the way male dominance is expressed in law. If you follow my shift in perspective from gender as difference to gender as dominance, gender changes from a distinction that is presumptively valid to a detriment that is presumptively suspect. The difference approach tries to map reality where the dominance approach tries to challenge and change it. In the dominance approach, sex discrimination stops being a question of morality and starts being a question of politics.

You can tell if sameness is your standard for equality if my critique of hierarchy looks like a request for special protection in disguise. It is not. It envisions a change that would make possible a simple equal chance for the first time. To define the reality of sex as difference and the warrant of equality as sameness not only guarantees that sex equality will never be achieved, it is wrong on both counts. Doctrinally speaking, the deepest problems of sex inequality do not find women "similarly situated"[36] to men, far less do they require intentionally discriminatory acts.[37] They merely require the status quo to be maintained. As a strategy for maintaining social power, first arrange social life unequally. Then permit only those who are already situated as equals to complain about it. Structure perception so that different means inferior. Then require that the only one who illegally discriminates is the one who, when he disadvantages someone different, *knows* he is treating a true equal as less.

Give women equal power in social life. Let what we say matter; then we will discourse on questions of morality. Take your foot off our necks; then we will see in what tongue women speak. So long as sex equality is limited by sex difference, whether you like it or don't like it, whether you choose to value it or to ignore it, whether you stake it out as a grounds for feminism or occupy it as the terrain of misogyny, women will be born, degraded, and die. We would settle for that equal protection of the laws under which one could be born, live, and die, without protection being a dirty word and equality bring a special privilege.

Notes

1. The Bona Fide Occupational Qualification (BFOQ) exception to Title VII of the Civil Rights Act of 1964, 29 C.F.R. 1604, permits sex to be a job qualification when it is a valid one. The leading interpretation of the proposed federal Equal Rights Amendment would, pursuing a similar analytic structure, permit a "unique physical characteristic" exception to its otherwise absolute embargo on taking sex into account. Brown, Emerson, Falk, Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," *Yale Law Journal* 80 (1971): 893.
2. Title VII of the Civil Rights Law of 1964; *Phillips* v. *Martin-Marietta*, 400 U.S. 542 (1971); *Frontiero* v. *Richardson*, 411 U.S. 484 (1974) is the high water mark. See also *Los Angeles* v. *Manhart*, 435 U.S. 702 (1978); *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983).
3. Title IX of the Education Amendments of 1972; *Cannon* v. *University of Chicago*, 441 U.S. 677 (1981); *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982); see also *De La Cruz* v. *Torney*, 582 F.2d 45 (1978).
4. Actually, women appear to lose most academic sex discrimination cases that go to trial, although I do not know of a statistical study on the subject. A case that won eventually, elevating the standard of proof in the process, is *Sweeney* v. *Board of Trustees of Keene State College*, 439 U.S. 29 (1979). The ruling for the plaintiff on remand was affirmed at 604 F.2d 106 (1979).
5. *Hishon* v. *King & Spaulding*, 467 U.S. 69 (1984).
6. See *Vanguard Justice* v. *Hughes*, 471 F. Supp. 670 (D. Md. 1979); *Meyer* v. *Missouri State Highway Commission*, 567 F. 2d 804, 891 (8th Cir. 1977); *Payne* v. *Travenol Laboratories Inc.*, 416 F. Supp. 248 (N.D. Miss., 1976). See

also *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements for prison guard jobs invalidated as sex discrimination).

7. *Frontiero* v. *Richardson*, 411 U.S. 484 (1974); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975).
8. This situation is relatively complex. See *Gomes* v. *R.I. Interscholastic League*, 469 F. Supp. 659 (D. Rhode Island, 1979); *Brenden* v. *Independent School District*, 477 F.2d 1292 (8th Cir. 1973); *Hollander* v. *Connecticut Interscholastic Athletic Conference* (Conn. Sup. Ct. 1971); *O'Connor* v. *Board of Education of School District No. 23*, 645 F.2d 578 (7th Cir. 1981); *Cape* v. *Tennessee Secondary School Athletic Association*, 424 F. Supp. 732 (E.D. Tenn. 1976), rev'd. 563 F.2d 793 (6th Cir. 1977); *Yellow Spring Exempted Village School District Board of Education* v. *Ohio High School Athletic Association*, 443 F. Supp. 753 (S.D. Ohio 1978); *Aiken* v. *Lieuallen*, 593 P.2d 1243 (Or. App. 1979).
9. *Rostker* v. *Goldberg*, 453 U.S. 57 (1981). See also L. Kornblum, "Women Warriors in a Men's World: The Combat Exclusion," *Law & Inequality: A Journal of Theory and Practice* 2 (1984).
10. D. Cole, "Strategies of Difference: Litigating for Women's Rights in a Man's World," *Law & Inequality: A Journal of Theory and Practice* 2 (1984): 34 n. 4 (collecting cases).
11. *Devine* v. *Devine*, 398 So. 2d 686 (Ala. Sup. Ct. 1981); *Danielson* v. *Board of Higher Education*, 358 F. Supp. 22 (S.D.N.Y. 1972); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Stanley* v. *Illinois*, 405 U.S. 645 (1971); *Coban* v. *Mohammed*, 441 U.S. 380 (1979); *Orr* v. *Orr*, 440 U.S. 268 (1979).
12. L. Weitzman, "The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards," *U.C.L.A. Law Review* 28 (1982): 1181, 1251, documents a decline in women's standard of living of 73 percent and an increase in men's of 42 percent within a year after divorce.
13. Equal Pay Act, 29 U.S.C. 206 (d) (1) (1976). See generally *Schultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (1970); *Corning Glass Works* v. *Brennan*, 417 U.S. 18 (1974); *I.U.E.* v. *Westinghouse*, 631 F.2d 1094 (1980), cert. denied 452 F.2d 353 (8 Cir. 1981).
14. Examples include *Christenson* v. *State of Iowa*, 563 F.2d 353 (8th Cir. 1977); *Gerlach* v. *Michigan Bell Tel Co.*, 501 F. Supp. 1300 (E.D. Mich. 1980); *Odomes* v. *Nucare, Inc.*, 653 F.2d 246 (6th Cir. 1981) (female nurse's aide denied Title VII remedy because her job duties were not substantially similar to those of better paid male orderly); *Power* v. *Barry County, Michigan*, 539 F. Supp. 721 (W.D. Mich. 1982).
15. *County of Washington* v. *Gunther*, 452 U.S. 161 (1981), permits a comparable worth-type challenge where pay inequality can be proven to be a correlate of intentional job segregation. See also *Lemons* v. *City and County of Denver*, 17 FEP 910 (D. Colo. 1978), 620 F.2d 228 (10 Cir. 1977), cert, denied, 449 U.S. 888 (1980); *AFSCME* v. *State of Washington*, 770 F.2d 1401 (9th Cir. 1985). See generally C. Pint, "Value, Work and Women," *Law & Inequality: A Journal of Theory and Practice* 1 (1983).
16. Combine *Bob Jones University* v. *United States*, 461 U.S. 547 (1983) with *Vorcheimer* v. *School District of Philadelphia*, 532 F.2d 880 (1976).
17. *Miller-Wohl* v. *Commissioner of labor*, 515 F. Supp. 1264 (D. Mon. 1981), vacated and dismissed, 685 F.2d 1088 (9 Cir. 1982). *California Federal Savings and Loan Assn.* v. *Guerra*, 758 F.2d 390 (9th Cir. 1985), cert. granted 54 U.S.L.W. 3460.
18. Most women work at jobs mostly women do, and most of those jobs are paid less than jobs that mostly men do. See, e.g., Pint, "Value, Work and Women," pp. 162-63, notes 19 and 20 (collecting studies).
19. *Phillips* v. *Martin-Marietta*, 400 U.S. 542 (1971).
20. *Reed* v. *Reed*, 404 U.S. 71 (1971) (statute barring women from administering estates is sex discrimination). If no women were taught to read and write, as used to be the case, the gender difference would not be imaginary in this case, yet the social situation would be even more sex-discriminatory than it is now.
21. *Kahn* v. *Shevin*, 416 U.S. 351, 353 (1974).
22. *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975).
23. *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); see also *Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464 (1981).
24. *Doerr* v. *B. F. Goodrich*, 484 F. Supp. 320 (N.D. Ohio 1979). W. Williams, "Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII," *Georgetown Law Journal* 69 (1981).
25. Congress requires the Air Force (10 U.S.C. Section 8549 (1983)) and the Navy (10 U.S.C. Section 6015 (1983)) to exclude women from combat, with some exceptions. *Owens* v. *Brown*, 455 F. Supp. 291 (D.D.C. 1978) had previously invalidated the prior Navy combat exclusion because it prohibited women from filling jobs they could perform and inhibited Navy's discretion to assign women on combat ships. The Army excludes women from combat based upon its own policies under congressional authorization to determine assignment policies (10 U.S.C. Section 3012 (e) (1983)).
26. C. Gilligan, *In a Different Voice* (Cambridge: Harvard University Press, 1982).
27. Ibid.

28. I argued this in Appendix A of *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979). That book ends with "Women want to be equal and different, too." I could have added "Men are." As a standard, this would have reduced women's aspirations for equality to some corresponding version of men's actualities. But as an observation, it would have been true.
29. D. Russell and N. Howell, "The Prevalence of Rape in the United States Revisited," *Signs: Journal of Women in Culture and Society* 8 (1983) (44 percent of women in 930 households were victims of rape or attempted rape at some time in their life).
30. D. Russell, "The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children," *Child Abuse and Neglect: The International Journal* 7 (1983).
31. R. Emerson Dobash and Russell Dobash, *Violence Against Wives: A Case Against the Patriarchy* (New York: Free Press, 1979), *Bruno* v. *Codd*, 396 N.Y.S. 2d 974 (Sup. Ct. 1977).
32. K. Barry, *Female Sexual Slavery* (Englewood Cliffs, N.J.: Prentice-Hall, 1979); Griffin, "Wives, Hookers and the Law: The Case for Decriminalizing Prostitution," *Student Lawyer* 10 (1982); Report of Jean Fernand-Laurent, Special Rapporteur on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (a United Nations report), in *International Feminism: Networking Against Female Sexual Slavery* 130 (K. Barry, C. Bunch, S. Castley, eds., 1984) (Report of the Global Feminist Workshop to Organize Against Traffic in Women, Rotterdam, Netherlands, April 6-15, 1983).
33. Galloway and Thornton, "Crackdown on Pornography–A No-Win Battle," *U.S. News and World Report*, June 4, 1984, p. 84. See also "The Place of Pornography," *Harper's*, November 1984, p. 31 (citing $7 billion per year).
34. *Loving* v. *Virginia*, 388 U.S. 1 (1967) first used the term "white supremacy" in invalidating an antimiscegenation law as a violation of equal protection. The law equally forbade whites and Blacks to intermarry.
35. The scholars Tussman and tenBroek first used the term "fit" to characterize the necessary relation between a valid equality rule and the world to which it refers. Tussman and tenBroek, "The Equal Protection of the Laws," *California Law Review* 37 (1949).
36. *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920): "[A classification] must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed*, 404 U.S. 71 (1971): "Regardless of their sex, persons within any one of the enumerated classes ... are similarly situated ... By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause."
37. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979).