Packet for the New English 306 Syllabus

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This packet contains materials we plan to use in English 306, the required undergraduate course in Rhetoric and Composition at The University of Texas at Austin. The new, standardized syllabus, "Writing about Difference," invites and teaches students to examine in their writing the arguments made in the essays, civil rights laws, and court opinions that have been selected for the course.

The Syllabus for the course, including Writing Assignments and Script Assignments (brief written assignments), is the result of the collaborative efforts of the faculty and graduate students who generously volunteered to work on the 1990-1991 syllabus over the summer.[1] Our pedagogical approach to argumentation, warranting the grounds offered in support of claims, is adapted from Stephen Toulmin's The Uses of Argument (New York: Cambridge University Press, 1958) and the second edition of An Introduction to Reasoning (New York: MacMillan, 1984), by Stephen Toulmin, Richard Rieke, and Allan Janik. Last May, instructors scheduled to teach the new E306 syllabus were also given a packet of readings which included "Reference Discourse," the chapter from James Kinneavy's A Theory of Discourse (New York: Norton, 1971) explaining the uses of "exploratory discourse" in the kinds of expository prose students will be learning to write and read. Instructors will use Kinneavy's work on exploratory discourse, along with the material adapted from Toulmin's on argumentation, to teach students how to conduct civil discussions in class as well as how to identify and explore argumentative possibilities in the works they read and write.

I have also included in this packet photocopies of the court opinions we plan to use in the course. The syllabus calls for all students to read and write on "Sweatt v Painter," and then for each group of five students (five groups per class) to work on and present one case to the class. In addition to "Sweatt," six cases rather than five are included, since instructors will decide whether to use "Frick v Lynch" or "Lantz by Lantz v Ambach." Where permissions have been granted, I have included photocopies of the

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[1] The members of the E 306 Syllabus Writing Group are: Linda Brodkey, Margaret Downs-Gamble, David H. Ericson, Shelli Fowler, Dana Harrington, Susan Sage Heinzelman, Sara Kimball, Allison Mosshart, Stuart Moulthrop, Richard Penticoff, and John Slatin.

essays we plan to use in the course. Where permissions have been requested but not yet granted, I have included a complete reference in lieu of the essay. The syllabus asks all students to read and write on the three essays by Martha Minow, Peggy McIntosh, and Richard Kluger, and then asks each student to read and write on the essay accompanying the group case. The last writing assignment presents students with a new situation and asks them to write an argument in support of their opinion about how the problem should be resolved. I have not included the material we were thinking about using for the "brief," which we were in the process of preparing when we learned that the course would be postponed for a year.

The civil laws which most readily apply to the cases we plan to use in the course are not in this packet. They include:

The First and the Fourteenth Amendments to the Constitution;
Title VII of the Civil Rights Act of 1964;
Title IX of the Education Amendment of 1972;
The Rehabilitatin Act of 1973; and
The Pregnancy Discrimination Act of 1978.

The materials to be used in a course can only provide an idea of what those who actually take it and teach it are likely to experience. However, in light of the controversy generated since the Lower Division English Policy Committee, after full discussion, voted to implement a standardized E 306 syllabus in the Fall of 1990, even a partial understanding of the pedagogy by which we plan to teach writing via sustained inquiry into arguments raised by cases concerning discrimination is better than none at all.

Tentative Syllabus
Fall Semester 1990
Linda Brodkey

E 306: Rhetoric and Composition
"Writing About Difference"

Required Texts:
The Scott, Foresman Handbook for Writers (HB)
English 306: Rhetoric and Composition Course Packet (available at Alphagraphics)

NOTE: Syllabus indicates the number of copies of each assignment needed in addition to the original

Week 1

Wed. 8/29

Class activity:
Course Overview
Syllabus
Policy Statement
Scholastic Honesty Statement

Fri. 8/31

Reading Assignment:
Martha Minow, "Introduction," Making All the Difference (due 9/5)
HB, Planning, 34-44; Summarizing, 602-605; Sexist Language, 402-409; Denotation/Connotation, 158-162 (due Fri 9/7)

Script Assignment 1
issue raised in Minow (50 words, 1 cc due Wed 9/5)

Library Assignment:
UGL Tour (due Wed 9/5)

Class Activity:
In-class Writing Assignment 1 (35-40 minutes)

Week 2

Mon. 9/3 Labor Day (no class)

Wed. 9/5

Class Activity:
Turn in 1 copy of Script 1
Summarizing re: claims and grounds

Demonstrate using Minow essay assigned on 8/31
Assign Students to Writing Groups

Writing Assignment 1:
Summary of assumption in Minow essay (1 copy to Instructor, 4 copies for Writing Group, due Mon 9/10)

Fri. 9/7

Writing groups
Plan summaries of Minow section

Week 3

Mon. 9/10

Class Activity
Turn in 5 copies of Writing Assignment 1
Discussion: sorting & ranking summaries of Minow
Writing Group
sorting and ranking summaries of Minow
Writing Assignment 2 (Group Assignment)
Group Summary of Assumption in Minow essay (1 copy, due Fri 9/14)

Wed. 9/12

Reading Assignment
McIntosh, "White Privilege and Male Privilege" (due Mon 9/17)
Script Assignment 2
Working definition of difference re Minow (@100 words, 1cc due Wed 9/14)
Writing Group
Sorting and Ranking summaries of Minow

Fri. 9/14

Class Activity
Turn in 1 copy of Writing Assignment 2
Turn in 1 copy of Script 2
Discussion of Minow essay:
Part I (group summaries);
Part II (defining difference)

Script Assignment 3
Working definition of privilege re McIntosh (@100 words, 1 cc due Mon 9/17)
Reading Assignment:
HB, Bibliography, 593-601; 602-605 (due Wed 9/19)
Writing Assignment 3

Documented essay analyzing a stereotype(2 cc due Mon 9/24)

Week 4

Mon. 9/17

Class Activity

Turn in 1 copy of Script 3

Discussion of "White Privilege and Male Privilege" (re: claims and grounds for definitions)

Reading Assignment

HB: MLA Documentation (23 C) 638--671 (due Wed 9/19

Wed. 9/19

Class Activity

Discussion: Documenting sources

Writing Groups:

explore arguments for Writing Assignment 3

Script Assignment 4

Compiling a documented lexicon of legal terms (1 cc due Mon 10/1)

Fri. 9/21

Class Activity

Discussion: exploring arguments for Writing Assignment 3

Writing Group

exploring arguments for Writing Assignment 3

Reading Assignment

"The Spurs of Texas Are upon You" (due Wed 9/26)

Fourteenth Amendment (due Wed 9/26)

"Sweatt v Painter" (due Fri 9/28)

Script Assignment 5

claim and ground from "The Spurs" (50 words, 1 cc due Wed 9/26)

WEEK 5

Mon. 9/24

Class Activity

Turn in 2 copies of Writing Assignment 3 (complete draft; revision due Mon 10/8)

Discussion: Critiques

Critique Assignment 1

Critique of Writing Assignment 3 (2 cc, due Fri./ 9/28)

Writing Groups

Exchange copies of Writing Assignment 3 (draft essays)

Begin critiques of Writing Assignment 3 (draft essays) (2 cc of critiques due Fri 9/28)

Wed. 9/26

Class Activity

Turn in 1 copy of Script 5

Discussion: Claims & Grounds in "The Spurs of Texas"

Fri. 9/28

Class Activity

Turn in 2 copies of critique of Writing Assignment 3

Discussion: "Sweatt v Painter"

Reading Assignment

Group case (due Wed 10/10)

essay related to the case (due Wed 10/10)

First Amendment, Title VII, Title IX, Rehabilitation Act, Pregnancy Discrimination Act (due Mon 10/8)

Script Assignment 6

Summary of claims and grounds of plaintiff's argument in Sweatt" (1 cc due Mon 10/1)

WEEK 6

Mon. 10/1

Class Activity

Turn in 1 copy of Script 6

Turn in 1 copy of Script 4 (legal lexicon)

Discussion: The plaintiff's argument in "Sweatt"

Reading Assignment

HB: "How to Write a Review," 762-767 (due Wed 10/3)

Script Assignment 7

Summarize the claims and grounds of the defendant's argument in "Sweatt" (1 cc due Wed 10/3)

Wed. 10/3

Class Activity

Turn in 1 copy of Script 7

Questions: Reviewing

Discussion: The defendant's argument in "Sweatt"

Writing Assignment 4

Review the essay assigned to the Group (2 cc of draft due Mon 10/15)

Script Assignment 8

Summarize the claims and grounds of the Court's opinion in "Sweatt" (1 cc due Fri 10/5)

Fri. 10/5

Class Activity
Turn in 1 copy of Script 8
Discussion: The Court's opinion in "Sweatt"

WEEK 7

Mon. 10/8

Class Activity
Turn in 2 copies of revised Writing Assignment 3
Discussion: Anti-discrimination law

Wed. 10/10

Class Activity
Questions: Anti-discrimination law
Exploring Arguments for review essay

Fri. 10/12

Class Activity
Questions: review essay
Writing Group
Exploring arguments for review essay

WEEK 8

Mon. 10/15

Class Activity
Turn in 2 draft copies of Writing Assignment 4
Critique Assignment 2
Critique of Writing Assignment 4 (2 cc due Fri 10/19)
Writing Group
Work on critiques

Wed. 10/17

Writing Group
Continue working on critiques

Fri. 10/19

Class Activity
Turn in 2 copies of critique 2

Writing Assignment 5
Summarize & assess the arguments of the Plaintiff, the Defendant, and the Court in the case assigned to your group (1 cc due Mon 10/29)
Writing Group
Work on Writing Assignment 5

WEEK 9

Mon. 10/22

Class Activity
Analyzing arguments
Script Assignment 9
Summary and assessment of plaintiff's or defendant's argument in the Group Case (@100 words, 1 cc due Wed 10/24)

Wed. 10/24

Class Activity
Turn in 1 copy of Script 9
Discussion: Plaintiff's or defendant's argument
Script Assignment 10
Brief summary and assessment of argument in the court opinion or dissenting opinion (@100 words,
1 cc, due Fri 10/26)
Writing Group
Discussion: summarizing and assessing the court opinion(s)

Fri. 10/26

Class Activity
Turn in 1 copy of Script 10
Discussion: arguments in the court opinion(s)
Group Presentation Assignment:
Presentations are to include
Summaries of arguments
Assessments of arguments
Relevant essays
Positions of all group members
Arguments not considered by the court
(1 cc due 11/12-21).

WEEK 10

Mon. 10/29

Class Activity
Turn in 1 copy of Writing Assignment 5
Writing Assignment 6

Write an opinion based on the transcript (1 draft cc due Mon 11/9)

Writing Group

Plans for Writing Assignment 6

Wed. 10/31

Class Activity

Discussion: Formulating an opinion

Writing Group

Discussion of opinions

Fri. 11/2

Class Activity

Discussion: Formulating an opinion

WEEK 11

Mon. 11/5

Class Activity

Library/Group Conferences with Instructor

Wed. 11/7

Class Activity

Library/Group Conferences with Instructor

Fri. 11/9

Class Activity

Turn in 1 copy of Writing Assignment 6 to Writing Group

Critique Assignment 3 (2 cc due Wed 11/14)

Writing Group

Exchange drafts

Begin Critiques

WEEK 12

Mon. 11.12

Writing Group 1

Present Case

Wed. 11/14

Class Activity

Turn in 2 copies of Critique

Writing Group 2

Present Case

Fri. 11/16

Writing Group 3

Present Case

WEEK 13

Mon. 11/19

Writing Group 4
Present Case

Wed. 11/21

Writing Group 5
Present Case

Fri/ 11/23

THANKSGIVING!!

WEEK 14

Mon. 11/26

Class Activity:
Turn in 2 copies of Writing Assignment 6 (Groups exchange)
Critique Assignment 4 (2 cc due Fri 11/30)

Wed. 11/28

Writing Group:
Work on Critique 4

Fri/ 11/30

Class Activity
Turn in 2 copies of Critique 4

WEEK 15

Mon. 12/3

Class Activity
Discussion: opinions

Wed. 12/5

Class Activity
Course Evaluation

Fri. 12/7

Class Activity:
In-class Writing Assignment 2

Tentative Script Assignments for E306

Script Assignment 1

Cite a passage from Martha Minow's essay (give the page number) and explain (@ 50 words) why you think it's worth thinking about.

Script Assignment 2

Explain (@ 50 words) which of Minow's arguments against the five assumptions about difference you find the most or least convincing.

Script Assignment 3

Make a list of 5 privileges (similar to the ones generated by Peggy McIntosh) that people who either see or hear do not have to think about or explain.

Script Assignment 4

Define (@25 words) the legal terms assigned to you by checking the recommended sources in the Undergraduate Library. Since your definition is part of the lexicon for the class (which your instructor will duplicate), you need to define each term on a separate page and cite the sources used to compose the definition.

Script Assignment 5

Summarize (@ 50 words) one claim and its grounds from Richard Kluger's "The Spurs of Texas Are upon You" and explain (@ 50 words) why you think it is worth thinking about.

Script Assignment 6

Summarize (@ 50 words) a principal claim and its grounds in the plaintiff's argument in "Sweatt v Painter."

Script Assignment 7

Summarize (@ 50 words) a principal claim and its grounds in the defendant's argument in "Sweatt v Painter."

Script Assignment 8

Summarize (@ 50 words) a principal claim and its grounds in the argument made by the Supreme Court reversing the decision made by the Lower Court in "Sweatt v Painter."

Script Assignment 9

Summarize and assess (@ 100 words) one of the primary claims and its grounds in either the plaintiff's or the defendant's argument in the case assigned to your group.

Script Assignment 10

Summarize and assess (@ 100 words) one of the primary claims and its grounds in the deciding opinion, minority opinion, or dissenting opinion in the case assigned to your group.

Tentative E306 Writing Assignments

Writing Assignment 1

Martha Minow challenges what she identifies as "five, closely related assumptions that underlie difference dilemmas" (p. 106). Summarize the argument that Minow makes against the assumption assigned to your group.

This assignment requires you to

1) identify the claim Minow makes concerning the (un)stated assumption underlying "difference," and

2) identify the grounds (or evidence) she uses to support her claim that the assumption is problematic, that is, open to doubt.

Once you have identified the claim Minow asserts and the grounds she uses in support of her assertion, you will be able to write a 200-300 word summary of her argument against the assumption.

Group 1--Assumption #1: Difference Is Intrinsic
Group 2--Assumption #2: The Unstated Norm
Group 3--Assumption #3: The Observer Can See without a Perspective
Group 4--Assumption #4: The Irrelevance of Other Perspectives
Group 5--Assumption #5: The Status Quo Is Natural, Uncoerced, and Good

Writing Assignment 2 (Group Assignment)

Working with the summaries each of you has already written, your writing group will develop a collective summary that best represents Minnow's argument against the assumption assigned to your group. The group summary you turn in will be distributed to the other members of the class.

This assignment requires each of you to:

1) Read the five summaries written by the group members.
2) Rank the summaries.
   Assign each summary a score. Give a 1 to the summary you think is best, a 2 to the second best, and so on. Assign each summary a different score even if you feel that two or more are comparable.
3) Name the criterion or criteria that you think is govering your ranking.

Once the summaries have been individually ranked, members of the group need to compare their rankings and discuss the criteria governing their selections. At least one member of the group needs to take notes. As a group you will then need to decide which criterion or criteria to use in constructing the group summary.

The summary you turn in as a group may well include passages from one or all of your individual summaries, or you may decide to write a new summary based on your rankings and discussions. The final version should be @ 200-300 words. Append a brief statement (@50 words) explaining the criterion or criteria used to create the group summary along with the notes taken during your group discussions.

Writing Assignment 3

Write a documented essay of @ 700 words defining, examining, analyzing, and critiquing one of the stereotypes (an oversimplified belief or opinion about a person or group of people) assigned to your group. Apply what you've learned concerning unexamined assumptions about difference to explore problems raised by the stereotype.

This assignment requires each of the you to:

1) choose one of the stereotypes assigned to your group (see below)
2) generate a list of characteristics associated with the stereotype
3) research the stereotype by
    a. locating books and periodicals that complicate the "stereotype"
    b. keeping a bibliographic record of your sources (see HB, 593-601, if you need help)
    c. copying materials from sources you think you might want to cite in your essay (see HB, 602-605, if you need help).
4) discuss your list and research with the other members of your group

The draft of this essay needs to include:
1) a definition of the stereotype,
2) an analysis of insights and limitations of that commonly accepted definition, incorporating information from your library sources, and
3) a critique of unstated assumption(s) not dealt with by the stereotype, incorporating information from Minow's essay.

Group 1: Unwed mother/Philanthropist/Pregnant Teen/Role Models

Group 2: Blind man/Blind woman/Handicapped Individual/Activist

Group 3: Homosexual/Heterosexual/The Perfect Date/Good Student

Female Athletes/Male Athletes/Good Sport/Jock

Group 4: Asian Woman/Professor/MBA/Bureaucrat

Group 5: Foreigner/ English speaker/ Hispanic/Employee

Writing Assignment 4

Reviews of academic books and essays are a specialized genre. For this assignment, each of you will write a 500-700 word review essay of the article assigned to your group. Because scholarly writing concentrates on convincing readers that the evidence used to ground claims is warranted, the purpose of a review is to evaluate how well a particular book or essay has accomplished this goal.

This assignment requires you to:

1) reread the article
2) select what you think are the principal claims
3) identify the grounds used to support the principal claims
4) assess how well the grounds warrant the claims made.

Write a title for your review and begin your essay with a full citation of the article. See HB (647-668): citing articles and chapters from books. In the review itself, construct an argument evaluating the effectiveness of the entire article. Support your position by assessing how well the grounds supporting the principal claims are warranted.

Writing Assignment 5

A court opinion summarizes and evaluates the arguments made by the plaintiff and defendant and provides a rationale for affirming or denying the case made by the plaintiff. An opinion may consist of one or more of the following:

1) the argument that supports the court's decision (majority opinion);
2) an argument that dissents from the argument in the majority opinion but supports the court's decision (minority opinion); and
3) an argument that dissents from both the opinion and the decision of the court (dissenting opinion).

If your group has been assigned a case in which there is a majority opinion, a minority opinion, and a dissenting opinion, focus on one in your essay.

Building from the work you've already done in Scripts 9 and 10, this assignment requires you to:

1) reread the case assigned to your group
2) choose an opinion (if there is more than one)
3) reread the relevant law(s)
4) identify the principal claims and grounds in the opinion
5) assess how well the grounds warrant the principal claims in the opinion.

Write an essay of @ 700 words summarizing and evaluating an opinion in the case assigned to your group. Summarize the opinion before assessing the grounds used to warrant the argument.

Writing Assignment 6

A legal opinion is an argument explaining the court's reasons for finding in favor of the the plaintiff or defendant. In its argument the court applies principles of law to specific cases. Forming an opinion is first a matter of deciding to what extent the complaint against the defendant is justified by law(s) and then deciding to what extent the circumstances of a particular case mitigate law(s). Arguments for both the relevance of legal principles and mitigating circumstances concern warranting the grounds used to support the claim(s) made to justify the decision.

This assignment requires you to:

1) read the materials (the brief and possible laws)
2) summarize the plaintiff's case
3) summarize the defendant's case
4) evaluate the plaintiff's case with respect to law
5) evaluate the defendant's case with respect to law
6) evaluate the plaintiff's case with respect to circumstances
7) evaluate the defendant's case with respect to circumstances
8) decide in favor of the plaintiff or defendant
9) formulate an argument supporting your opinion

Write an opinion (@ 500-700 words) in which you give your reasons for finding in favor of the plainfiff or defendant. Your opinion needs to take into account both a legal principle and the circumstances of the case. You may, if you wish, use additional materials for establishing circumstances. You are, however, restricted to either the laws provided for the case or the others in your Course Packet, since undergraduates are not allowed to use the Law Library.

MARTHA MINOW

Making All the Difference

INCLUSION, EXCLUSION, AND AMERICAN LAW

Cornell University Press

Ithaca and London

Making a Difference

Doesn't everything divide us?

—Quoted in Faith Conlon et al.,
The Things That Divide Us

The children's television show *Sesame Street* instructs with animation, skits, and songs. As one song asks, "Which one of these things is not like the others?" The screen depicts a group of items, perhaps a chair, a table, a cat, and a bed. By asking young viewers to pick out the items that do not belong with the rest of the group, the song helps them sharpen their vocabulary, perception, and analysis of objects in the world.

I often tell people that if you master this *Sesame Street* episode, you have started to think like a lawyer. For much of legal reasoning demands familiarity with legal terms, practice in perceiving problems through categories, and acceptance of the consequences assigned to particular legal categories. Consider a collision of two automobiles at an intersection of two busy streets. The traditional law of accidents, known as tort law, asked who was at fault in the accident. An answer to this question would also yield an answer to the question of who should pay for it. The law then defined fault: a person would be at a fault whose own actions or failures to act caused the injury, and whose actions or failures to act were "negligent." Negligence, in turn, was defined as a failure in a duty to take adequate care, with the duties of care specified according to who the actor was and what he or she was doing. A driver of an automobile would be negligent for failing to drive at the legal speed or failing to observe traffic signals. Legal analysis would fit the facts about the collision into this latticework of definitions. Arguments could then be channeled into the specific issues focused by the legal terms: was the driver of the blue car negligent? Or was there a separate cause, such as the second driver's own negligence, or perhaps a child who ran into the street and led the first driver to swerve to avoid her? Each of these questions could

be answered yes or no, and each answer would signal consequences about who should be held liable and who must pay.

The fault-based approach highlights the way legal analysis simplifies the world. The categories of negligence and cause might seem infinitely malleable. Certainly, in the abstract, we could debate a variety of duties people may owe to one another when driving cars; we could also identify an infinite chain of causes and effects, preceding the births of the drivers and extending long into the future. But legal analysis contracts such discussions by sharpening the definitions and by referring back to precedents: prior judicial decisions ruling on the meanings of negligence and causation in similar contexts. The lawyers turn to these precedents to engage directly in a *Sesame Street* analysis: which of the precedents does the current case resemble? Is it like the prior decision declaring it nonnegligent conduct for a driver cruising at the legal speed to fail to slow down at the intersection? Or does it more comfortably belong with the case declaring it negligent conduct for the driver to fail to slow down at the intersection when it was raining? Legal analysis is a process of perceiving and selecting traits of a given conflict, and analogizing and distinguishing prior decisions. Legal rules announced in statutes and in judicial opinions provide definitions and categories; legal precedents appearing in prior court judgments provide constellations of fact patterns and competing normative rules that allow advocates to fit a new case to the rule—or to an exception. And the basic method of legal analysis requires simplifying the problem to focus on a few traits rather than the full complexity of the situation, and to use those traits for the comparison process with both the governing rule and the precedents that could apply.

When framed for judicial resolution, this legal analysis casts the problem in either/or terms: the plaintiff was either negligent or not; the plaintiff either wins or loses. A premise of the judicial system is that the truth will best emerge and justice will be served if two adversaries fully and aggressively present the competing versions of the case. The judge then selects the winning side. There are, however, other ways to analyze and judge the event.[1] One alternative would reject the idea that cause can be located in one actor, trying instead to apportion the contribution of fault manifested by both drivers and allocating the costs from the accident accordingly.[2] This approach could even subtract from the total damages that portion of the damages would be the fault of neither one. Another approach would reject altogether the idea

[1]Beyond the approaches described in the text, we might view the accident as fated: the losses fall where they fall. This approach has characterized law in contexts where particular actors are thought to owe no duty to others arising from their own conduct; it has become unpopular, and unlikely, in this era in which victims have trouble protecting themselves from the onslaught of complex technologies beyond their control.

[2]One rule, still used in many jurisdictions, assessed the fault of the different drivers only to defeat the lawsuit of a complainant whose "contributory negligence" was demonstrated; see *Restatement (Second) of Torts* (St. Paul, Minn.: American Law Institute, 1965), sec. 467. A more recent version, "comparative negligence," provides for the assessment and allocation described in the text. See Victor E. Schwartz, *Comparative Negligence*, 2d ed. (Indianapolis, Ind.: A. Smith, 1986).

that liability and payment should rest on fault, and instead tax all drivers (or demand their own private purchase of insurance) to create a pool of money for distribution based on the predictable level of accidents in the particular community.[3] These alternative theories have indeed become prevalent for handling automobile accidents in many communities. Together with the fault theory, they exemplify the tools of legal analysis: specially crafted categories, narrowing and simplifying a problem, are used to assign consequences to people in a real-world dispute, once the facts of their dispute are sorted into the legal categories. Yet in contrast to the fault theory, both the alternative rule of comparative negligence and the insurance-based scheme removing car accidents entirely from the fault-based tort system begin to alter the basic dualistic, win/lose quality of traditional legal analysis.

Except for its specialized vocabulary, legal analysis looks a lot like other kinds of analysis—as the comparison with the *Sesame Street* song should suggest. When we analyze, we simplify. We break complicated perceptions into discrete items or traits. We identify the items and call them chair, table, cat, and bed. We sort them into categories that already exist: furniture and animal.[4] It sounds familiar. It also sounds harmless. I do not think it is.

I believe we make a mistake when we assume that the categories we use for analysis just exist and simply sort our experiences, perceptions, and problems through them. When we identify one thing as like the others, we are not merely classifying the world; we are investing particular classifications with consequences and positioning ourselves in relation to those meanings. When we identify one thing as unlike the others, we are dividing the world; we use our language to exclude, to distinguish—to discriminate. This last word may be the one that most recognizably raises the issues about which I worry. Sometimes, classifications express and implement prejudice, racism, sexism, anti-Semitism, intolerance for difference. Of course, there are "real differences" in the world; each person differs in countless ways from each other person. But when we simplify and sort, we focus on some traits rather than others, and we assign consequences to the presence and absence of the traits we make significant. We ask, "What's the new baby?"—and we expect as an answer, boy or girl. That answer, for most of history, has spelled consequences for the roles and opportunities available to that individual. And when we respond to persons' traits rather than their conduct, we may treat a given trait as a justification for excluding someone we think is "different." We feel no need for further justification: we attribute the consequences to the

[3]Commonly called "no-fault" insurance, this approach originated in the work of Robert Keeton in Massachusetts; see his *Basic Text on Insurance Law* (St. Paul, Minn.: West, 1971). One virtue is that it can remove automobile accident cases from court and eliminate the costs of litigation by devising an administrative scheme to handle the disbursement process.

[4]There may be similarity as well as difference: e.g., the chair, table, cat, bed each have four legs. And there may be differences that demand new categories for each item—based on color, size, age, physical location, symbolic significance, and a variety of still more distinguishing traits. Thus, the selected traits may submerge from view other traits that provide different axes for comparison.

differences we see. We neglect the other traits that may be shared. And we neglect how each of us, too, may be "different."

Presuming real differences between people, differences that we all know and recognize, presumes that we all perceive the world the same way and that we are unaffected by our being situated in it. This presumption also ignores the power of our language, which embeds unstated points of comparison inside categories that falsely imply a natural fit with the world. The very term "working mother" reveals that the general term "mother" carries some unstated common definition—that is, a woman who cares for her children full time without pay. Even if unintended, such unstated meanings must be expressly modified if the speaker means something else.[5] Labels of difference often are assigned by some to describe others in ways they would not describe themselves, and in ways that carry baggage that may be difficult to unload.

If you have ever felt wronged by a label of difference assigned to you, you may know what I mean. People often feel unrecognized, excluded, or degraded "because" of their gender, religion, race, ethnicity, nationality, age, height, weight, family membership, sexual orientation, or health status. The expansiveness of this list does not trivialize the issue, even though it does suggest that there are many more differences that people make significant than any of us may note self-consciously. Organizing perceptions along some lines is essential, but which lines will we use—and come to use unthinkingly? Human beings use labels to describe and sort their perceptions of the world. The particular labels often chosen in American culture can carry social and moral consequences while burying the choices and responsibility for those consequences. The labels point to conclusions about where an item, or an individual, belongs without opening for debate the purposes for which the label will be used. This is what worries me about any mode of analysis that asks, "which one of these is not like the others?"

Labels and Morals

An animal behaviorist, Harold A. Herzog, Jr., has examined the impact of the labels we use in our moral responses to, of all things, mice. At the University of Tennessee a clean and well-run facility for animals houses some 15,000 mice used each year in experiments. The university requires approval by an animal care committee for any experiment using the mice, and both the federal Department of Agriculture and the American Association for the Accreditation of Laboratory Animal Care inspect and monitor the standards of care provided. Yet it is only the experimental mice, Herzog notes, who are

[5]See George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind* (Chicago: University of Chicago Press, 1987), pp. 80–81. As another example, the term "surrogate mother" obscures the fact that it applies to the person who is actually the biological mother.

protected by these concerns for animal care. At any given time, some mic escape; these become "pests" and are routinely captured and destroyed. Th staff at the center use "sticky" traps, something like flypaper, to catch thes "pests" overnight, and those that are not dead by morning are gasse Herzog observes that these traps would never be used for the "good" experi mental mice, yet no animal care committee, no public or private agenc reviews this "pest removal" process. "Once a research animal hits the floo and becomes an escape, its moral standing is instantly diminished."[6] Sim ilarly, some mice are used as food for other research animals, and a mous labeled "snake food" also falls outside the attention of an animal car committee. The role, and label, of the creature determines variations in hov the very same animal may be perceived and treated.

Perhaps most ironically, Herzog reports an incident from his family life His young son had a pet mouse, Willie. When Willie died, the family gav him a burial, with a tombstone and a funeral. "At the same time that we wer mourning Willie's demise, however, my wife and I were setting snap trap each night in a futile attempt to eliminate the mice that inhabit our kitchen." The mere change in label from pet to pest transformed the moral status of th different mice. Herzog explains that he is not opposing the use of mice i research; nor is he criticizing the treatment of mice at his university; and h acknowledges that countless mice are consumed by their natural predator outside of human laboratories and homes. He concludes that the roles an labels humans assign to animals "deeply influence our sense of what i ethical."[8]

The interaction between labels and moral judgments is, if anything, mor pronounced when the labels are about people. To the ridicule or indifferenc of others, groups of women, members of racial minorities, and disable persons have often struggled to remake the labels assigned to them—and t shake free of the negative associations those labels have carried. Whic would, should we use: ladies or women? blacks or African Americans Hispanics or Chicanos? Puerto Ricans or Latinos? handicapped or physi cally challenged? exceptional or disabled? In the struggle for terms of self description, we are caught invariably in our membership in a larger society whose language we share, even if we resist the words used by others t describe us. Negative labels are especially a problem for members of minority groups or groups with less influence in the society. For this very reason, the

[6]Harold A. Herzog, Jr., "The Moral Status of Mice," *American Psychologist* 43 (June 1988), 473, 474.

[7]Ibid., p. 474.

[8]Labels not only influence but also reflect our sense of what is ethical. Herzog (ibid.) explains, "I suspect that there is an interaction between our labels (i.e., pest, pet, food, subject) and how we treat animals. Labels are, in part, the result of the role that the animal occupies relative to humans; conversely, the label influences the behavior and emotions directed toward the animal. . . . Moral codes are the product of human psychology, not 'pure' reason. Because ethical judgments are inextricably bound in a complex matrix of emotion, logic, and self-interest, a better understanding of the *psychology* of how humans arrive at moral decisions will be critical to progress in the area of animal welfare."

efforts to rename oneself may be circumscribed by the attitudes and authority of those who have defined the difference.

The tendency to build social divisions based on selected traits is not, however, restricted to those who have enjoyed more privilege or those who have been in the majority. Holly Near and Adrian Torf wrote a song called "Unity" that brings a shock of recognition to many audiences:

> One man fights the KKK
> But he hates the queers
> One woman works for ecology
> It's equal rights she fears;
> Some folks know that war is hell
> But they put down the blind.
> I think there must be a common ground
> But it's mighty hard to find.[9]

Athol Fugard, John Kani, and Winston Ntshona wrote a play, *The Island*, set in a prison on Robben Island off the shore of South Africa. In the play, two political prisoners live a wretched existence of grueling physical toil and brutal treatment, but they are deep friends and mutually supportive—until one of the prisoners learns that he is to be released. The sheer idea of an endpoint to his incarceration distinguishes him from his cellmate, and the two are no longer equal. The other prisoner feels jealous, desperate, even brutal; his fellow prisoner's better fortune seems to confirm rather than challenge his despair.[10] Both *The Island* and the song "Unity" depict recognizable patterns of subjection and domination in which people participate—as victims, as perpetrators, and as perpetuators of prejudice.

Language and labels play a special role in the perpetuation of prejudice about differences. After Martin Luther King was killed in 1968, a third grade teacher in Iowa decided she had to teach her students, who were all white, about discrimination. Jane Elliott created a two-day experiment: on the first day she gave children with brown eyes special privileges and permission to discriminate against their "inferior" blue-eyed classmates. On the second day the students reversed roles. The teacher was stunned by how readily the "superior" students on each day took to their privileges and delighted in degrading their classmates. Equally noteworthy was the reaction of the "inferior" students: they demonstrated physical and emotional signs of de-

[9] © 1982 Hereford Music (ASCAP), words by Holly Near, music by Holly Near & Adrian Torf. All Rights Reserved. Used by permission. Available on *Speed of Light* by Holly Near. Distributed by Redwood Records 1-800-888-SONG.

[10] *The Island*, in Athol Fugard, John Kani, and Winstone Ntshona, *Statements* 45 (New York: Theater Communications Group, 1986). The prison authorities arrange for them both to participate in a dramatic production of Antigone. The prisoner without a release date is assigned to play Antigone, and initially objects to another humiliation: playing a woman. Yet in the course of speaking Antigone's lines he actually finds a voice for his own objections to the injustice he faces.

feat and passivity, even performing more poorly in classroom assignments.[11] Name-calling by school children may seem juvenile, but it reappears in the shorthand of corporate boardrooms, which labels those who are "unsound" or "not one of us." The familiar wartime device of naming people on the enemy side so that they are no longer fully human gave us "Jap," "Kraut," and "Gook."

The systematic genocide orchestrated by the Nazis followed policies of labeling Jews, gypsies, political dissidents, and homosexuals. As one survivor remembered: "We had to wear yellow stripes. People treated us like animals. When people saw the yellow they did not see the human being who wore it. Maybe people are really all animals and only human on a very thin surface."[12] Genocide and war are not due only to labeling, but putting labels on other people does compress moral sensibilities and make it easier to deny any bonds of commonality.

Perhaps we know only by comparing, by drawing distinctions from and similarities to what we already know. But when we use our terms of comparison to shut off any understanding of our connections with one another as human beings, we risk becoming something less than human ourselves.

Boundaries

The questions I am raising here may seem both impractical and disturbing. They attack what has counted as analysis, and what may be an inevitable human need to sort through overwhelmingly complicated experience. And aren't people really different, anyway? Don't we need the boundaries of difference to make sense of perceptions, experience, identities, and human obligations?

Boundaries based on difference have been critical to what has counted as legal analysis, and boundaries also figure prominently in legal assumptions about the self and about society. Traditional legal rules presume that there is a clear and knowable boundary between each individual and all others. Tort law describes the violations when one individual crosses another's boundaries. Rules of contract contemplate distinct parties, able to formulate their preferences and express their wills in the form of a knowing and voluntary exchange. Constitutional law recognizes the rights of each distinct individual, not groups; constitutional law also establishes three distinct and bounded branches of government. Each of these legal rules may seem to

[11] William Peters, *A Class Divided: Then and Now*, exp. ed. (New Haven, Conn.: Yale University Press, 1987). The experiment was repeated and filmed for a television documentary, "A Class Divided" in 1970; at a reunion fourteen years later the students reported the long-lasting impression the experiment had made in their lives.

[12] Frau Dr. Jolana Roth, quoted in Claudia Koonz, *Mothers in the Fatherland: Women, the Family, and Nazi Policies* (New York: St. Martin's Press, 1987), p. 424. See also Vasily Grossman, *Life and Fate* (New York: Harper & Row, 1980), pp. 80–93.

avoid labels because it emphasizes the importance of each individual. And yet, these rules contribute to labeling by favoring a view of certain and clear boundaries rather than of relationships.

Legal doctrines within each field of law also tend to establish categories, conceived as bounded rather than open-ended or determined through interaction with events. The lawyer makes an argument to fit a problem inside or outside a category, such as negligence; the adversary makes opposing arguments. The parties' lawyers themselves are bounded, distinct; their job in court is to disagree, not to agree.[13] Judges determine whether "the doctrine applies," whether the problem "falls within the statute or rule," and whether the precedent is "on all fours," perched squarely on top of the pending dispute. These descriptions of legal reasoning treat the categories of law as given receptacles, ready to contain whatever new problem may arise. Missing from these descriptions is the possibility that our very process of sorting may stretch some categories, contract others, or even require us to invent a new box for what we cannot yet classify.

Legal rules in Western societies historically have drawn a boundary between normal and abnormal, or competent and incompetent people. Children and mentally disabled persons present classic instances of the legally incompetent individual; for most purposes, they still remain labeled legally incompetent and subject to restraints by law. During different periods of history, women, slaves, sailors, Jews, and clergy also took their places across the line of legal competency and suffered legal disabilities curbing their rights and powers under law. In hindsight, after many changes, we can question whether any of these groups ever belonged on the other side of the line defining sufficient capacity or competence to enjoy legal rights. But beyond the historic assignments of difference that we might now view as error, the traditional creation of two classes of people ignores the possibility that people exhibit a range of capacities and abilities. The traditional view also neglects the possibility that certain kinds of incapacity could be remedied by different social practices; certain kinds, indeed, were created by them.[14]

Finally, law has long sought to define the boundaries of each person's obligations to others. Anglo-American law during the past 150 years established limits to these obligations at the duty to do no harm to others.[15] For example, there is no duty to rescue a drowning stranger, and a rescuer may

[13]Where the opponents do not sufficiently disagree, the court may dismiss the case as collusive or insufficiently adverse. See Laurence Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1988), pp. 93–95.

[14]For example, the legal disabilities assigned to women largely followed from other legal rules depriving them of control over their own property, labor, and person; see Chapters 5 and 9.

[15]See Joel Feinberg, *Reason and Responsibility* (Encino, Calif.: Dickenson, 1975); Joel Feinberg, "Legal Paternalism," in *Paternalism*, ed. Rolf Sartorius (Minneapolis: University of Minnesota, 1983). See also Alan Dershowitz, "Toward a Jurisprudence of 'Harm' Prevention," in *The Limits of Law*, Nomos vol. 15, ed. James Roland Pennock and John William Chapman (New York: Lieber-Atherton, 1974), p. 135.

even incur liability for a job incompletely done.[16] Yet legal rules treat certain special relationships differently: parents bear obligations to children, trustees to wards, and professionals to clients. These exceptional relationships also mark the people who are often labeled legally incompetent or abnormal. When law recognizes relationships of assigned rather than chosen obligation, it also classifies some people as marginal. The traditional rules that made husbands responsible for their wives also removed married women from the world of individual rights.

Law's usual boundaries distinguish the self from others, the normal group from the abnormal, and autonomous individuals from those in relationships of dependency. With this vocabulary, law has organized perceptions of individuals and of groups and has helped to implement norms curbing responsibility to anyone outside one's own family. This vocabulary that neatly defines persons and their roles and obligations has its costs. One is that legal rules often falter when conflicts arise within ongoing relationships. Conflicts within the family, disputes within schools, and disagreements over the treatment of anyone considered incompetent or abnormal often strain the resources of judges and administrators and provoke intense public controversy. Families and communities fight over educational and medical decisions for disabled children, and existing legal rules provide few answers. Some argue that there is no vocabulary for embedding rights within relationships without disturbing or disrupting those relationships. Others protest that without rights, relationships of unchecked power endanger the well-being and security of the more vulnerable parties.

Another cost of its bounded vocabulary is that law ends up contributing to rather than challenging assigned categories of difference that manifest social prejudice and misunderstanding. Especially troubling is the meaning of equality for individuals identified as different from the norm. What should equality mean when schools and public institutions make decisions about people who differ by race, physical capability, mental ability, language proficiency, ethnic identity, gender, or religion? Does equality mean treating everyone the same, even if this similar treatment affects people differently? Members of minorities may find that a neutral rule, applied equally to all, burdens them disproportionately. Instructing a class entirely in English carries different consequences for students proficient in English and students proficient in Spanish instead.

Because of its preoccupation with boundaries, law has neglected ongoing relationships between people, and law has failed to resolve the meaning of equality for people defined as different by the society. Both these problems concern people who are often marginal: children, disabled persons, members of ethnic and religious and racial minorities. Women of any background may be neglected by legal rules, given their traditional exclusion from the public

[16]See Leon Sheleff, *The Bystander* (Lexington, Mass.: Lexington Books, 1978); *The Good Samaritan and the Law*, ed. James Ratcliffe (Garden City, N.Y.: Anchor Books, 1966).

processes for defining the rules of marriage and divorce, the workplace, and violence, domestic or otherwise. Law has treated as marginal, inferior, and different any person who does not fit the normal model of the autonomous, competent individual. Law has tended to deny the mutual dependence of all people while accepting and accentuating the dependency of people who are "different." And law has relied on abstract concepts, presented as if they have clear and known boundaries, even though the concepts await redefinition with each use. Even the institutions of government are treated as separate and bounded by governing legal rules. This view restrains some efforts by government officials to respond to people's needs. If courts, in particular, are denied power to respond to people's vulnerabilities, abuses of public and private power may persist without relief.

These characteristics of law reflect the powerful human need to set boundaries in order to avoid being overwhelmed by perceptions, obligations, and connections with others. But many different sets of categories can be used to organize the world. Anglo-American law has historically used categories to assign people to different statuses. The price of these legal categories has been borne disproportionately by the most marginal and vulnerable members of the society. Labeling them will only hide human responsibility for their treatment, not solve the problems of organizing perceptions and responsibilities. Naming differences to distinguish people isolates those who do the naming as well, and naming differences may deny the humanity of those who seem different.

Moreover, the whole concept of a boundary depends on relationships: relationships between the two sides drawn by the boundary, and relationships among the people who recognize and affirm the boundary. From this vantage point one can see that connections between people are the preconditions for boundaries; the legal rules erecting boundaries between people rely on understanding social agreements and the sense of community.[17]

Once we understand the relationships that are critical to setting and respecting boundaries, we can examine more honestly which boundaries express and promote the kinds of relationships we know and desire. For example, the tort rules governing automobile accidents all depend upon relationships. The rules defining fault in terms of negligence and direct causation express patterns of relationships between people, patterns of presumed independence and bounded separateness respected by the government and by the people living in the community.[18] The modified rule that compares the negligence or fault of the two drivers embodies a conception of

[17]For a thoughtful exploration of the flawed conception of boundaries as applied both to the self and to legal rights, see Jennifer Nedelsky, "Law, Boundaries, and the Bounded Self" (University of Toronto Faculty of Law, unpublished manuscript, 1989). The development of an individual sense of autonomy depends upon a close psychological relationship with another person, whose presence and acts of mirroring critically contribute to the individual's sense of self (see Chapter 7).

[18]This fault approach may be understood as an effort to hold people responsible for their own actions, and to induce people to change their behavior in anticipation of possible future fault.

their relationship as mutual rather than one-directional: it takes two drivers to create an accident, and each contributes to what counts as its cause.[19] The insurance approach takes this understanding of relationships one step further: here, the conception of relationships expands to include all members of the driving community, who share the risk of accidents. The insurance scheme distributes the costs of accidents throughout the group that shares the risk, the group that contributes to the insurance pool.[20] Law then expresses and organizes a different sense of boundaries but retains the power and the commitment to provide clarity and resolution to conflicts between people that are bound to arise. The choice is not between boundaries and connections; it is a question of what kinds of boundaries and connections to construct and enforce. The choice is not between individualism and relationships; it is a question of which kinds of relationships we should sponsor, especially in light of the distribution of shared risks.

Similar contrasting approaches can be adopted in the legal treatment of difference. We can treat differences as the private, internal problem of each different person, a treatment that obviously depends on communal agreements and public enforcement. We can treat differences as a function of relationships and compare the contributions made by different people to the costs and burdens of difference. Or we can treat differences as a pervasive feature of communal life and consider ways to structure social institutions to distribute the burdens attached to difference.[21]

Overview of This Book

These are the issues for this book: how does and how could law treat differences and boundaries between people? The legacy of statuses assigned by law to differentiate people and the continuing struggles to alter that legacy

[19]This contributory fault approach more finely tunes the relationship between fault and liability by communicating to both parties that they may share responsibility for any meetings by accident.

[20]Eligibility rules for insurance can provide a basis for changing the conduct and practices of the applicant: the insurance companies can refuse to insure drivers who have repeated accidents or whose cars fall below a specified standard of safety. Thus, the insurance route does not take the level of accidents as a given but permits methods of trying to alter the behaviors that contribute to it.

[21]Traditional legal rules governing challenges to race and gender discrimination in fact have borrowed from torts the notion of fault, requiring demonstration that the perpetrator caused the harm—and (unlike the requirements of the negligence standard) actually intended it. With lawsuits initiated by groups of people, the law expanded in the field of employment discrimination to permit a presumption of discrimination based on statistical measures of the disparate impact on the minority group of the defendants' employment practices. To some extent, affirmative action programs, whether voluntary or court imposed, represent both corrective action and an insurance concept, distributing the costs of past discrimination throughout the community rather than assigning them solely to the past victims. See, e.g., Kathleen Sullivan, "Sins of Discrimination: Last Term's Affirmative Action Cases," *Harv. L. Rev.* 100 (1986), 78. The focus of this book is less on the doctrinal developments in discrimination law than on the legal conceptions of difference.

simple sense of not fitting in while leaving the majority free to feel unresponsible for and uninvolved in the problems of difference.

Legal responses to the dilemma of difference recreate rather than resolve it. The right to be treated as an individual ignores the burdens of group membership; the right to object to the burdens of group membership reinvokes the trait that carries the negative meanings. Particularly intractable versions of the dilemma complicate decisions over medical treatment for severely disabled persons, whether young or old. Denying them treatment that would be available to someone less disabled, or to someone of a different age, seems to punish on the basis of a difference beyond the person's control. Yet extending medical treatment, including extraordinary measures, with deliberate disregard of the individual's age or disability may fulfill a principle of neutrality at the cost of ignoring that individual's actual situation. Since the individual is usually unable to speak to the decision, the problem is especially pronounced; there is no recourse to the person's own views to help establish a ground for respecting the individual. Similarly, decisions about housing, education, and employment for individuals with severe mental disabilities add to the dilemma of difference the difficulty of learning what the individuals most affected would themselves want. Decisions about the treatment of AIDS and people at risk of acquiring the AIDS virus also head directly into the difference dilemma. Identification of people at risk exposes them to discrimination; nonidentification puts them in danger of unwittingly catching the virus or passing it on to others.

Once we notice the difference dilemma, it is easy to see it in unexpected places. But more intriguing than its pervasiveness, I believe, are its sources. Why do we encounter this dilemma about how to redress the negative consequences of difference without reenacting it? What is, or should be, the meaning of difference?

CHAPTER 2

Sources of Difference

> Is my understanding only blindness to my own lack of understanding?
>
> —Ludwig Wittgenstein, *On Certainty*

> When you presume, you are not treating me as the person I am; when you do not presume, you are treating me as the person I am in a minimal sense; when you recognize and respond to the person I am, you are treating me as the person I am in a maximal sense.
>
> —Elizabeth V. Spelman, "On Treating Persons as Persons"

Dilemmas of difference appear unresolvable. The risk of nonneutrality—the risk of discrimination—accompanies efforts both to ignore and to recognize difference in equal treatment and special treatment. Difference can be recreated in color or gender blindness and in affirmative action;[1] in governmental neutrality and in governmental preferences; and in discretionary decisions and in formal constraints on discretion. Why does difference seem to pose choices each of which undesirably revives difference or the stigma or disadvantage associated with it?

First epigraph: Reprinted by permission of Basil Blackwell, Inc., from *On Certainty*, by Ludwig Wittgenstein. Second epigraph: Reprinted by permission of University of Chicago Press from "On Treating Persons as Persons," by Elizabeth V. Spelman, *Ethics* 88 (1978).

[1]Affirmative action programs seek to aid disadvantaged groups by giving them special treatment. Some plans are voluntary, adopted by schools and employers to alter the composition of their communities to better reflect the larger population. Some are imposed by courts or agencies as remedies for demonstrated past discriminatory practices. A dilemma of difference may arise if the special treatment highlights the historic differences and reintroduces stigma for those who participate in the program; thus, minority members or white women may become stigmatized as merely affirmative action hires, presumed unqualified without the special treatment. This result may reflect misunderstanding of the program and a faulty view that the prior selection procedures were themselves free from bias, yet the risk of aggravating stigma persists. See, e.g., William Van Alstyne, "Rites of Passage: Race, the Supreme Court, and the Constitution," *U. Chi. L. Rev.* 46 (1978), 775, 778: affirmative action plans fail to alleviate discrimination and instead contribute to "racism, racial spoils systems, racial competition and racial odium."

In this last question lies a clue to the problem. The possibility of reiterating difference, whether by acknowledgment or nonacknowledgment, arises as long as difference itself carries stigma and precludes equality. Buried in the questions about difference are assumptions that difference is linked to stigma or deviance and that sameness is a prerequisite for equality. Perhaps these assumptions themselves must be identified and assessed if we are to escape or transcend the dilemmas of difference.

If to be equal one must be the same, then to be different is to be unequal or even deviant.[2] But any assignment of deviance must be made from the vantage point of some claimed normality: a position of equality implies a contrasting position used to draw the relationship—and it is a relationship not of equality and inequality but of superiority and inferiority.[3] To be different is to be different in relationship to someone or something else—and this point of comparison must be so taken for granted, so much the "norm," that it need not even be stated.

At least five closely related but unstated assumptions underlie difference dilemmas. Once articulated and examined, these assumptions can take their proper place among other choices about how to treat difference, and we can consider what we might do to challenge or renovate them.

Five Unstated Assumptions

First, we often assume that "differences" are intrinsic, rather than viewing them as expressions of comparisons between people on the basis of particular traits. Each of us is different from everyone else in innumerable ways. Each of these differences is an implicit comparison we draw. And the comparisons themselves depend upon and reconfirm the selection of particular traits as the ones that assume importance in the comparison process. An

[2]See Carol Gilligan, "In a Different Voice: Women's Conceptions of Self and Morality," *Harvard Education Review* 47 (1977), 418, 482 (1977); Audre Lorde, "Age, Race, Class and Sex: Women Redefining Difference," in *Sister Outsider: Essays and Speeches* (Trumansburg, N.Y.: Crossing Press, 1984), pp. 114, 116.

[3]See Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987); and Ruth Colker, "Anti-Subordination above All: Sex, Race, and Equal Protection," *N.Y.U. L. Rev.* 61 (1986), 1003, both criticizing equal rights debates for failing to focus on issues of superiority and subordination. MacKinnon charges the debates with focusing on women's similarities and their differences from men, while treating maleness as the unquestioned norm. "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 entitlement . . . so that it is women . . . who have to show in effect that they are men in every relevant respect?" (p. 37). MacKinnon urges instead what she calls the "dominance approach"—which presumes that "the question of equality . . . is at root a question of hierarchy"—and then equal distribution of power (p. 40). Colker similarly views hierarchy, not difference, as the root problem: "Facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy" (pp. 1007–8). Both MacKinnon and Colker maintain that talk of "sameness" or "neutrality" obscures the hierarchy that is already in place; therefore, eliminating the hierarchy is the ultimate goal for movements for equality.

assessment of difference selects out some traits and makes them matter; indeed, it treats people as subject to categorization rather than as manifesting multitudes of characteristics.[4]

Second, we typically adopt an unstated point of reference when assessing others. It is from the point of reference of this norm that we determine who is different and who is normal. The hearing-impaired student is different in comparison to the norm of the hearing student—yet the hearing student differs from the hearing-impaired student as much as she differs from him, and the hearing student undoubtedly has other traits that distinguish him from other students. Unstated points of reference may express the experience of a majority or may express the perspective of those who have had greater access to the power used in naming and assessing others. Women are different in relation to the unstated male norm. Blacks, Mormons, Jews, and Arabs are different in relation to the unstated white Christian norm. Handicapped persons are different in relation to the unstated norm of able-bodiedness or, as some have described it, the vantage point of "Temporarily Able Persons."[5]

The unstated point of comparison is not general but particular, and not inevitable but only seemingly so when left unstated.[6] The unstated reference point promotes the interests of some but not others; it can remain unstated because those who do not fit have less power to select the norm than those who fit comfortably within the one that prevails.

A reference point for comparison purposes is central to a notion of equality. Equality asks, equal compared with whom? A notion of equality that demands disregarding a "difference" calls for assimilation to an unstated norm. To strip away difference, then, is often to remove or ignore a feature distinguishing an individual from a presumed norm—such as that of a white, able-bodied, Christian man—but leaving that norm in place as the measure for equal treatment. The white person's supposed compliment to a black friend, "I don't even think of you as black," marks a failure to see the implicit racism in ignoring a "difference" and adopting an unstated and potentially demeaning point of comparison.[7] As historian J. R. Pole has explained, constitutional notions of equality in the United States rest on the idea that people are equal because they could all take one another's places in work, intellectual exchange, or political power if they were disassociated from their

[4]See Gordon W. Allport, *The Nature of Prejudice* (1954; Cambridge, Mass.: Addison-Wesley, 1958), pp. 19–27: prejudice is founded on categorical thinking and overgeneralization.

[5]See Nancy Mairs, "Hers," *New York Times*, July 9, 1987, p. C2.

[6]Whites tend to cite the race of an individual only if that person is not white, since the unstated race is understood to be white. Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory* (Trumansburg, N.Y.: Crossing Press, 1983), p. 117, comments: "As feminists we are very familiar with the male version of this: the men write and speak and presumably, therefore, also think as though whatever is true of them is true of everybody. White people also speak in universals. . . . For the most part, it never occurred to us to modify our nouns accordingly; to our minds the people we were writing about were *people*. We don't think of ourselves as *white*."

[7]See Karen Russell, "Growing Up with Privilege and Prejudice," *New York Times Magazine*, June 14, 1987, pp. 22, 24.

contexts of family, religion, class, or race and if they had the same opportunities and experiences.[8] This concept of equality makes the recognition of differences a basis for denying equal treatment. In view of the risk that difference will mean deviance or inequality, stigmatization from difference, once identified, is not surprising.

Third, we treat the person doing the seeing or judging as without a perspective, rather than as inevitably seeing and judging from a particular situated perspective. Although a person's perspective does not collapse into his or her demographic characteristics, no one is free from perspective, and no one can see fully from another's point of view.[9]

Fourth, we assume that the perspectives of those being judged are either irrelevant or are already taken into account through the perspective of the judge. This assumption is a luxury of those with more power or authority, for those with less power often have to consider the views of people unlike themselves. As a novelist has wryly observed, horses "have always understood a great deal more than they let on. It is difficult to be sat on all day, every day, by some other creature, without forming an opinion about them. On the other hand, it is perfectly possible to sit all day, every day, on top of another creature and not have the slightest thought about them whatsoever."[10] Moreover, this assumption treats a person's self-conception or world view as unrelated to how others treat him or her.

Finally, there is an assumption that the existing social and economic arrangements are natural and neutral. If workplaces and living arrangements are natural, they are inevitable. It follows, then, that differences in the work and home lives of particular individuals arise because of personal choice. We presume that individuals are free, unhampered by the status quo, when they form their own preferences and act upon them.[11] From this view, any departure from the status quo risks nonneutrality and interference with free choice.[12]

These interrelated assumptions, once made explicit, can be countered with some contrary ones. Consider these alternative starting points. Difference is relational, not intrinsic. Who or what should be taken as the point of reference for defining differences is debatable. There is no single, superior

[8]J. R. Pole, *The Pursuit of Equality in American History* (Berkeley: University of California Press, 1978), pp. 293–94.

[9]See Kenneth L. Karst, "The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment," *Harv. L. Rev.* 91 (1977), 54 n.304, commenting on the effects of the absence of a woman justice on the Supreme Court that decided that pregnancy is sex-neutral.

[10]Douglas Adams, *Dirk Gently's Holistic Detective Agency* (New York: Simon & Schuster, 1987), p. 4.

[11]For critiques of this view, see John Elster, *Sour Grapes* (Cambridge: Cambridge University Press 1983); Cass R. Sunstein, "Legal Interference with Private Preferences," *U. Chi. L. Rev.* 51 (1986), 1129.

[12]See, e.g., Alexander M. Bickel, *The Supreme Court and the Ideal of Progress* (New York: Harper & Row, 1970). But Skelly Wright, "Professor Bickel, the Scholarly Tradition, and the Supreme Court," *Harv. L. Rev.* 84 (1971), 769, criticized the value-neutrality approach for its insensitivity to the powerless.

perspective for judging questions of difference. No perspective asserted to produce "the truth" is without a situated perspective, because any statement is made by a person who has a perspective. Assertions of a difference as "the truth" may indeed obscure the power of the person attributing a difference while excluding important competing perspectives. Difference is a clue to the social arrangements that make some people less accepted and less integrated while expressing the needs and interests of others who constitute the presumed model. And social arrangements can be changed. Arrangements that assign the burden of "differences" to some people while making others comfortable are historical artifacts. Maintaining these historical patterns embedded in the status quo is not neutral and cannot be justified by the claim that everyone has freely chosen to do so.

Let us consider the usual assumptions and these alternatives in the context of contested legal treatments of difference. Making the usually unstated assumptions explicit can open up debate about them and also reveal the many occasions when lawyers and judges have mustered alternative views.

Assumption 1: Difference Is Intrinsic, Not a Comparison

Can and should questions about who is different be resolved by a process of discovering intrinsic differences? Is difference something intrinsic to the different person or something constructed by social attitudes? By posing legal claims through the difference dilemma, litigants and judges treat the problem of difference as what society or a given decision-maker should do about the "different person"—a formulation that implicitly assigns the label of difference to that person.

The difference inquiry functions by pigeonholing people in sharply distinguished categories based on selected facts and features. Categorization helps people to cope with complexity and to understand one another.[13] Devising categories to simplify a complicated world may well be an inevitable feature of human cognition.[14]

When lawyers and judges analyze difference and use categories to do so, they import a basic method of legal analysis. Legal analysis, cast in a judicial mode, typically asks whether a given situation "fits" in a category defined by a legal rule or, instead, belongs outside it. Questions presented for review by the Supreme Court, for example, often take the form "Is this a that?"[15] For

[13]George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind* (Chicago: University of Chicago Press, 1987), p. xi.

[14]See Jerome S. Bruner, "Art as a Mode of Knowing," in *On Knowing: Essays for the Left Hand*, ed. Jerome S. Bruner (Cambridge, Mass.: Belknap Press of Harvard University Press, 1979), pp. 59, 69: "There is, perhaps, one universal truth about all forms of human cognition: the ability to deal with knowledge is hugely exceeded by the potential knowledge contained in man's environment. To cope with this diversity, man's perception, his memory, and his thought processes early become governed by strategies for protecting his limited capacities from the confusion of overloading. We tend to perceive things schematically, for example, rather than in detail, or we represent a class of diverse things by some sort of averaged 'typical instance.'"

[15]See Martin P. Golding, *Legal Reasoning* (New York: Knopf, 1984), p. 104.

example, are Jews a race? Is a contagious disease a handicap? Other questions take the form "Is doing *x* really doing *y*?" For example, is altering a statutory guarantee of job reinstatement after maternity leave really engaging in gender discrimination? Is denying unemployment benefits to someone who left work because of pregnancy also really discriminating on the basis of gender? As Martin Golding has explained, these may appear to be simple factual questions with clear answers, but they are also "questions about the application of a name, to which any answer is arbitrary."[16] Edward Levi, a leading expositor of the nature of legal reasoning, has explained the three steps involved: "Similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case. . . . The finding of similarity or difference is the key step in the legal process."[17]

Again, as critics have noted for nearly a century, these patterns of legal analysis imply that legal reasoning yields results of its own accord, beyond human control.[18] But differences between people and between problems and between legal concepts or precedents are statements of relationships; they express a comparison with another person, problem, concept, or precedent. A difference cannot be understood except as a contrast between instances, or between a norm and an example.[19] Assessing similarities and differences is a basic cognitive process in organizing the world; it depends on comparing a new example with an older one. Legal analysis depends on the process of comparing this case with other cases, a process of drawing similarities and differences. Ann Scales has noted: "To characterize similarities and differences among situations is a key step in legal judgments. That step, however, is not a mechanistic manipulation of essences. Rather, that step always has a

[16]Ibid. See also Charles Taylor, "Overcoming Epistemology," in *After Philosophy: End or Transformation?* ed. Kenneth Barnes, James Bohman, and Thomas McCarthy (Cambridge, Mass.: MIT Press, 1987). Taylor compares theories of knowledge that treat language as a violent interference with reality and an obstacle to truth, and theories of knowledge that conceive of emphatically self-critical reason as capable of reaching more and more correct insights about the world.

[17]Edward Hirsch Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949), p. 2. But Levi also emphasizes that the rules are not fixed, and "the classification changes as the classification is made. The rules change as the rules are applied" (pp. 3–4). Analysis of sameness and difference characterizes both reasoning by analogy and precedential reasoning. Other modes of contemporary legal reasoning include policy analysis, weighing costs and benefits, and evaluating proposed action in terms of consequences.

[18]See Grant Gilmore, *The Ages of American Law* (New Haven, Conn.: Yale University Press, 1977), discussing Cardozo and uncertainty; Felix Cohen, "Field Theory and Judicial Logic," *Yale L.J.* 59 (1950), 238, 244–49; Joseph William Singer, "Legal Realism Now: Review of Laura Kalman, Legal Realism at Yale: 1917–1960," *Calif. L. Rev.* 76 (1988), 467; Joseph William Singer, "The Player and the Cards: Nihilism and Legal Theory," *Yale L.J.* 94 (1984), 1.

[19]See Mary Douglas, *How Institutions Think* (Syracuse, N.Y.: Syracuse University Press, 1986), pp. 58–59: "It is naive to treat the quality of sameness, which characterizes members of a class, as if it were a quality inherent in things or as a power of recognition inherent in the mind. . . . Sameness is not a quality that can be recognized in things themselves; it is conferred upon elements within a coherent scheme."

moral crux."[20] The very act of classification remakes the boundaries of the class, moving the line to include rather than exclude this instance. Indeed, many categories used to describe people's differences are invented only at the moment when summoned into the service of defining someone.[21] Acknowledging this means acknowledging that difference is not discovered but humanly invented.

Sometimes, courts have made such acknowledgments. For example, when asked whether Jews and Arabs are distinct races for the purposes of civil rights statutes, the Supreme Court in 1987 reasoned that objective, scientific sources could not resolve this question, essentially acknowledging that racial identity is socially constructed.[22] Yet, oddly, the justices then turned to middle and late nineteenth-century notions of racial identity, prevalent when the remedial statutes were adopted, rather than examining contemporary assumptions and current prejudices. The problem for the litigants was whether to invoke categories that had been used to denigrate them in order to obtain legal protection. As these cases illustrate, groups that seek to challenge assigned categories and stigma run into this dilemma: "How do you protest a socially imposed categorization, except by organizing around the category?"[23] Moreover, a label of difference accentuates one over all other characteristics and may well carry a web of negative associations. Perceptions and assessments of difference pick out the traits that do not fit comfortably within dominant social arrangements, even when those traits could easily be made irrelevant by different social arrangements or different rules about what traits should be allowed to matter.

Legislatures on occasion demonstrate an understanding of the labeling process that assigns some people to categories based on traits that may be only imagined by others. The federal Rehabilitation Act forbids discrimination against handicapped persons—and also against persons perceived by others to be handicapped.[24]

Some have argued that the assignment of differences in Western thought entails not just relationships and comparisons but also the imposition of

[20]Ann C. Scales, "The Emergence of Feminist Jurisprudence: An Essay," *Yale L.J.* 95 (1986), 1373, 1386–87. See Douglas, *How Institutions Think*, p. 63: "Institutions bestow sameness. Socially based analogies assign disparate items to classes and load them with moral and political content."

[21]See Ian Hacking, "Making Up People," in *Reconstructing Individualism: Autonomy, Individuality and Self in Western Thought*, ed. Thomas C. Heller, Morton Sosna, and David E. Wellbery (Stanford, Calif.: Stanford University Press, 1986), pp. 222, 228–29, identifies the process by which categories are invented as persons are assigned to them.

[22]See Shaare Tefila Congregation v. Cobb, 107 S.Ct. 2019 (1987); and Saint Francis College v. Al-Khazraji, 107 S.Ct. 2022 (1987). For a thoughtful exploration of the history of the social construction of racial identity, see Neil Gotanda, "Towards a Critique of Colorblind: Abstract and Concrete Race in American Law" (unpublished draft, 1987).

[23]Steven Epstein, "Gay Politics, Ethnic Identity: The Limits of Social Constructionism," *Socialist Review*, May–Aug. 1987, pp. 9, 19.

[24]See School Board v. Arline, 107 S.Ct. 1123, 1130 (1987) (interpreting 29 U.S.C. sec. 706 [7][B]ii, 794).

hierarchies.[25] To explore this idea, we need the next unstated assumption: the implicit norm or reference point for the comparison through which difference is assigned.

Assumption 2: The Norm Need Not Be Stated

To treat someone as different means to accord him treatment that is different from the treatment of someone else; to describe someone as "the same" implies "the same as" someone else. When differences are discussed without explicit reference to the person or trait on the other side of the comparison, an unstated norm remains. Usually, this default reference point is so powerful and well established that specifying it is not thought necessary.[26]

When women argue for rights, the implicit reference point used in discussions of sameness and difference is the privilege accorded some men—typically, white men who are well established in the society. It is misleading to treat the implicit norm as consisting of all men, as rhetoric for women's rights tends to do, for that obscures historical racial and class differences in the treatment of men themselves. But the reference point of privileged men can present powerful arguments for overcoming the exclusion of women from activities and opportunities. Reform efforts on behalf of women during the nineteenth and twentieth centuries asserted women's fundamental similarities to the men who were allowed to vote, sit on juries, engage in business, and participate in essential political and economic institutions. Declarations of rights in the federal Constitution and other basic legal documents used universal terms, and advocates for women's rights argued that women fit those terms as well as privileged men did.[27] Unfortunately for the reformers, embracing the theory of "sameness" meant that any sign of

[25]This has been a theme emphasized in the work of deconstructive critics. See, e.g., Jacques Derrida, "Difference," in *Speech and Phenomena and Other Essays on Husserl's Theory of Signs*, trans. David Allison (Evanston, Ill.: Northwestern University Press, 1973), pp. 129–60; Collette Guillaumin, "The Question of Difference," trans. Helene Wenzel, in *Feminist Issues* 2 (1982), 33–52; Barbara Johnson, Translator's Foreword to Jacques Derrida, *Dissemination*, trans. Barbara Johnson (Chicago: University of Chicago Press, 1981), p. viii. In feminist works, see Alice Jardine, "Prelude: The Future of Difference," in *The Future of Difference*, ed. Hester Eisenstein and Alice Jardine (Boston: G. K. Hall 1980), pp. xxv, xxvi; Frances Olsen, "The Sex of Law" (unpublished manuscript, 1984); Patricia Collins, "Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought," *Social Problems* 33 (Dec. 1986), S14. On critical legal theory, see Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harv. L. Rev.* 89 (1976), 1685; Pierre Schlag, "Cannibalistic Moves: An Essay on the Metamorphasis of the Legal Distinction," *Stan. L. Rev.* 40 (1988), 929.

[26]Donald A. Schon, *The Reflective Practitioner: How Professionals Think in Action* (New York: Basic Books, 1983), p. 53, quotes Geoffrey Vickers: "We can recognize and describe deviations from a norm very much more clearly than we can describe the norm itself."

[27]E.g., Bradwell v. State, 83 U.S. 130 (1872) (Myra Bradwell arguing unsuccessfully that the privileges and immunities clause protected her from gender bias in rules governing admission to the bar); and United States v. Susan B. Anthony, transcript of 1872 argument following Anthony's arrest for illegally voting, reprinted in *Feminism: The Essential Historical Writings*, ed. Miriam Schneir (New York: Vintage Books, 1972), pp. 132–36.

difference between women and the men used for comparison could be used to justify treating women differently from those men.

A prominent "difference" assigned to women, by implicit comparison with men, is pregnancy—especially pregnancy experienced by women working for pay outside their homes. The Supreme Court's treatment of issues concerning pregnancy and the workplace highlights the power of the unstated norm in analyses of problems of difference. In 1975 the Court accepted an appeal to a male norm in striking down a Utah statute that disqualified a woman from receiving unemployment compensation for a specified period surrounding childbirth, even if her reasons for leaving work were unrelated to the pregnancy.[28] Although the capacity to become pregnant is a difference between women and men, this fact alone did not justify treating women and men differently on matters unrelated to pregnancy. Using men as the norm, the Court reasoned that any woman who can perform like a man can be treated like a man. A woman could not be denied unemployment compensation for different reasons than a man would.

What, however, is equal treatment for the woman who is correctly identified within the group of pregnant persons, not simply stereotyped as such, and temporarily unable to work outside the home for that reason? The Court first grappled with these issues in two cases that posed the question of whether discrimination on the basis of pregnancy—that is, employers' denial of health benefits—amounted to discrimination on the basis of sex. In both instances the Court answered negatively, reasoning that the employers drew a distinction not on the forbidden basis of sex but only on the basis of pregnancy; and since women could be both pregnant and nonpregnant, these were not instances of sex discrimination.[29] Only from a point of view that regards pregnancy as a strange occurrence, rather than an ongoing bodily potential, would its relationship to female experience be made so tenuous; and only from a vantage point that regards men as the norm would the exclusion of pregnancy from health insurance coverage seem unproblematic and free from gender discrimination.

Congress responded by enacting the Pregnancy Discrimination Act, which amended Title VII (the federal law forbidding gender discrimination in employment) to include discrimination on the basis of pregnancy within the range of impermissible sex discrimination.[30] Yet even under these new statutory terms, the power of the unstated male norm persists in debates over the definition of discrimination. Indeed, a new question arose under the Pregnancy Discrimination Act: if differential treatment on the basis of pregnancy is forbidden, does the statute also forbid any state requirement for pregnancy

[28]The case was decided on due process grounds. See Turner v. Department of Employment, sec. 423 U.S. 44 (1975) (per curiam); see also Cleveland Board of Educ. v. LaFleur, 414 U.S. 632 (1974) (invalidating a local school board rule requiring pregnant teachers to take unpaid maternity leaves as a violation of due process).

[29]See General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (Title VII); Geduldig v. Aiello, 417 U.S. 484 (1974) (equal protection).

[30]Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. sec. 2000e [k][1982]).

or maternity leaves—which are, after all, distinctions drawn on the basis of pregnancy, even though drawn to help women?

A collection of employers launched a lawsuit in the 1980s arguing that even favorable treatment on the basis of pregnancy violated the Pregnancy Discrimination Act. The employers challenged a California statute that mandated a limited right to resume a prior job following an unpaid pregnancy disability leave.[31] The case—California Federal Savings & Loan Association v. Guerra, which became known as "Cal/Fed"[32]—in a real and painful sense divided the community of advocates for women's rights. Writing briefs on opposing sides, women's rights groups went public with the division. Some maintained that any distinction on the basis of pregnancy—any distinction on the basis of sex—would perpetuate the negative stereotypes long used to demean and exclude women. Others argued that denying the facts of pregnancy and the needs of new mothers could only hurt women; treating women like men in the workplace violated the demands of equality. What does equality demand—treating women like men, or treating women specially?

What became clear in these arguments was that a deeper problem had produced this conundrum: a work world that treats as the model worker the traditional male employee who has a full-time wife and mother to care for his home and children. The very phrase "special treatment," when used to describe pregnancy or maternity leave, posits men as the norm and women as different or deviant from that norm. The problem was not women, or pregnancy, but the effort to fit women's experiences and needs into categories forged with men in mind.[33]

The case reached the Supreme Court. Over a strenuous dissent, a majority of the justices reconceived the problem and rejected the presumption of the male norm which had made the case seem like a choice between "equal treatment" and "special treatment." Instead, Justice Marshall's opinion for the majority shifted from a narrow workplace comparison to a broader comparison of men and women in their dual roles as workers and as family members. The Court found no conflict between the Pregnancy Discrimination Act and the challenged state law that required qualified reinstatement of women following maternity leaves, because "California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs." The Court therefore construed the federal law to permit states to require that employers remove barriers in the workplace that would

[31]California Fair Employment and Housing Act, Cal. Gov't Code Ann. sec. 12945 (b)(2)(West 1980).

[32]107 S.Ct. 683 (1987).

[33]See generally Lucinda M. Finley, "Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate," *Colum. L. Rev.* 86 (1986), 1118; Nadine Taub and Wendy W. Williams, "Will Equality Require More than Assimilation, Accommodation, or Separation from the Existing Social Structure?" *Rutgers L. Rev./Civ. Rts. Devs.* 37 (1985), 825. Several scholars have demonstrated the pull of unstated norms in the context of employment and public regulation. See Jack M. Beermann and Joseph William Singer, "Baseline Questions in Legal Reasoning: The Example of Property in Jobs," *Ga. L. Rev.* 23 (1989), 911; Cass Sunstein, "Lochner's Legacy," *Colum. L. Rev.* 87 (1987), 873.

disadvantage pregnant people compared with others. Moreover, reasoned the majority, if there remains a conflict between a federal ban against sex-based discrimination and a state law requiring accommodation for women who take maternity leaves, that conflict should be resolved by the extension to men of benefits comparable to those available to women following maternity or pregnancy leaves.[34] Here, the Court used women's experiences as the benchmark and called for treating men equally in reference to women, thus reversing the usual practice. The dissenters, however, remained convinced that the federal law prohibited preferential treatment on the basis of pregnancy; they persisted in using the male norm as the measure for equal treatment in the workplace.[35]

There remains a risk of using the child-rearing couple as a new unstated reference point and failing them to recognize the burdens of workers who need accommodation to care for a dependent parent or to take care of some other private need. A new norm may produce new exclusions and assign the status of "difference" to still someone else. Unstated references appear in many other contexts. The assumption of able-bodiedness as the norm is manifested in architecture that is inaccessible to people who use wheelchairs, canes, or crutches to get around. Implicit norms often work subtly, through categories manifested in language. Reasoning processes tend to treat categories as clear, bounded, and sharp edged; a given item either fits within the category or it does not. Instead of considering the entire individual, we often select one characteristic as representative of the whole. George Lakoff has illustrated this phenomenon with the term "mother." Although "mother" appears to be a general category, with subcategories such as "working mother" and "unwed mother," the very need for modifying adjectives demonstrates an implicit prototype that structures expectations about and valuations of members of the general category, yet treats these expectations and valuations as mere reflections of reality.[36] If the general category is religion but the unstated prototype is Christianity, a court may have trouble recognizing as a religion a group lacking, for example, a minister.[37]

Psychologist Jerome Bruner wrote, "There is no seeing without looking, no hearing without listening, and both looking and listening are shaped by expectancy, stance, and intention."[38] Unstated reference points lie hidden in

[34]107 S.Ct. at 694, 695.

[35]See 107 S.Ct. at 698 (White, J., dissenting).

[36]See Lakoff, *Women, Fire, and Dangerous Things*, pp. 39–84.

[37]We tend to think metaphorically, allowing one concept to stand for another, or synecdochically, letting a part stand for a whole. These ways of thinking often obscure understanding either because they keep us from focusing on aspects of a thing that are inconsistent with the metaphor we choose, or because we fail to remember that we have made the substitution. See Howard Gardner, *The Mind's New Science: A History of the Cognitive Revolution* (New York: Basic Books, 1985), pp. 372–73; George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980), pp. 10–13, 35–40; *Judgment under Uncertainty: Heuristics and Biases*, ed. Daniel Kahneman, Paul Slovic, and Amos Tversky (New York: Cambridge University Press, 1982), pp. 23–98.

[38]Jerome S. Bruner, *Actual Minds, Possible Worlds* (Cambridge, Mass.: Harvard University Press, 1986), p. 110, paraphrasing Robert Woodworth. Similarly, Albert Einstein said, "It is the

legal discourse, which is full of the language of abstract universalism. The U.S. Constitution, for example, included general language to describe persons protected by it, even when it excluded black slaves and white women from its intended reach.[39] Legal language seeks universal applicability, regardless of the particular traits of an individual, yet abstract universalism often "takes the part for the whole, the particular for the universal and essential, the present for the eternal."[40] Legal reasoning feels rational, according to one theorist, when "particular metaphors for categorizing likeness and difference in the world have become frozen, or institutionalized as common sense."[41] Making explicit the unstated points of reference is the first step in addressing this problem; the next is challenging the presumed neutrality of the observer, who in fact sees inevitably from a situated perspective.

Assumption 3: The Observer Can See without a Perspective

This assumption builds on the others. Differences are intrinsic, and anyone can see them; there is one true reality, and impartial observers can make judgments unaffected and untainted by their own perspective or experience.[42] The facts of the world, including facts about people's traits, are knowable truly only by someone uninfluenced by social or cultural situations. Once legal rules are selected, regardless of prior disputes over the rules themselves, society may direct legal officials to apply them evenhandedly and to use them to discover and categorize events, motives, and culpability as they exist in the world. This aspiration to impartiality in legal judgments, however, is just that—an aspiration, not a description. The aspiration even risks obscuring the inevitable perspective of any given legal official, or of anyone else, and thereby makes it harder to challenge the impact of perspective on the selection of traits used to judge legal consequences.

The ideal of objectivity itself suppresses the coincidence between the viewpoints of the majority and what is commonly understood to be objective or unbiased. For example, in an employment discrimination case the defendant, a law firm, sought to disqualify Judge Constance Baker Motley from sitting on the case because she, as a black woman who had once represented plaintiffs in discrimination cases, would identify with those who suffer race

theory which decides what we can observe" (quoted in Daniel Bell, *The Coming of Post-Industrial Society: A Venture in Social Forecasting* [New York: Basic Books, 1973], p. 9).

[39]Nancy Cott, "Women and the Constitution" (unpublished paper). Cott notes that only the post–Civil War amendments introduce the particularizing language of race and gender, attempting to secure actual universal reach where the previous universal language of the Constitution had not intended to do so.

[40]Carol C. Gould, "The Woman Question: Philosophy of Liberation and the Liberation of Philosophy," in *Women and Philosophy: Toward a Theory of Liberation*, ed. Carol C. Gould and Marx Wartofsky (New York: Putnam, 1976).

[41]Gary Pellar, "The Metaphysics of American Law," *Calif. L. Rev.* vol. 73 (1985), 1151, 1156.

[42]See Alison Jaggar, *Feminist Politics and Human Nature* (Totowa, N.J.: Rowman & Allenheld, 1983), p. 356.

or sex discrimination. The defendant assumed that Judge Motley's personal identity and her past political work had made her different, lacking the ability to perceive without a perspective. Judge Motley declined, however, to recuse herself and explained: "If background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds."[43]

Because of the aspiration to impartiality and the prevalence of universalist language in law, most observers of law have been reluctant to confront the arguments of philosophers and psychologists who challenge the idea that observers can see without a perspective.[44] Philosophers such as A. J. Ayer and W. V. Quine note that although we can alter the theory we use to frame our perceptions of the world, we cannot see the world unclouded by preconceptions.[45] What interests us, given who we are and where we stand, affects our ability to perceive.[46]

[43]Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D. N.Y. 1975); accord Commonwealth v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 115 (E.D. Pa. 1974) (Higginbotham, J.) (denying defendant's motion to disqualify the judge from a race discrimination case because of the judge's racial identity as a black person). Judge Higginbotham noted that "black lawyers have litigated in federal courts almost exclusively before white judges, yet they have not urged the white judges should be disqualified on matters of race relations (id. at 177).

[44]Science shares both this aspiration of impartiality and the preference for universalist language. See, e.g., Karl Popper, *Realism and the Aim of Science*, ed. W. W. Bartley III (Totowa: Rowman and Littlefield, 1983). Popper stated his view of the aspiration frankly: "It is the aim of science to find satisfactory explanations," and such explanations should be "in terms of testable and falsifiable universal laws and initial conditions" (pp. 132, 134). However, considerable critical attention has focused on the aim of science to derive impartial universal laws from objective observations. For instance, Paul Feyerabend, *Against Method*, rev. ed. (London: Verso, 1988) challenges the notion of *objective* observations, arguing that all facts are value-laden or "contaminated." And Thomas Kuhn's seminal book *The Structure of Scientific Revolutions*, 2d ed. (Chicago: University of Chicago Press, 1970) calls into question the impartiality of scientific endeavors. Kuhn demonstrates that competing scientific theories are usually incommensurable; therefore, there is often no logical or objective basis for choosing between them. This suggests that something other than logic plays a significant part in charting the course science pursues. Bringing a different angle to the critique of science, Evelyn Fox Keller, *Reflections on Gender and Science* (New Haven, Conn.: Yale University Press, 1985), argues that the aspiration of science to generate universal laws in an impartial fashion reflects not merely a search for truth. She maintains that the quest for objectivity and universality is largely a projection onto science of a need to dominate and control the world.

[45]A. J. Ayer, *Philosophy in the Twentieth Century* (New York: Random House, 1982), p. 157; W. V. Quine, *Ontological Relativity and Other Essays* (New York: Columbia University Press, 1969). See also Thomas Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986); Hilary Putnam, *Reason, Truth, and History* (New York: Cambridge University Press, 1981); William James, *Psychology* (New York: Holt, 1892). The idea is even more pronounced in Kuhn, *Structure of Scientific Revolutions*, pp. 23–25; Kuhn argues that scientific inquiry has pursued truth within a paradigm of rational organization of fact gathering that is so taken for granted that it restricts the scientists' vision according to its own premises.

[46]William James, *On Some of Life's Ideals: A Certain Blindness in Human Beings* (New York: Holt, 1900; rpt. Folcroft, Pa.: Folcroft Library Editions, 1974); Luce Irigaray, *Ethique de la différence sexuelle* (Rotterdam: Erasmus Universiteit Rotterdam, 1987), pp. 19–20, quoted in Stephen Heath, "Male Feminism," in *Men in Feminism*, ed. Alice Jardine and Paul Smith (New York: Methuen 1987): "I will never be in a man's place, a man will never be in mine. Whatever

The impact of the observer's unacknowledged perspective may be crudely oppressive. When a municipality includes a nativity creche in its annual Christmas display, the majority of the community may perceive no offense to non-Christians in the community. If the practice is challenged in court as a violation of the Constitution's ban against establishment of religion, a judge who is Christian may also fail to see the offense to anyone and merely conclude, as the Supreme Court did in 1984, that Christmas is a national holiday.[47] Judges may be peculiarly disabled from perceiving the state's message about a dominant religious practice because judges are themselves often members of the dominant group and therefore have the luxury of seeing their perspectives mirrored and reinforced in major social and political institutions. Similarly, members of a racial majority may miss the impact of their own race on their perspective about the race of others.[48]

The power of unacknowledged perspectives permeated a recent Supreme Court analysis of the question of whether a federal statute exempting religious organizations from rules against religious discrimination in employment decisions violates the establishment clause of the First Amendment. A majority for the Court endorsed this legislative grant of discretion to religious organizations, and rejected a discharged employee's claims that such accommodation of religion unconstitutionally promotes religious organizations at the price of individual religious liberty. The majority reasoned that the preference for religion was exercised not by the government but rather by the church.[49] Here, the justices suggested that the government could remain neutral even while exempting religious organizations from otherwise universal prohibitions against discriminating on the basis of religion in employment decisions.

Justice Sandra Day O'Connor pointed out in her concurring opinion that allowing a private decision-maker to use religion in employment decisions inevitably engaged the government in that discrimination. For her, the question for the Court was how an "objective observer" would perceive a government policy of approving such religion-based employment decisions. She challenged the justices in the majority to admit that the law was not neutral and to explore the meaning of this nonneutrality to someone not involved in the dispute. The aspiration to impartiality infuses her analysis, yet the meaning of objectivity almost dissolves in application: "To ascertain whether the statute [exempting religious organizations from the ban against religious discrimination in employment] conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute."[50]

What could "objective" mean here? First, it acknowledges the limited perspective of the government representatives. Second, it rejects the viewpoint of the religious group as too biased or embedded in the problem.[51] So at a minimum, "objective" means "free from the biases of the litigating parties." But is there anyone who has no perspective on this issue? Justice O'Connor described a judge as someone capable of filling the shoes of the "objective observer," yet she acknowledged that she was answering from her own perspective: "*In my view* the objective observer should perceive the government action as an accommodation of the exercise of religion rather than as a government endorsement of religion."[52] Although at other times, Justice O'Connor has indicated a sensitive awareness of perspectives other than her own, here she failed to consider that no one can achieve a perspective free from a particular viewpoint. Her conclusion in this case—like her rejection of a religious-freedom challenge to a military regulation punishing servicemen for the wearing of religious headgear[53]—did not consider the possibility that her own perspective matches the perspective of a majority group and neglects the perspective of a minority. The comfort of finding one's perspective widely shared does not make it any less a perspective, especially in the face of evidence that other people perceive the world from a different perspective.

Justice Antonin Scalia's dissenting opinion in an affirmative action case reveals both considerable shrewdness about the effect of the observer's hidden perspective and surprising unawareness about the impact of his own perspective. He predicted that the majority's approval of an affirmative action employment plan would lead many employers to engage in voluntary affirmative action plans that employ only minimally capable employees rather than risk litigation challenging their employment practices as discriminatory: "This situation is more likely to obtain, of course, with respect to the least skilled jobs—perversely creating an incentive to discriminate against precisely those members of the nonfavored groups *least* likely to have profited from societal discrimination in the past."[54] Justice Scalia thus implied,

the possible identifications, one will never exactly occupy the place of the other—they are irreducible the one to the other."

[47]Lynch v. Donnolley, 465 U.S. 668 (1984). Subsequently, the Court has emphasized that context matters in the assessment of establishment clause challenges to public displays of a crèche. See County of Allegheny v. American Civil Liberties Union, 109 S.Ct. 3086 (1989).

[48]See Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," *Stan. L. Rev.* 39 (1987), 317, 380.

[49]See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S.Ct. 2862, 2869 n.15 (1987). The case arose in the context of nonprofit religious activities.

[50]See id. at 2874 (O'Connor, J., concurring).

[51]Cf. William James (*On Some of Life's Ideals*, p. 6): "The subject judged knows a part of the world of reality which the judging spectator fails to see, knows more while the spectator knows less; and, wherever there is conflict of opinion and difference of vision, we are bound to believe that the truer side is the side that feels the more, and not the side that feels the less."

[52]107 S.Ct. at 2875 (O'Connor, J., concurring) (emphasis added).

[53]See Goldman v. Weinberger, 106 S.Ct. 1310 (1986) (rejecting claim by an Orthodox Jew, serving as military psychologist, of a religious exemption from Air Force dress regulations to permit him to wear a yarmulke); Frank I. Michelman, "The Supreme Court, 1985 Term—Foreword: Traces of Self-Governance," *Harv. L. Rev.* 100 (1986), 1.

[54]Johnson v. Transportation Agency, 107 S.Ct. 1442, 1475 (1987) (Scalia, J., dissenting) (original emphasis).

without quite saying, that the perspective of the justices had influenced their development of a rule promoting affirmative action plans in a setting that could never touch members of the Court or people like them.[55]

Yet in another respect his opinion manifests, rather than exposes, the impact of the observer's perspective on the observed. He provided a generous and sympathetic view of the male plaintiff, Johnson, but demonstrated no comparable understanding of Joyce, the woman promoted ahead of him; his description of the facts of the case offered more details about Johnson's desires and efforts to advance his career. In effect, Justice Scalia tried to convey Johnson's point of view that the promotion of Joyce represented discrimination against Johnson.[56] Unlike the majority of the court, Justice Scalia provided no description of Joyce's career aspirations and her efforts to fulfill them; he thus betrayed a critical lack of sympathy for those most injured by social discrimination in the past.[57] Most curious was his apparent inability to imagine that Joyce and other women working in relatively unskilled jobs are, even more so than Johnson, people "*least* likely to have profited from societal discrimination in the past."[58] Operating under the apparent assumption that people fall into one of two groups—women and blacks on the one hand; white, unorganized, unaffluent, and unknown persons on the other[59]—Justice Scalia neglected the women who have been politically powerless and in need of the Court's protection. Although his opinion reveals that the Court may neglect the way it protects professional jobs from the affirmative action it prescribes for nonprofessionals, he himself remained apparently unaware of the effects of his own perspective on his ability to sympathize with some persons but not others.

A classic instance of unselfconscious immersion in a perspective that harms others appears in the Supreme Court's majority opinion in Plessy v. Ferguson,[60] which upheld the rationale of "separate but equal" in rejecting a challenge to legislated racial segregation in public railway cars. This is the decision ultimately overturned by the Court in Brown v. Board of Education.[61] A majority of the Court reasoned in *Plessy* that if any black people felt that segregation stamped them with a badge of inferiority, "it is not by reason of anything found in the [legislation], but solely because the colored race chooses to put that construction upon it."[62]

Homer Plessy's attorney had urged the justices to imagine themselves in the shoes of a black person: "Suppose a member of this court, nay, suppose every member of it, by some mysterious dispensation of providence should wake to-morrow with a black skin and curly hair . . . and in traveling through that portion of the country where the 'Jim Crow Car' abounds, should be ordered into it by the conductor. It is easy to imagine what would be the result. . . . What humiliation, what rage would then fill the judicial mind!"[63] But the justices in the Court's majority in 1896 remained unpersuaded and, indeed, seemed unable to leave the perspective of a dominant group even when they offered their own imagined shift in perspectives. They posed the hypothetical situation of a state legislature dominated by blacks which adopted the same law commanding racial segregation in railway cars that was then before the Court. The justices reasoned that certainly whites "would not acquiesce in [the] assumption" that this law "relegate[d] the white race to an inferior position."[64] Even in their effort to imagine how they would feel if the racial situation were reversed, the justices thereby manifested their viewpoint as members of a dominant and powerful group, which would never feel stigmatized by segregation.

Demonstrating that it was not impossible at that time to imagine a perspective other than that of the majority, however, Justice John Harlan dissented. He declared that the arbitrary separation of the races amounted to "a badge of servitude wholly inconsistent with the civil freedom and the equality before the law." He specifically rebutted the majority's claim about the meaning of segregation: "Everyone knows that the statute in question had its origins in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[65]

Justices to this day often fail to acknowledge their own perspective and its influence in the assignment of difference in relation to some unstated norm. Veiling the standpoint of the observer conceals its impact on our perception of the world.[66] Denying that the observer's perspective influences perception leads to the next assumption: that all other perspectives are either presumptively identical to the observer's own or do not matter.

[55]Justice Scalia ignored, however, the calls for diversifying the judiciary. See, e.g., Charles Halpern and Ann MacRory, "Choosing Judges," *New York Times*, July 1, 1979, p. E21.

[56]See 107 S.Ct. at 1468 (Scalia, J., dissenting).

[57]Paul Brest, "The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle," *Harv. L. Rev.* 90 (1976), 1, 39–42, 53–54, argues that the claims of those who have suffered because of patterns of discrimination deserve priority over the claims of those who have suffered by the vagaries of fate.

[58]107 S.Ct. at 1475 (Scalia, J., dissenting) (original emphasis).

[59]See id. at 1476: "The irony is that these individuals [the Johnsons of the country]—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent."

[60]163 U.S. 537 (1896).

[61]347 U.S. 483 (1954).

[62]163 U.S. at 551.

[63]Brief for the Plaintiff, Plessy v. Ferguson, reprinted in *Civil Rights and the American Negro: A Documentary History*, ed. Alpert B. Blaustein and Robert L. Zangrando (New York: Washington Square Press, 1968), pp. 298, 303–4.

[64]163 U.S. at 551.

[65]Id. at 537, 562, 557.

[66]Another instance of this assumption in Supreme Court jurisprudence appears in its treatment of the Fourth Amendment, where the perspectives of police officers and victims of crime provide the presumed starting point in assessing alleged violations of the guarantee against unwarranted searches or seizures. See Tracey Maclin, "Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?" *Amer. Crim. L. Rev.* 25 (1988), 669.

Assumption 4: Other Perspectives Are Irrelevant

In her short story "Meditations on History," Sherley Ann Williams illustrates how people can assume that their perspective is the truth, ignore other perspectives, and thereby miss much of what is going on. In the story a pregnant slave woman waits to be hanged for running away from her master and killing a white man. The owner has confined her in detention until her baby is born; then he will take the baby, to make up for the loss of his grown slave. A white man who is writing a book about managing slaves interviews the slave woman and seems satisfied that he is able to understand her. He concludes that she is basically stupid and confused; he grows especially irritated as she hums and sings during their interview, never considering that she is in this way communicating with other slaves about a rescue plan. When she escapes, with the help of her friends, the writer is baffled; he never comes to understand how incomplete was his understanding of her.[67]

Many people who judge differences in the world reject as irrelevant or relatively unimportant the experience of "different people." William James put it this way: "We have seen the blindness and deadness to each other which are our natural inheritance."[68] People often use stereotypes as though they were real and complete, thereby failing to see the complex humanity of others. Stereotyped thinking is one form of the failure to imagine the perspective of another. Glimpsing contrasting perspectives may alter assumptions about the world, as well as about the meaning of difference.

When judges consider the situation of someone they think is very much unlike themselves, there is a risk that they will not only view that person's plight from their own vantage point but also fail to imagine that there might be another vantage point. When a criminal defendant charged racial discrimination in the administration of the death penalty in Georgia's criminal justice system, the Supreme Court split between those justices who treated alternative perspectives as irrelevant and those who tried to imagine them. The defendant's lawyer submitted a statistical study of over 2,000 murder cases in Georgia during the 1970s, and the Court assumed it to be valid. According to the study, a defendant's likelihood of receiving the death sentence correlated with the victim's race and, to a lesser extent, with the defendant's race: black defendants convicted of killing white victims had the greatest likelihood of receiving the death penalty, and defendants of either race who killed black victims had considerably less chance of being sentenced to death. A majority of the Court concluded that even taking this evidence as true, the defendant had failed to show that the decision-makers in his case had acted with a discriminatory purpose.[69]

[67]Sherley Ann Williams, "Meditations on History," in *Midnight Birds: Stories by Contemporary Black Women Writers*, ed. Mary Helen Washington (Garden City, N.Y.: Anchor Books, 1980), p. 200.

[68]James, "What Makes a Life Significant," in *On Some of Life's Ideals*, pp. 49, 81. I want to acknowledge here that "blindness" as a metaphoric concept risks stigmatizing people who are visually impaired.

[69]McCleskey v. Kemp, 107 S.Ct. 1756, 1766 n.7. (1987). The Court noted that it had permitted statistical evidence of discrimination in the contexts of jury venire selection and Title VII violations because "in those cases, the statistics relate to fewer and fewer entities, and fewer variables are relevant to the challenged decisions" (id. at 1768).

Moreover, reasoned Justice Lewis Powell for the majority, recognizing the defendant's claim would open the door "to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender" or physical appearance. This argument, perhaps meant in part to trivialize the charge of race discrimination by linking it with physical appearance,[70] implied that discrepancies in criminal sentences are random and too numerous to control. This formulation took the vantage point of such decision-makers as the reviewing court and the jury but not the perspective of the criminal defendant. Scholars of discrimination law have argued that the effect of discrimination on minorities is the same whether or not the majority group members intended it.[71]

What would happen if the Court in a case like this considered an alternative perspective? Justice William Brennan explored this possibility in his dissent. Perhaps knowing that neither he nor many of his readers could fully grasp the defendant's perspective, he tried to look through the eyes of the defense attorney who is asked by Warren McCleskey, the black defendant in the case, about the chances of a death sentence. Adopting that viewpoint, Justice Brennan concluded that "counsel would feel bound to tell McCleskey, that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks . . . [and] there was a significant chance that race would play a prominent role in determining if he lived or died." Moreover, he wrote, "enhanced willingness to impose the death sentence on black defendants, or diminished willingness to render such a sentence when blacks are victims, reflects a devaluation of the lives of black persons." Under these circumstances, he concluded, the judicial system had, in fact, considered race and produced judgments "completely at odds with [the] concern that an individual be evaluated as a unique human being."[72]

To the majority's fear of widespread challenges to all aspects of criminal sentence Justice Brennan responded: "Taken at its face, such a statement seems to suggest a fear of too much justice. . . . The prospect that there may be more widespread abuse than McCleskey documents may be dismaying,

[70]Appearance discrimination may not, in fact, be trivial; for it may disguise racial, ethnic, or gender discrimination, or it may encode other forms of stereotypic and prejudicial thinking. See Note, "Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance," *Harv. L. Rev.* 100 (1987), 2035, 2051.

[71]See Lawrence, "The Id, the Ego, and Equal Protection," pp. 352–53; and Alan D. Freeman, "Antidiscrimination Law: A Critical Review," in *The Politics of Law: A Progressive Critique*, ed. David Kairys (New York: Pantheon Books, 1982), pp. 96–116.

[72]107 S.Ct. at 1782 (Brennan, J., dissenting); id. at 1790; accord at 1806 (Stevens, J., dissenting). Justice Blackmun argued that overt discrimination is especially pernicious in the criminal justice system because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others" (id. at 1795, Blackmun, J., dissenting) (quoting Strauder v. Western Virginia, 100 U.S. 303, 308 [1880]); id. at 1790.

but it does not justify complete abdication of our judicial role."[73] To the majority of the Court, acknowledging discrimination in this case looked like a management problem for the courts rather than a means of reducing potential injustices suffered by defendants.[74]

Randall Kennedy has emphasized still another perspective deflected by the majority, the perspective of the black communities "whose welfare is slighted by criminal justice systems that respond more forcefully to the killing of whites than the killing of blacks." In this view, black communities are denied equal access to a public good: punishment of those who injure members of that community. Taken seriously, this perspective could lead to the execution of more black defendants who have killed black victims. Kennedy concludes that "race-based devaluations of human life constitute simply one instance of a universal phenomenon: the propensity for persons to sympathize more fully with those with whom they can identify."[75]

It may be impossible to take the perspective of another completely, but the effort to do so can help us recognize that our own perspective is partial. Searching especially for the viewpoint of minorities not only helps those in the majority shake free of their unstated assumptions but also helps them develop a better normative sense in light of the experience of those with less power.[76] Members of minority groups have often had to become conversant with the world view of the majority while also trying to preserve their own. W. E. B. Du Bois's famous statement in his *Souls of Black Folk* describes that effort: "It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of the world that looks on in amused contempt and pity. One ever feels his twoness—an American, a Negro."[77] More recently, Bell Hooks explained her perception of how she and other women of color came to understand the world: "Living as we did—on the edge—we developed a particular way of seeing reality. We looked both from the outside in and from the inside out. We focused our attention on the center as well as on the margin. We understood both."[78] Works of fiction have often powerfully evoked the multiple worlds inhabited by members of minorities and thereby helped to convey the partiality of even a majority world view that presents itself as the one reality.[79]

[73] Id. at 1791.

[74] The courts tended to take the perspective of law enforcement officials rather than defendants in criminal cases. See Maclin, "Constructing Fourth Amendment Principles."

[75] Randall Kennedy, "*McCleskey v. Kemp:* Race, Capital Punishment, and the Supreme Court," *Harv. L. Rev.* 101 (1988), 1388–95.

[76] See Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations," 22 *Harv. C.R.–C.L. L. Rev.* 323 (1987), urging individuals seeking justice to look to the perspectives of minorities for normative insights.

[77] W. E. B. Du Bois, *The Souls of Black Folk: Essays and Sketches* (New York: Dodd, Mead, 1979), p. 3.

[78] Bell Hooks, *Feminist Theory: From Margin to Center* (Boston: South End Press, 1984), p. ix.

[79] See, e.g., James Baldwin, "Sonny's Blues," in *The Norton Anthology of Short Fiction*, 2d ed., ed. R. V. Cassill (New York: Norton, 1981) (a black ex-convict's middle-class brother comes to understand and appreciate the ex-convict's world of jazz music); Robin Becker, "In the Badlands," in *The Things That Divide Us* ed. Faith Conlon, Rachel da Silva, and Barbara Wilson (1985) (a disapproving mother learns to accept and appreciate her daughter's lesbian lover); Alice Walker, "Advancing Luna and Ida B. Wells," in Washington, *Midnight Birds* (perspectives shift between a white woman and a black woman on the possible rape of the white woman by a black man). See also Ralph Ellison, *Invisible Man* (New York: Vintage Press, 1972); Richard Wright, *Native Son* (New York: Harper & Row, 1940).

Judges have sometimes demonstrated an acute awareness of the perspective of religious persons or groups, contrasted with the view of a secular employer or the government. In Sherbert v. Verner,[80] the Supreme Court considered the claims of a member of the Seventh-Day Adventists who had been discharged by her employer because she would not work on Saturday—the Sabbath observed by her church—and was unable to find other work that allowed her to observe her Sabbath. When she applied for state unemployment compensation, the state commission rejected her claim on the ground that she had refused to accept suitable work. The commission argued that it employed a neutral rule, denying benefits to anyone who failed without good cause to accept suitable work when offered. The Supreme Court reasoned that this rule was not neutral; that from the woman's point of view it burdened her religious beliefs. Indeed, reasoned the Court, the government's failure to accommodate religion, within reasonable limits, amounted to hostility toward religion.[81]

Similarly, in Wisconsin v. Yoder, a majority of the Supreme Court refused enforcement of compulsory school laws against members of an Amish community who claimed that their religious way of life would be burdened if their adolescent children had to attend school beyond the eighth grade. Even though compulsory school laws serve widely supported public purposes, and even though the Amish way of life seemed unfamiliar to the Court, the justices were able to imagine the intrusion represented by compulsory schooling. Yet Justice William O. Douglas, in partial dissent, reminded the Court of another perspective often ignored: the viewpoint of the children, who might have preferred the chance to continue their formal education.[82]

A perspective may go unstated because it is so unknown to those in charge that they do not recognize it as a perspective. Judges in particular often presume that the perspective they adopt is either universal or superior to others. Indeed, a perspective may go unstated because it is so powerful and

[80] 374 U.S. 398 (1963).

[81] Subsequent cases, following the precedent of *Sherbert*, include Thomas v. Review Board, 450 U.S. 707 (1981) (state cannot deny unemployment benefits to a Jehovah's Witness who quit his job for religious reasons when transferred to making military equipment); Hobbie v. Unemployment Appeals Commission, 107 S.Ct. 1046 (1987) (state cannot deny unemployment benefits to individual who was fired when she refused, after religious conversion, to work on Saturdays).

[82] 406 U.S. 205 (1972); id. at 205, 241–43 (Douglas, J., concurring in part and dissenting in part). Justice Douglas reasoned: "The Court's analysis assumes that the only interests at stake in this case are those of the Amish parents on the one hand, and those of the State on the other," and "if the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notion of religious duty upon their children." Yet "the views of the child whose parent is the subject of the suit" are crucial.

pervasive that it may be presumed without defense. It has been said that Aristotle could have checked out—and corrected—his faulty assertion that women have fewer teeth than men. He did not do so, however, because he thought he knew.[83] Presumptions about whose perspective ultimately matters arise from the fifth typically unarticulated assumption, that the status quo is the preferred situation.

Assumption 5: The Status Quo Is Natural, Uncoerced, and Good

Connected with many of the other assumptions is the idea that critical features of the status quo—general social and economic arrangements—are natural and desirable. From this assumption follow three propositions. First, the goal of governmental neutrality demands the status quo because existing societal arrangements are assumed to be neutral. Second, governmental actions that change the status quo have a different status from omissions, or failures to act, that maintain the status quo. Third, prevailing societal arrangements are not forced on anyone. Individuals are free to make choices and to assume responsibility for those choices. These propositions are rarely stated, both because they are deeply entrenched and because they treat the status quo as good, natural, and freely chosen—and thus not in need of discussion.

Difference may seem salient, then, not because of a trait intrinsic to the person but because the dominant institutional arrangements were designed without that trait in mind—designed according to an unstated norm reconfirmed by the view that alternative perspectives are irrelevant or have already been taken into account. The difference between buildings built without considering the needs of people in wheelchairs and buildings that are accessible to people in wheelchairs reveals that institutional arrangements define whose reality is to be the norm and what is to seem natural. Sidewalk curbs are not neutral or natural but humanly constructed obstacles. Interestingly, modifying what has been the status quo often brings unexpected benefits as well. Inserting curb cuts for the disabled turns out to help many others, such as bike riders and parents pushing baby strollers. (They can also be positioned to avoid endangering a visually impaired person who uses a cane to determine where the sidewalk ends.)

Yet the weight of the status quo remains great. Existing institutions and language already shape the world and already express and recreate attitudes about what counts as a difference, and who or what is the relevant point of comparison. Assumptions that the status quo is natural, good, and uncoerced make proposed changes seem to violate the commitment to neutrality, predictability, and freedom.

For example, courts have treated school instruction in evolution as neutral toward religion, even though some groups and some states find that instruction corrosive to particular religious beliefs (as in Edwards v. Aguillard). Similarly, many legal observers have viewed affirmative action as nonneutral, compared with the status quo treatments of race and gender in employment and other distributions of societal resources. Proposals to alter rules about gender roles encounter objections, from both men and women, to what is seen as undesirable disruption in the expectations and predictability of social relationships. Suggestions to integrate schools, private clubs, and other social institutions that have been segregated by race or by gender provoke protests that these changes would interfere with freedom—referring, often explicitly, to the freedom of those who do not wish to associate with certain others.[84]

Yet the status quo is often challenged as burdensome—not neutral, not desirable, and not free—for members of minority religious groups. For example, a seemingly neutral rule, limiting unemployment benefits to those who become unemployed through no fault of their own, offended the constitutional protections of religious freedom—according to the Supreme Court—when the rule burdened an individual who lost her job when she refused to work during her religious Sabbath. In Hobbie v. Unemployment Appeals Commission,[85] the Court concluded that the state's unemployment scheme must accommodate religious adherences. The government's rules cannot be neutral in a world that is not neutral.

Despite judgments such as this one, courts on other occasions have not understood how burdensome apparently neutral governmental rules may be, given other dimensions of differences among people. An ostensibly neutral state policy on unemployment compensation figured also in the case of a woman who had taken a pregnancy leave from her job with no guarantee of reinstatement; upon her return the employer told her there were no positions available.[86] Linda Wimberly applied for unemployment benefits but was denied under a state law disqualifying applicants unless their reasons for leaving a job were directly attributable to the work or to the employer. Wimberly argued that a federal statute forbidding discrimination in unem-

[83] "Aristotle maintained that women have fewer teeth than men; although he was twice married, it never occurred to him to verify this statement by examining his wives' mouths" (*Bertrand Russell's Best: Silhouettes in Satire*, ed. Robert E. Egner [New York: Mentor Books, New American Library, 1958], p. 67).

[84] See Herbert Weschler, "Toward Neutral Principles of Constitutional Law," *Harv. L. Rev.* 73 (1959), 1. Judge Skelly Wright's critique of this argument appears in his "Professor Bickel," p. 769. For criticisms of the attempt to use neutral principles, see Mark Tushnet, "Following the Rule Laid Down: A Critique of Interpretive and Neutral Principles," *Harv. L. Rev.* 96 (1983), 781, arguing that neutral principles are incapable of guiding judicial decisions. Also see John Hart Ely, "The Supreme Court's 1977 Term—Foreword: On Discovering Fundamental Values," *Harv. L. Rev.* 92 (1978), p. 5, pointing out that neutral principles tell us nothing about the appropriate *content* of a decision. For a defense of those Supreme Court decisions criticized by Wechsler, see Louis Pollack, "Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler," *U. Pa. L. Rev.* 108 (1959), 1, (arguing that the Supreme Court's decisions not only are correct but also satisfy Wechsler's requirement of following neutral principles. For a thoughtful analysis of the tensions between freedom of association and antidiscrimination, see Deborah Rhode, "Association and Assimilation," *Nw. U. L. Rev.* 81 (1986), 106. This topic has yielded several recent Supreme Court decisions rejecting associational defenses to discriminatory practices. See New York State Club Ass'n v. City of New York, 56 U.S.L.W. 4653 (June 21, 1988); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[85] 107 S.Ct. 1046 (1987).

[86] Wimberly v. Labor & Indus. Relations Comm'n of Missouri, 107 S.Ct. 821 (1987).

ployment compensation "solely on the basis of pregnancy or termination of pregnancy" required accommodation for women who leave work because of pregnancy.[87]

The Supreme Court unanimously rejected Wimberly's claim that this denial of benefits contravened the federal statute. The Court found that the state had not singled out pregnancy as the reason for withholding unemployment benefits; instead, pregnancy fell within a broad class of reasons for unemployment unrelated to work or to the employer. The Court interpreted the federal statute to forbid discrimination but not to mandate preferential treatment.[88] In the eyes of the justices, it was neutral to have a general rule denying unemployment benefits to anyone unemployed for reasons unrelated to the workplace or the employer.[89] A state choosing to define its unemployment eligibility to disqualify not just those who leave work because of pregnancy but also those who leave work for good cause, illness, or compelling personal reasons may thus do so without violating federal law.[90]

Similarly, statistical patterns of racial discrepancies in death-penalty sentencing, as presented in McCleskey v. Kemp, cannot be presumed to establish unconstitutional discrimination, because the status quo is deemed neutral, absent more direct proof of intentional discrimination. The appearance of neutrality in law may thus at times defeat claims that the social and political arrangements are not neutral, unfairly distinguishing some people from others.

This pattern of thought is often connected to the view that rules seen as neutral produce different results for different people only because people make free choices that have different consequences.[91] When women choose to become pregnant and then take leave from their paid employment, they do not deserve unemployment benefits, because they left their jobs voluntarily.[92]

[87] 26 U.S.C. sec. 3304(a)(12) (1982).

[88] 107 S.Ct. at 825, 826.

[89] The Court explained: "Thus, a State could not decide to deny benefits to pregnant women while at the same time allowing benefits to persons who are in other respects similarly situated: the 'sole basis' for such a decision would be on account of pregnancy. On the other hand, if a state adopts a neutral rule that incidentally disqualifies pregnant or formerly pregnant claimants as part of the larger group, the neutral application of that rule cannot readily be characterized as a decision made 'solely on the basis of pregnancy'" (ibid., p. 825).

[90] Further, under the view that governmental actions changing the status quo raise problems not raised by failures to act, the Court reasoned that if Congress had wanted to require special treatment for pregnancy, it would have said so, and even the federal ban against discrimination on the basis of pregnancy in unemployment compensation schemes lacked sufficient specificity to forbid the denial of benefits to a woman in Wimberly's situation. The Court treated this as a problem of congressional silence: Congress did not mean to authorize preferential treatment because it did not say so. To treat silence as denial of special treatment and to treat accommodation of pregnancy as preferential treatment are both signs of the assumption that the status quo is neutral or good.

[91] Similar assumptions underlie the judicial treatment of differences in wealth as unimportant to constitutional rights and protections. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). See generally Laurence Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988), pp. 1665–72.

[92] See Finley, "Transcending Equality Theory," pp. 1118, 1136–38.

When a worker chooses to convert to a new religion and then loses a job because of conflict between religious demands and the work schedule, this too may be treated as a personal choice—but the courts have been more solicitous of this kind of choice, given constitutional protections for the free exercise of religion.[93] Courts have traditionally refused to find that a rape occurred, absent proof of force by the defendant and/or resistance by the victim; the victim's silence or lack of sufficient protest has been deemed to constitute consent to sexual relations.[94]

Men and women historically have held different types of jobs. Social attitudes, including attitudes held by women, are the preferred explanation for some who presume that the status quo is natural, good, or chosen. Justice Scalia dissented on this ground when a majority for the Supreme Court approved a voluntary affirmative action plan to improve the positions of white women and minorities in a traditionally segregated workplace. No woman had held the job of road crew dispatcher, but women themselves, explained Justice Scalia, had not sought this job in the past. He acknowledged but rejected the view of some people that "the social attitudes which cause women themselves to avoid certain jobs and to favor others are as nefarious as conscious, exclusionary discrimination."[95] An extensive dispute about the role of women's choices in the gender segregation of the workplace arose in a sex discrimination charge pursued by the federal Equal Employment Opportunity Commission against Sears, Roebuck & Co.[96] Did the absence of women from jobs as commission salespersons result from women's own choices and preferences, or from societal discrimination and employers' refusals to make those jobs available? The legal framework in the case seemed to force the issue into either/or questions: women's work-force participation was due either to their own choices or to forces beyond their control; women's absence from certain jobs was either due to employers' discrimination or not; either women lacked the interest and qualifications for these jobs, or women had the interest and qualifications for the jobs.

Would it be possible to articulate a third view? Consider this one: choices by working women and decisions by their employers were both influenced by larger patterns of economic prosperity and depression and by shifting

[93] In *Hobbie*, the Supreme Court rejected the state's argument that the employee's refusal to work amounted to misconduct related to her work, which rendered her ineligible for unemployment benefits, given a scheme limiting compensation to persons who become "unemployed through no fault of their own." The Court rejected this emphasis on the cause of the conflict because the "salient inquiry" was whether the denial of the unemployment benefits unlawfully burdened Hobbie's free exercise right. The Court also rejected the state's claim that making unemployment benefits available to Hobbie would unconstitutionally establish religion by easing eligibility requirements for religious adherents (107 S.Ct. at 1047–48, 1051 n.11).

[94] Susan Estrich, "Rape," *Yale L. J.* 95 (1986), 1086, 1098–1105, 1130–32.

[95] Johnson v. Transportation Agency, 107 S.Ct. 1442, 1443 (1987).

[96] 628 F. Supp. 1264 (N.D. Ill. 1986). See Mary Joe Frug, "On Sears" (New England School of Law, Boston, unpublished manuscript, 1988); Ruth Milkman, "Women's History and the Sears Case," *Feminist Studies* 12 (Summer 1986), 375–400; Nadine Taub, "The Sears Case and Its Relevance for Legal Education," *American Association of Law Schools, Women in Legal Education Newsletter*, Nov. 1986.

social attitudes about appropriate roles for women. These larger patterns became real in people's lives when internalized and experienced as individual choice.[97] Assuming that the way things have been resulted either from people's choices or from nature helps to force legal arguments into these alternatives and to make legal redress of historic differences a treacherous journey through incompatible alternatives.

Sometimes, judges have challenged the assumption that the status quo is natural and good; they have occasionally approved public and private decisions to take difference into account in efforts to alter existing conditions and to remedy their harmful effects.[98] But for the most part, unstated assumptions work in subtle and complex ways. They fill a basic human need to simplify and make our world familiar and unsurprising, yet by their very simplification, assumptions exclude contrasting views. Moreover, they contribute to the dilemma of difference by frustrating legislative and constitutional commitments to change the treatment of differences in race, gender, ethnicity, religion, and handicap.

The Effects of Unstated Assumptions

Unstated assumptions make the difference dilemma seem intractable. If difference is intrinsic, then it will crop up whether noticed or ignored. If difference is knowable by reference to an unstated norm, then the norm itself remains hidden from evaluation. If an observer such as a judge can see differences without a perspective, and already knows whatever is of value in anyone else's perspective, then those who "are different" have no chance to challenge the assignment of difference or its consequences. And if the status quo is natural, good, and chosen, then efforts to alter its differential burdens on people will inevitably seem unnatural, undesirable, and coercive. Noticing difference and ignoring it both recreate difference; both can threaten such goals as neutrality, equality, and freedom.

Moreover, if equality depends on "sameness," then the recurrence of difference undermines chances for equality. The fear of emphasizing difference, whether by acknowledgment or nonacknowledgment, arises as long as difference carries stigma and precludes equality. Jonathan Kozol reported in the 1960s an incident whose dated quality suggests that in some areas, at least, we have learned to disentangle difference from inequality: In an all black urban school one white teacher advised another not to bring up slavery while discussing the cotton gin with her students. The first teacher explained, not with malice but with an expression of intense and honest affection for her class: "I don't want these children to have to think back on this year later on

[97]See Kathy E. Ferguson, *The Feminist Case against Bureaucracy* (Philadelphia: Temple University Press, 1984), p. 177.

[98]See, e.g., Swann v. Charlotte-Mecklenberg Board of Educ., 402 U.S. 1 (1971) (approving the use of racial balance goals in a school desegregation plan). See Kathleen M. Sullivan, "Sins of Discrimination: Last Term's Affirmative Action Cases," *Harv. L. Rev.* 100 (1986), 78.

and have to remember that we were the ones who told them they were Negro."[99]

If individuals can be meaningfully categorized in terms that carry negative associations, on the basis of a limited number of traits selected to compare them with others who are presumed the norm, then difference assumes a large and immutable significance. Treating the individual as handicapped or deficient in the English language runs the risk of assigning to that individual, as an internal limit, the category of difference that carries the message of inequality. This is not inevitable, for the categories of handicap and proficiency in English are not the sum total of those individuals, nor are they conclusive indications of those individuals' potential or worth.

Stephen Jay Gould, a gifted observer of biology and zoology, put it this way: "Few tragedies can be more extensive than the stunting of life, few injustices deeper than the denial of opportunity to strive or even to hope, by a limit imposed from without, but falsely identified as lying within. . . . We inhabit a world of human differences and predilections, but the extrapolation of these facts to theories of rigid limits is ideology."[100] Ideology becomes a concern here because expressions of power, approval, and disapproval are at work in the links between categories of sameness and difference and the values of equality and inequality. The assumptions that differences lie *within* people obscures the fact that they represent comparisons drawn *between* people, comparisons that use some traits as the norm and confirm some people's perceptions as the truth while devaluing or disregarding the perspectives of others.

In addition, the assumption that the status quo is good, natural, and uncoerced contributes to a riddle of neutrality, another version of the difference dilemma. If the public schools must remain neutral toward religion, do they do so by balancing the teaching of evolution with the teaching of scientific arguments about divine creation—or does this accommodation of a religious view depart from the requisite neutrality? Governmental neutrality may freeze in place the past consequences of differences. Yet any departure from neutrality in governmental standards uses governmental power to

[99]Jonathan Kozol, *Death at an Early Age: The Destruction of the Hearts and Minds of Negro Children in the Boston Public Schools* (Boston: Houghton Mifflin, 1967), p. 68. Kozol continues: "The amount of difficulty involved in telling children they are Negro, of course, is proportional to the degree of ugliness which is attached to that word within a person's mind. . . . What she was afraid of was to be remembered as the one who told them that they were what they *are*. . . . To be taught by a teacher who felt that it would be wrong to let them know it must have left a silent and deeply working scar. The extension to children of the fears and evasions of a teacher is probably not very uncommon, and at times the harm it does is probably trivial. But when it comes to a matter of denying to a class of children the color of their skin and the very word that designates them, then I think that it takes on the proportions of a madness" (pp. 68–69; original emphasis). Yet shielding a minority child from community dislike may disable her from recognizing hostility when it comes her way. See ch. 2 (discussing Audre Lorde).

[100]Stephen Jay Gould, *The Mismeasure of Man* (New York: Norton, 1981), pp. 28–29. Anthony Cohen, *The Symbolic Construction of Community* (London: Tavistock, 1985), p. 110, pushes the point yet another step; he suggests that "the finer the differences between people, the stronger is the commitment people have to them."

make those differences matter and thus symbolically reinforces them. The relationship between means and ends thus becomes so troubled that decision-makers may become paralyzed with inaction. If the goal is to avoid identifying people by a trait of difference, but the institutions and practices make that trait matter, there seems to be no way to remedy the effects of difference without making difference matter yet again.

Debates over affirmative action powerfully depict this dilemma, but the dilemma appears only when the background assumption is that the status quo is neutral and natural rather than part of the discriminating framework that must itself be changed.[101] The dilemma seems especially sharp if the decision-makers assume that the world will continue to make that difference matter.[102] Consider this episode: An instructor in a residential school for blind children points out the mantel of a fireplace to a child who is about to bang his head on it. The child says, "Why don't you put some padding on it? This is a school for the blind; we could hurt ourselves." The instructor replies, "There won't be padding outside the school when you leave here."[103] Deciding not to pad the mantelpiece at the school for the blind may help train the blind students to be wary about such hazards; it may also lead to accidents in the school and contribute to an attitude that the world outside does not need to be renovated to accommodate the needs of people disabled by its current construction.

Finally, the usually unstated assumptions contribute to another form of the difference dilemma. Legal officials often face a choice between using their power to grant broad discretion to others and using their power to articulate formal rules that specify categorical decisions for dispensing public—or private—power. When should courts and legislatures delegate to other public or private decision-makers the discretion to differentiate people, and when should legal institutions instead articulate specific rules restricting such

[101]See, e.g., Van Alstyne, "Rites of Passage," p. 775, arguing that affirmative action itself promotes racism and only neutral rules avoid discrimination. Ruth Colker ("Anti-Subordination above All," pp. 1003, 1013) has responded to similar attacks on affirmative action by noting that "history demonstrates the difficulty of achieving true equality through race- or sex-neutral remedies." She and other defenders of affirmative action argue that the statue quo is not neutral, so neutral rules recreate nonneutrality. Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987), has argued that even the goal of "equal opportunity" may entrench an unfair status quo and perpetuate discrimination. The fictional heroine of his eloquent book comments that civil rights reformers found largely illusory the long-sought promise of equal opportunity.

[102]Stephen L. Carter, "When Victims Happen to Be Black," *Yale L.J.* 97 (1988), 420, 435, thoughtfully explores the criticisms of affirmative action which typically deny that all black people are victims in a legal or moral sense while presuming that whites as a group are victimized by racially conscious affirmative action purposes. This insight offers a clue to deep assumptions about what kinds of racial categories are relevant and what social arrangements are the presumed benchmarks.

[103]See James Garfield, *Follow My Leader* (New York: Viking, 1957). See also "Unwanted Help," *New York Times*, Sept. 16, 1984, p. 49: the Association for the Blind opposed an electronic guidance system because it would discourage blind students from developing their own senses.

differentiation? The power to differentiate persists, whether exercised fo mally or delegated to others.

If legal officials articulate specific rules to cabin the discretion of othe regarding the treatment of difference, this practice can secure adherence t the goals of equality and neutrality by forbidding consideration of diffe ences except in the manner explicitly specified by the legal rules. Althoug likely to promote accountability, this solution of formal rules has drawback Making and enforcing specific rules engages legal officials in the problem c reinvesting differences with significance by noticing them. Specifically arti ulating permissible and impermissible uses of difference may enshrine cat gorical analysis and move further away from the ideal of treating persons a individuals rather than as members of groups defined by shared traits.

Alternatively, legal officials can grant or cede discretion to other decisior makers. Then, any problems from noticing or ignoring difference, any risk of nonneutrality in means and in results, are no longer problems for court but become matters falling within the discretion of other public or privat decision-makers. This solution, of course, merely moves the problem t another forum, giving the new decision-maker discretion to take differenc into account, perhaps in an impermissible manner.

The choice between discretion and formality vividly occupied the Suprem Court in its debate over charges of racial discrimination in the administratio of the death penalty in Georgia's criminal justice system. If the crimina justice system must not take the race of defendants or victims into account, i this goal achieved by granting discretion to prosecutors and jurors, who ca then make individualized decisions but may also introduce racial concerns Or should judges impose formal rules specifying conditions under whic racial concerns must be made explicit in order to guard against them? Th Court's majority emphasized the central importance of jury discretion in th criminal justice system as a reason for resisting the implication of unconstitu tional discrimination from the statistical demonstration of differential risk of the death penalty, based on the races of both victims and defendants Justice Powell reasoned that "it is difficult to imagine guidelines that woul produce the predictability sought by the dissent without sacrificing the dis cretion essential to a humane and fair system of criminal justice."[104]

Justice Brennan's dissent agreed that individualized assessments are crit ical to the criminal process, but he argued that "discretion is a means, not a end" and that under the circumstances of the case the Court must monito the discretion of others.[105] The dissenters saw the grant of discretion to pros ecutors and juries, though disengaging judges and legislators from directl endorsing the use of differences in decisions, as allowing *those* decision makers to give significance to differences. The majority saw a risk that i courts and legislatures specify formal rules restricting the discretion of othe

[104]107 S.Ct. at 1778 n.37.
[105]Id. at 1790, 1793–94.

decision-makers and directing them not to allow gender, race, or other traits of difference to influence their judgments, this very specificity might make difference newly significant and undermine the goal of justice based on individualized, rather than categorical, consideration.

Articulating the assumptions behind the difference dilemma can expose what hinges on the choice between broad discretion and formal rules. That choice seems a dilemma if difference is intrinsic, for then difference will reappear under either regime. Similarly, if the norm used for defining difference remains unstated and uncontestable, neither grants of discretion nor formal rules can restrain the attribution of difference. Alternative perspectives may be silenced if courts refrain from monitoring decisions by other bodies—but the same result may occur if courts presume to know how to regulate difference without considering the perspectives of others. And if the status quo is taken as a neutral benchmark, neither formal rules nor informal discretion can reach the institutional arrangements that burden some more than others.

If the assumptions behind the difference dilemma are exposed and debated, however, the tension between formal, predictable rules and individualized judgments under discretionary standards becomes simply another terrain for reconsidering the relationships and patterns of power that influence the negative consequences of difference. Stating the assumptions that have gone unstated, I believe, opens room for debate and for new kinds of solutions. Discovering that difference arises in relationships and in contexts that are themselves mutable introduces new angles of vision, new possibilities for change. The next chapter offers glimpses of new approaches to difference and also considers the problems that these approaches themselves may raise.

WHITE PRIVILEGE AND MALE PRIVILEGE:

A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES

THROUGH WORK IN WOMEN'S STUDIES

-by-

Peggy McIntosh

Through work to bring materials and perspectives from Women's Studies into the rest of the curriculum, I have often noticed men's unwillingness to grant that they are over-privileged in the curriculum, even though they may grant that women are disadvantaged. Denials which amount to taboos surround the subject of advantages which men gain from women's disadvantages. These denials protect male privilege from being fully recognized, acknowledged, lessened, or ended.

Thinking through unacknowledged male privilege as a phenomenon with a life of its own, I realized that since hierarchies in our society are interlocking, there was most likely a phenomenon of white privilege which was similarly denied and protected, but alive and real in its effects. As a white person, I realized I had been taught about racism as something which puts others at a disadvantage, but had been taught not to see one of its corollary aspects, white privilege, which puts me at an advantage.

I think whites are carefully taught not to recognize white privilege, as males are taught not to recognize male privilege. So I have begun in an untutored way to ask what it is like to have white privilege. This paper is a partial record of my personal observations, and not a scholarly analysis. It is based on my daily experiences within my particular circumstances.

I have come to see white privilege as an invisible package of unearned assets which I can count on cashing in each day, but about which I was "meant" to remain oblivious. White privilege is like an invisible

weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.

Since I have had trouble facing white privilege, and describing its results in my life, I saw parallels here with men's reluctance to acknowledge male privilege. Only rarely will a man go beyond acknowledging that women are advantaged to acknowledging that men have unearned advantage, or that unearned privilege has not been good for men's development as human beings, or for society's development, or that privilege systems might ever be challenged and changed.

I will review here several types or layers of denial which I see at work protecting, and preventing awareness about, entrenched male privilege. Then I will draw parallels, from my own experience, with the denials which veil the facts of white privilege. Finally, I will list 46 ordinary and daily ways in which I experience having white privilege, within my life situation and its particular social and political frameworks.

Writing this paper has been difficult, despite warm receptions for the talks on which it is based.[1] For describing white privilege makes one newly accountable. As we in Women's Studies work reveal male privilege and ask men to give up some of their power, so one who writes about having white privilege must ask, "Having described it, what will I do to lessen

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1. This paper was presented at the Virginia Women's Studies Association conference in Richmond in April, 1986 and the American Educational Research Association conference in Boston in October, 1986 and discussed with two groups of participants in the Dodge Seminars for Secondary School Teachers in New York and Boston in the spring of 1987.

or end it?"

The denial of men's overprivileged state takes many forms in discussions of curriculum change work. Some claim that men must be central in the curriculum because they have done most of what is important or distinctive in life or in civilization. Some recognize sexism in the curriculum but deny that it makes male students seem unduly important in life. Others agree that certain individual thinkers are blindly male-oriented but deny that there is any systemic tendency in disciplinary frameworks or epistemology to over-empower men as a group. Those men who do grant that male privilege takes institutionalized and embedded forms are still likely to deny that male hegemony has opened doors for them personally. . Virtually all men deny that male overreward alone can explain men's centrality in all the inner sanctums of our most powerful institutions. Moreover, those few who will acknowledge that male privilege systems have over-empowered them usually end up doubting that we could dismantle these privilege systems. They may say they will work to improve women's status, in the society or in the university, but they can't or won't support the idea of lessening men's. In curricular terms, this is the point at which they say that they regret they cannot use any of the interesting new scholarship on women because the syllabus is full. When the talk turns to giving men less cultural room, even the most thoughtful and fair-minded of the men I know well tend to reflect, or fall back on, conservative assumptions about the inevitability of present gender relations and distributions of power, calling on precedent or sociobiology and psychobiology to demonstrate that male domination is natural and follows inevitably from evolutionary pressures. Others resort

to arguments from "experience" or religion or social responsibility or wishing and dreaming.

After I realized, through faculty development work in Women's Studies, the extent to which men work from a base of unacknowledged privilege, I understood that much of their oppressiveness was unconscious. Then I remembered the frequent charges from women of color that white women whom they encounter are oppressive. I began to understand why we are justly seen as oppressive, even when we don't see ourselves that way. At the very least, obliviousness of one's privileged state can make a person or group irritating to be with. I began to count the ways in which I enjoy unearned skin privilege and have been conditioned into oblivion about its existence, unable to see that it put me "ahead" in any way, or put my people ahead, overrewarding us and yet also paradoxically damaging us, or that it could or should be changed.

My schooling gave me no training in seeing myself as an oppressor, as an unfairly advantaged person, or as a participant in a damaged culture. I was taught to see myself as an individual whose moral state depended on her individual moral will. At school, we were not taught about slavery in any depth; we were not taught to see slaveholders as damaged people. Slaves were seen as the only group at risk of being dehumanized. My schooling followed the pattern which Elizabeth Minnich has pointed out: whites are taught to think of their lives as morally neutral, normative, and average, and also ideal, so that when we work to benefit others, this is seen as work which will allow "them" to be more like "us." I think many of us know how obnoxious this attitude can be in men.

After frustration with men who would not recognize male privilege, I

decided to try to work on myself at least by identifying some of the daily effects of white privilege in my life. It is crude work, at this stage, but I will give here a list of special circumstances and conditions I experience which I did not earn but which I have been made to feel are mine by birth, by citizenship, and by virtue of being a conscientious law-abiding "normal" person of good will. I have chosen those conditions which I think in my case attach somewhat more to skin-color privilege than to class, religion, ethnic status, or geographical location, though of course all these other factors are intricately intertwined. As far as I can see, my Afro-American co-workers, friends, and acquaintances with whom I come into daily or frequent contact in this particular time, place, and line of work cannot count on most of these conditions.

1. I can if I wish arrange to be in the company of people of my race most of the time.

2. I can avoid spending time with people whom I was trained to mistrust and who have learned to mistrust my kind or me.

3. If I should need to move, I can be pretty sure of renting or purchasing housing in an area which can afford and in which I would want to live.

4. I can be pretty sure that my neighbors in such a location will be neutral or pleasant to me.

5. I can go shopping alone most of the time, pretty well assured that I will not be followed or harassed.

6. I can turn on the television or open to the front page of the paper and see people of my race widely represented.

7. When I am told about our national heritage or about "civilization," I am shown that people of my color made it what it is.

8. I can be sure that my children will be given curricular materials that testify to the existence of their race.

9. If I want to, I can be pretty sure of finding a publisher for this piece on white privilege.

10. I can be pretty sure of having my voice heard in a group in which I am the only member of my race.

11. I can be casual about whether or not to listen to another woman's voice in a group in which she is the only member of her race.

12. I can go into a music shop and count on finding the music of my race represented, into a supermarket and find the staple foods which fit with my cultural traditions, into a hairdresser's shop and find someone who can cut my hair.

13. Whether I use checks, credit cards, or cash, I can count on my skin color not to work against the appearance of financial reliability.

14. I can arrange to protect my children most of the time from people who might not like them.

15. I do not have to educate my children to be aware of systemic racism for their own daily physical protection.

16. I can be pretty sure that my children's teachers and employers will tolerate them if they fit school and workplace norms; my chief worries about them do not concern others' attitudes toward their race.

17. I can talk with my mouth full and not have people put this down to my color.

18. I can swear, or dress in second hand clothes, or not answer

letters, without having people attribute these choices to the bad morals, the poverty, or the illiteracy of my race.

19. I can speak in public to a powerful male group without putting my race on trial.

20. I can do well in a challenging situation without being called a credit to my race.

21. I am never asked to speak for all the people of my racial group.

22. I can remain oblivious of the language and customs of persons of color who constitute the world's majority without feeling in my culture any penalty for such oblivion.

23. I can criticize our government and talk about how much I fear its policies and behavior without being seen as a cultural outsider.

24. I can be pretty sure that if I ask to talk to "the person in charge," I will be facing a person of my race.

25. If a traffic cop pulls me over or if the IRS audits my tax return, I can be sure I haven't been singled out because of my race.

26. I can easily buy posters, post-cards, picture books, greeting cards, dolls, toys, and children's magazines featuring people of my race.

27. I can go home from most meetings of organizations I belong to feeling somewhat tied in, rather than isolated, out-of-place, outnumbered, unheard, held at a distance, or feared.

28. I can be pretty sure that an argument with a colleague of another race is more likely to jeopardize her chances for advancement than to jeopardize mine.

29. I can be pretty sure that if I argue for the promotion of a person of another race, or a program centering on race, this is not likely to cost

me heavily within my present setting, even if my colleagues disagree with me.

30. If I declare there is a racial issue at hand, or there isn't a racial issue at hand, my race will lend me more credibility for either position than a person of color will have.

31. I can choose to ignore developments in minority writing and minority activist programs, or disparage them, or learn from them, but in any case, I can find ways to be more or less protected from negative consequences of any of these choices.

32. My culture gives me little fear about ignoring the perspectives and powers of people of other races.

33. I am not made acutely aware that my shape, bearing, or body odor will be taken as a reflection on my race.

34. I can worry about racism without being seen as self-interested or self-seeking.

35. I can take a job with an affirmative action employer without having my co-workers on the job suspect that I got it because of my race.

36. If my day, week, or year is going badly, I need not ask of each negative episode or situation whether it has racial overtones.

37. I can be pretty sure of finding people who would be willing to talk with me and advise me about my next steps, professionally.

38. I can think over many options, social, political, imaginative, or professional, without asking whether a person of my race would be accepted or allowed to do what I want to do.

39. I can be late to a meeting without having the lateness reflect on my race.

40. I can choose public accommodation without fearing that people of my race cannot get in or will be mistreated in the places I have chosen.

41. I can be sure that if I need legal or medical help, my race will not work against me.

42. I can arrange my activities so that I will never have to experience feelings of rejection owing to my race.

43. If I have low credibility as a leader I can be sure that my race is not the problem.

44. I can easily find academic courses and institutions which give attention only to people of my race.

45. I can expect figurative language and imagery in all of the arts to testify to experiences of my race.

46. I can choose blemish cover or bandages in "flesh" color and have them more or less match my skin.

I repeatedly forgot each of the realizations on this list until I wrote it down. For me, white privilege has turned out to be an elusive and fugitive subject. The pressure to avoid it is great, for in facing it I must give up the myth of meritocracy. If these things are true, this is not such a free country; one's life is not what one makes it; many doors open for certain people through no virtues of their own. These perceptions mean also that my moral condition is not what I had been led to believe. The appearance of being a good citizen rather than a troublemaker comes in large part from having all sorts of doors open automatically because of my color.

A further paralysis of nerve comes from literary silence protecting

privilege. My clearest memories of finding such analysis are in Lillian Smith's unparalleled Killers of the Dream and Margaret Andersen's review of Karen and Mamie Fields' Lemon Swamp. Smith, for example, wrote about walking toward black children on the street and knowing they would step into the gutter; Andersen contrasted the pleasure which she, as a white child, took on summer driving trips to the south with Karen Fields' memories of driving in a a closed car stocked with all necessities lest, in stopping, her black family should suffer "insult, or worse." Adrienne Rich also recognizes and writes about daily experiences of privilege, but in my observation, white women's writing in this area is far more often on systemic racism than on our daily lives as light-skinned women. [2]

In unpacking this invisible knapsack of white privilege, I have listed conditions of daily experience which I once took for granted, as neutral, normal, and universally available to everybody, just as I once thought of a male-focused curriculum as the neutral or accurate account which can speak for all. Nor did I think of any of these perquisites as bad for the holder. I now think that we need a more finely differentiated taxonomy of privilege, for some of these varieties are only what one would want for everyone in a just society, and others give license to be ignorant, oblivious, arrogant and destructive. Before proposing some more finely-tuned categorization, I will make some observations about the general effects of these conditions on my life and expectations.

In this potpourri of examples, some privileges make me feel at home

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2. Andersen, Margaret, "Race and the Social Science Curriculum: A Teaching and Learning Discussion." Radical Teacher, November, 1984, pp. 17-20.
Smith, Lillian, Killers of the Dream, New York, 1949.

in the world. Others allow me to escape penalties or dangers which others suffer. Through some, I escape fear, anxiety, or a sense of not being welcome or not being real. Some keep me from having to hide, to be in disguise, to feel sick or crazy, to negotiate each transaction from the position of being an outsider or, within my group, a person who is suspected of having too close links with a dominant culture. Most keep me from having to be angry.

I see a pattern running through the matrix of white privilege, a pattern of assumptions which were passed on to me as a white person. There was one main piece of cultural turf; it was my own turf, and I was among those who could control the turf. I could measure up to the cultural standards and take advantage of the many options I saw around me to make what the culture would call a success of my life. My skin color was an asset for any move I was educated to want to make. I could think of myself as "belonging" in major ways, and of making social systems work for me. I could freely disparage, fear, neglect, or be oblivious to anything outside of the dominant cultural forms. Being of the main culture, I could also criticize it fairly freely. My life was reflected back to me frequently enough so that I felt, with regard to my race, if not to my sex, like one of the real people.

Whether through the curriculum or in the newspaper, the television, the economic system, or the general look of people in the streets, we received daily signals and indications that my people counted, and that others either didn't exist or must be trying, not very successfully, to be like people of my race. We were given cultural permission not to hear voices of people of other races, or a tepid cultural tolerance for hearing

or acting on such voices. I was also raised not to suffer seriously from anything which darker-skinned people might say about my group, "protected," though perhaps I should more accurately say prohibited, through the habits of my economic class and social group, from living in racially mixed groups or being reflective about interactions between people of differing races.

In proportion as my racial group was being made confident, comfortable, and oblivious, other groups were likely being made inconfident, uncomfortable, and alienated. Whiteness protected me from many kinds of hostility, distress, and violence, which I was being subtly trained to visit in turn upon people of color.

For this reason, the word "privilege" now seems to me misleading. Its connotations are too positive to fit the conditions and behaviors which "privilege systems" produce. We usually think of privilege as being a favored state, whether earned, or conferred by birth or luck. School graduates are reminded they are privileged and urged to use their (enviable) assets well. The word "privilege" carries the connotation of being something everyone must want. Yet some of the conditions I have described here work to systemically overempower certain groups. Such privilege simply confers dominance, gives permission to control, because of one's race or sex. The kind of privilege which gives license to some people to be, at best, thoughtless and, at worst, murderous should not continue to be referred to as a desirable attribute. Such "privilege" may be widely desired without being in any way beneficial to the whole society.

Moreover, though "privilege" may confer power, it does not confer

moral strength. Those who do not depend on conferred dominance have traits and qualities which may never develop in those who do. Just as Women's Studies courses indicate that women survive their political circumstances to lead lives which hold the human race together, so "under-privileged" people of color who are the world's majority have survived their oppression and lived survivors' lives from which the white global minority can and must learn. In some groups, those dominated have actually become strong through not having all of these unearned advantages, and this gives them a great deal to teach the others. Members of so-called privileged groups can seem foolish, ridiculous, infantile or dangerous by contrast.

I want, then, to distinguish between earned strength and unearned power conferred systemically. Power from unearned privilege can look like strength when it is in fact permission to escape or to dominate. But not all of the privileges on my list are inevitably damaging. Some, like the expectation that neighbors will be decent to you, or that your race will not count against you in court, should be the norm in a just society and should be considered as the entitlement of everyone. Others, like the privilege not to listen to less powerful people, distort the humanity of the holders as well as the ignored groups. Still others, like finding one's staple foods everywhere, may be a function of being a member of a numerical majority in the population. Others have to do with not having to labor under pervasive negative stereotyping and mythology.

We might at least start by distinguishing between positive advantages which we can work to spread, to the point where they are not advantages at all but simply part of the normal civic and social fabric, and negative

types of advantage which unless rejected will always reinforce our present hierarchies. For example, the positive "privilege" of belonging, the feeling that one belongs within the human circle, as Native Americans say, fosters development and should not be seen as privilege for a few. It is, let us say, an entitlement which none of us should have to earn; ideally it is an unearned entitlement. At present, since only a few have it, it is an unearned advantage for them. The negative "privilege" which gave me cultural permission not to take darker-skinned Others seriously can be seen as arbitrarily conferred dominance and should not be desirable for anyone. This paper results from a process of coming to see that some of the power which I originally saw as attendant on being a human being in the U.S. consisted in unearned advantage and conferred dominance, as well as other kinds of special circumstance not universally taken for granted.

In writing this paper I have also realized that white identity and status (as well as class identity and status) give me considerable power to choose whether to broach this subject and its trouble. I can pretty well decide whether to disappear and avoid and not listen and escape the dislike I may engender in other people through this essay, or interrupt, take over, dominate, preach, direct, criticize, or control to some extent what goes on in reaction to it. Being white, I am given considerable power to escape many kinds of danger or penalty as well as to choose which risks I want to take.

There is an analogy here, once again, with Women's Studies. Our male colleagues do not have a great deal to lose in supporting Women's Studies, but they do not have a great deal to lose if they oppose it either. They simply have the power to decide whether to commit themselves to more

equitable distributions of power. They will probably feel few penalties whatever choice they make; they do not seem, in any obvious short-term sense, the ones at risk, though they and we are all at risk because of the behaviors which have been rewarded in them.

Through Women's Studies work I have met very few men who are truly distressed about systemic, unearned male advantage and conferred dominance. And so one question for me and others like me is whether we will be like them, or whether we will get truly distressed, even outraged, about unearned race advantage and conferred dominance and if so, what we will do to lessen them. In any case, we need to do more work in identifying how they actually affect our daily lives. We need more down-to-earth writing by people about these taboo subjects. We need more understanding of the ways in which white "privilege" damages white people, for these are not the same ways in which it damages the victimized. Skewed white psyches are an inseparable part of the picture, though I do not want to confuse the kinds of damage done to the holders of special assets and to those who suffer the deficits. Many, perhaps most, of our white students in the U.S. think that racism doesn't affect them because they are not people of color; they do not see "whiteness" as a racial identity. Many men likewise think that Women's Studies does not bear on their own existences because they are not female; they do not see themselves as having gendered identities. Insisting on the universal <u>effects</u> of "privilege" systems, then, becomes one of our chief tasks, and being more explicit about the <u>particular</u> effects in particular contexts is another. Men need to join us in this work.

In addition, since race and sex are not the only advantaging systems

at work, we need to similarly examine the daily experience of having age advantage, or ethnic advantage, or physical ability, or advantage related to nationality, religion, or sexual orientation. Prof. Marnie Evans suggested to me that in many ways the list I made also applies directly to heterosexual privilege. This is a still more taboo subject than race privilege: the daily ways in which heterosexual privilege makes married persons comfortable or powerful, providing supports, assets, approvals, and rewards to those who live or expect to live in heterosexual pairs. Unpacking that content is still more difficult, owing to the deeper imbeddedness of heterosexual advantage and dominance, and stricter taboos surrounding these.

But to start such an analysis I would put this observation from my own experience: The fact that I live under the same roof with a man triggers all kinds of societal assumptions about my worth, politics, life, and values, and triggers a host of unearned advantages and powers. After recasting many elements from the original list I would add further observations like these:

1. My children do not have to answer questions about why I live with my partner (my husband).
2. I have no difficulty finding neighborhoods where people approve of our household.
3. My children are given texts and classes which implicitly support our kind of family unit, and do not turn them against my choice of domestic partnership.
4. I can travel alone or with my husband without expecting embarrassment

or hostility in those who deal with us.

5. Most people I meet will see my marital arrangements as an asset to my life or as a favorable comment on my likability, my competence, or my mental health.

6. I can talk about the social events of a weekend without fearing most listeners' reactions.

7. I will feel welcomed and "normal" in the usual walks of public life, institutional, and social.

8. In many contexts, I am seen as "all right" in daily work on women because I do not live chiefly with women.

Difficulties and dangers surrounding the task of finding parallels are many. Since racism, sexism, and heterosexism are not the same, the advantaging associated with them should not be seen as the same. In addition, it is hard to disentangle aspects of unearned advantage which rest more on social class, economic class, race, religion, sex and ethnic identity than on other factors. Still, all of the oppressions are interlocking, as the Combahee River Collective statement of 1977 continues to remind us eloquently.[3]

One factor seems clear about all of the interlocking oppressions. They take both active forms which we can see and embedded forms which as a member of the dominant group one is taught not to see. In my class and place, I did not see myself as racist because I was taught to recognize

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3. "A Black Feminist Statement," The Combahee River Collective, pp. 13-22 in Hull, Scott, Smith, eds., All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave: Black Women's Studies. The Feminist Press, 1982.

racism only in individual acts of meanness by members of my group, never in invisible systems conferring unsought racial dominance on my group from birth. Likewise, we are taught to think that sexism or heterosexism is carried on only through individual acts of discrimination, meanness, or cruelty toward women, gays, and lesbians, rather than in invisible systems conferring unsought dominance on certain groups. Disapproving of the systems won't be enough to change them. I was taught to think that racism could end if white individuals changed their attitudes; many men think sexism can be ended by individual changes in daily behavior toward women. But a man's sex provides advantage for him whether or not he approves of the way in which dominance has been conferred on his group. A "white" skin in the United States opens many doors for whites whether or not we approve of the way dominance has been conferred on us. Individual acts can palliate, but cannot end, these problems. To redesign social systems we need first to acknowledge their colossal unseen dimensions. The silences and denials surrounding privilege are the key political tool here. They keep the thinking about equality or equity incomplete, protecting unearned advantage and conferred dominance by making these taboo subjects. Most talk by whites about equal opportunity seems to me now to be about equal opportunity to try to get into a position of dominance while denying that <u>systems</u> of dominance exist.

It seems to me that obliviousness about white advantage, like obliviousness about male advantage, is kept strongly inculturated in the United States so as to maintain the myth of meritocracy, the myth that democratic choice is equally available to all. Keeping most people unaware that freedom of confident action is there for just a small number

of people props up those in power, and serves to keep power in the hands of the same groups that have most of it already. Though systemic change takes many decades, there are pressing questions for me and I imagine for some others like me if we raise our daily consciousness on the perquisites of being light-skinned. What will we do with such knowledge? As we know from watching men, it is an open question whether we will choose to use unearned advantage to weaken hidden systems of advantage, and whether we will use any of our arbitrarily-awarded power to try to reconstruct power systems on a broader base.

I have appreciated commentary on this paper from the Working Papers Committee of the Wellesley College Center for Research on Women, from members of the Dodge seminar, and from many individuals, including Margaret Andersen, Sorel Berman, Joanne Braxton, Johnnella Butler, Sandra Dickerson, Marnie Evans, Beverly Guy-Sheftall, Sandra Harding, Eleanor Hinton Hoytt, Pauline Houston, Paul Lauter, Joyce Miller, Mary Norris, Gloria Oden, Beverly Smith, and John Walter.

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June 21, 1989

To: Users of the White Privilege and Male Privilege paper for course assignments, classroom discussions, and racism workshops.

From: Peggy McIntosh, Wellesley College Center for Research on Women, author of "White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies" (Center Working Paper #189)

Subject: Notes and Topics for Further Reflection on White Privilege and Male Privilege

In March, 1989, Brenda Montgomery invited me to be on her Chicago radio talk show to discuss this paper. She is an Afro-American woman with an Afro-American audience. She read the list of 46 aspects of privilege aloud on the air, and we spent 70 minutes discussing them and talking with callers, rather than the originally allotted 20 minutes. Response was very positive.

Brenda Montgomery said at one point, "With these attitudes, whites turn into Teflon people. Nothing sticks; it all just rolls off them." I said, "But the thing is, the things on the list are not attitudes. They are not conscious." Listening, later, I began to hear that many black friends use the word "attitude" in a different way than I do. They use it to refer to something deep, generalized, and usually unacknowledged. "She has an attitude." But they also seem sometimes to use it to refer to something they wish the holder would recognize and work on. The difference in usage may come from blacks' cultural experience of dealing with invisible or unconscious racism so much of the time. Joyce Miller of Bryn Mawr College has pointed out to me that two researchers who do work in this area have given the name of "aversive racism" to this kind of deep and unacknowledged feeling which is quite at odds with the holder's conscious attitudes, and which leads to behavior which is quite at odds with a person's conscious intentions and understanding of what she or he is doing. (See References.)

A black woman said she was glad to hear me "working on my own people," because if she said these things about white privilege, she would be seen as militant. Try saying five of these things on the list aloud, imagining that you are a person of color talking about white privilege. Imagine how you would be seen or heard by Caucasian friends or colleagues. Would you be seen and heard as militant? If so, ask yourself whether you have ever formed or created a climate in which a person of color enumerating white privileges can have as much credibility and appear as rationally analytical as a white person doing so. Do you create such a climate?

A black man said that everything on the list was obvious, and that I was

rather naive in thinking that it wasn't. It was obvious to him, but not to me. The list was very hard for me to compile. This situation reminds me of the way in which I assume that white men know they are privileged, whereas they seem oblivious, and we are made to tiptoe around rather than mention in their presences the bald existence of patriarchy, which most of them will go to their graves denying.

When the caller said that the existence of white privilege was obvious, this reminded me also of research which reports that whites think blacks in the U.S. are doing well, while blacks say they are not. Those in a privileged group are educated to oblivion about what it is like for others, especially for others who have to be in their presences. This point may seem obvious, but it is not obvious in the white public domain, and this caller made that clear to me with a new force. What I would add, that he perhaps did not realize, is that a deep politics reinforced by taboos keeps "the obvious" from being seen by those who have been awarded most power in this culture. We are kept ignorant about white privilege and are ignorant about this ignorance.

A black man disagreed with my statement that the privilege of whites is unearned. He said whites earn it through white supremacy. "That's the rules of the game -- white supremacists get it all." A few minutes later, this caller asked me whether I thought some of us (i.e. some of my race) were a little bit less white supremacist than others. His assumption was that all whites are white supremacists.

I do not like this assumption, but I have to take it seriously because it parallels my perception that all white men are "patriarchal" in habits of mind and behavior because of the cultural structures they are born in, though some of them are indeed "less patriarchal than others." "White supremacist" is a label I had associated before only with those who say that white people <u>are</u> superior and <u>should</u> control others. Yet white men who do not explicitly say they are superior, or that they should control women, usually just go ahead and accept whatever unearned public and private power they are given. They seem to me to <u>embody</u> and <u>enact</u> patriarchy, however non-sexist they may seem to themselves to be. I can therefore see how whites can be seen as white supremacist. White women and men can think they are decent, fair, open, "sympathetic," while being seen as white supremacist, unless we have explicitly disowned or worked against inherited racial systems, and the look of superiority which privilege systems allow us. Then we may seem "a little bit less white supremacist" than others.

A black woman who is listed in the Acknowledgments section to the paper says that the list is fine as far as it goes, and that what she experiences beyond the world touched by the list is a whole lot of other suffering I don't have a chance to see. I understand this and urge all readers to add further examples from their observations.

I also urge readers to make their own lists based on their own daily contexts and experiences; this one is specific to my own circumstances, among my friends and colleagues in this particular place and time.

A white male caller said, "Race is not the issue," and told us that he was discriminated against because of his long white beard. "All difference brings

discrimination." The talk show host thanked him and cut him off without much further comment. If you had decided to answer him, what would you have said?

One caller said that the class system was at the heart of the list, and that I was talking chiefly about class privilege. Consider this, in reference to)oints on my list, or on your own.

A Jewish woman said that she feels that as a Jewish woman she cannot count)n many of the elements of privilege which I list. Consider differences between Jewish and Black experience, and similarities.

An editor wrote to me saying that it was useful to have "blunt writing about racism." I wrote back to say that I wasn't exactly doing "blunt writing about racism." Then a white woman in Los Angeles said I had explained "subtle male bias" to her, and this comment, too, disconcerted me. Both comments seem to)verlook the elements of unearned privilege, invisibility, and oblivion which I emphasize. Another recent disjunction: a columnist in Los Angeles quoted the part about the "invisible knapsack," but only in reference to male privilege; she)mitted all mention of race privilege. Either I have not been clear about what I)m saying, or my main points are very hard for these white readers to accept, or both.

A white Jewish male friend said that he thought my list clouded the topic by jumbling together situations in which there is an absence of discrimination with situations in which there is an actual presence of white privilege. No woman of color to whom I have recounted this criticism has granted this difference, nor do I. But I have found it useful to think about his comment, for he is a thoughtful feminist man. As I think about his distinction, and realize I cannot agree to it, this clarifies the subject, and correlates indirectly with the recent Supreme Court decisions which leave a huge burden on individuals to prove they were intentionally and specifically discriminated against. My colleague wants to distinguish between conditions which give specific advantages to whites and those which simply have whiteness as the cultural norm.

A member of the Bird Clan of the Cherokee Nation, Brenda Collins, says that Caucasian women should never say to women of other races, "I know just how you feel." What might Caucasian women do that makes more sense?

The Boston Globe on June 8, 1989 reported that the Massachusetts Board of Regents of Higher Education had voted to "prohibit racism" in the Massachusetts higher education system. But it is not possible to simply "prohibit racism" the way you can, say, "prohibit smoking." Racism is both like an individual's smoke-producing action and like the whole system that produces every kind of air pollution breathed by all of us. How do we go about thinking about and working to change a whole set of systems which produce air pollution? And how do we manage to change understanding of what racism is, to the point where no one thinks you can simply prohibit it? I think we need to say that after all these centuries of white privilege, no one can simply declare white privilege)rohibited, starting today. But first, we need public and private awareness that white privilege exists.

A white woman has written to me about the privilege system: "It is very

hard to give up anything once the system is working for you." Yes. But also there are rewards for making good on what we say are our ideals. Within your life circumstances, how can those of you who are reading these questions use power to share power, or use privilege to dismantle privilege systems? Is it possible to arrive at some two or three ways in which each, or all, can see, speak, or act in such ways? and involve their institions in doing so?

Can Caucasian people understand that so-called privilege can be a deficit status? I have a black friend who said to me once, "I wouldn't want to be white if you paid me five million dollars." Can whites learn to understand that they are not "models"?

Can white Americans learn that their versions of things are not international models? One listener has suggested that we should make lists like this about "the ugly American," living off unearned colonizers' power. We are not the only ones who do this, nor do we do it in all situations, but the comparison is valid.

Many groups traditionally committed to "service" have requested permission to use this paper: church groups, the Junior League, and the Women's International League for Peace and Freedom. Church councils include Episcopal, Quaker, Unitarian-Universalist, and Lutheran. I think certain white people who had thought of themselves as "good" are able to be more reflective about the conditions surrounding their apparent virtue if they look at this kind of list.

But also the list has been useful to black students in the classes of Prof. Beverly Guy-Sheftall, who uses the paper in a sophomore course, at traditionally black Spelman College in Atlanta, Georgia. Dr. Sheftall reports that paradoxically, discussion of the points on my list brings many black students to their first understanding of what their parents and grandparents had been talking about as "institutionalized racism." Many of these students entered Spelman College saying, as so many 17 year-old white female students say, "I've never been discriminated against."

This account and analysis of privilege, then, is useful both for those whose groups have been given permission to dominate, and those whose groups have not been given such permission.

I would welcome responses and further comment from readers of this paper.

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principle of tax law that the ordinary meaning of terms is persuasive of their statutory meaning.[12]

We conclude that Congress made no distinctions based upon the inducements for paying the premium. Congress delimited the bond premium it wished to make amortizable in terms of categories of bonds, and there is no doubt that respondent purchased bonds which are included within the purview of § 125. Respondent is therefore entitled to this deduction and the judgment below is

Affirmed.

MR. JUSTICE BLACK dissents. He believes that this case should be decided in accordance with, and for the reasons given by, the opinion of the Court of Appeals for the Ninth Circuit in *Commissioner* v. *Shoong*, 177 F. 2d 131 (1949).

MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

[12] *Crane* v. *Commissioner*, 331 U. S. 1, 6–7 (1947); *Helvering* v. *Flaccus Oak Leather Co.*, 313 U. S. 247, 249 (1941); *Helvering* v. *San Joaquin Fruit & Investment Co.*, 297 U. S. 496, 499 (1936); *Lang* v. *Commissioner*, 289 U. S. 109, 111 (1933); cf. *Atlantic Coast Line R. Co.* v. *Phillips*, 332 U. S. 168, 171 (1947).

SWEATT *v.* PAINTER ET AL.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 44. Argued April 4, 1950.—Decided June 5, 1950.

Petitioner was denied admission to the state-supported University of Texas Law School, solely because he is a Negro and state law forbids the admission of Negroes to that Law School. He was offered, but he refused, enrollment in a separate law school newly established by the State for Negroes. The University of Texas Law School has 16 full-time and three part-time professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities, scholarship funds, an Order of the Coif affiliation, many distinguished alumni, and much tradition and prestige. The separate law school for Negroes has five full-time professors, 23 students, a library of 16,500 volumes, a practice court, a legal aid association and one alumnus admitted to the Texas Bar; but it excludes from its student body members of racial groups which number 85% of the population of the State and which include most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner would deal as a member of the Texas Bar. *Held:* The legal education offered petitioner is not substantially equal to that which he would receive if admitted to the University of Texas Law School; and the Equal Protection Clause of the Fourteenth Amendment requires that he be admitted to the University of Texas Law School. Pp. 631–636.

Reversed.

A Texas trial court found that a newly-established state law school for Negroes offered petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas" and denied mandamus to compel his admission to the University of Texas Law School. The Court of Civil Appeals affirmed. 210 S. W. 2d 442. The Texas Supreme Court denied writ of error. This Court granted certiorari. 338 U. S. 865. *Reversed*, p. 636.

W. J. Durham and *Thurgood Marshall* argued the cause for petitioner. With them on the brief were *Robert L. Carter, William R. Ming, Jr., James M. Nabrit* and *Franklin H. Williams.*

Price Daniel, Attorney General of Texas, and *Joe R. Greenhill*, First Assistant Attorney General, argued the cause for respondents. With them on the brief was *E. Jacobson*, Assistant Attorney General.

Briefs of *amici curiae*, supporting petitioner, were filed by *Solicitor General Perlman* and *Philip Elman* for the United States; *Paul G. Annes* for the American Federation of Teachers; *Thomas I. Emerson, Erwin N. Griswold, Robert Hale, Harold Havighurst* and *Edward Levi* for the Committee of Law Teachers Against Segregation in Legal Education; *Phineas Indritz* for the American Veterans Committee, Inc.; and *Marcus Cohn* and *Jacob Grumet* for the American Jewish Committee et al.

An *amici curiae* brief in support of respondents was filed on behalf of the States of Arkansas, by *Ike Murray*, Attorney General; Florida, by *Richard W. Ervin*, Attorney General, and *Frank J. Heintz*, Assistant Attorney General; Georgia, by *Eugene Cook*, Attorney General, and *M. H. Blackshear, Jr.*, Assistant Attorney General; Kentucky, by *A. E. Funk*, Attorney General, and *M. B. Holifield*, Assistant Attorney General; Louisiana, by *Bolivar E. Kemp, Jr.*, Attorney General; Mississippi, by *Greek L. Rice*, Attorney General, and *George H. Ethridge*, Acting Attorney General; North Carolina, by *Harry McMullan*, Attorney General, and *Ralph Moody*, Assistant Attorney General; Oklahoma, by *Mac Q. Williamson*, Attorney General; South Carolina, by *John M. Daniel*, Attorney General; Tennessee, by *Roy H. Beeler*, Attorney General, and *William F. Barry*, Solicitor General; and Virginia, by *J. Lindsay Almond, Jr.*, Attorney General, and *Walter E. Rogers*, Assistant Attorney General.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

This case and *McLaurin* v. *Oklahoma State Regents*, *post*, p. 637, present different aspects of this general question: To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court. We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible. *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947), and cases cited therein. Because of this traditional reluctance to extend constitutional interpretations to situations or facts which are not before the Court, much of the excellent research and detailed argument presented in these cases is unnecessary to their disposition.

In the instant case, petitioner filed an application for admission to the University of Texas Law School for the February, 1946 term. His application was rejected solely because he is a Negro.[1] Petitioner thereupon brought this suit for mandamus against the appropriate school officials, respondents here, to compel his admission. At that time, there was no law school in Texas which admitted Negroes.

The state trial court recognized that the action of the State in denying petitioner the opportunity to gain

[1] It appears that the University has been restricted to white students, in accordance with the State law. See Tex. Const., Art. VII, §§ 7, 14; Tex. Rev. Civ. Stat. (Vernon, 1925), Arts. 2643b (Supp. 1949), 2719, 2900.

a legal education while granting it to others deprived him of the equal protection of the laws guaranteed by the Fourteenth Amendment. The court did not grant the relief requested, however, but continued the case for six months to allow the State to supply substantially equal facilities. At the expiration of the six months, in December, 1946, the court denied the writ on the showing that the authorized university officials had adopted an order calling for the opening of a law school for Negroes the following February. While petitioner's appeal was pending, such a school was made available, but petitioner refused to register therein. The Texas Court of Civil Appeals set aside the trial court's judgment and ordered the cause "remanded generally to the trial court for further proceedings without prejudice to the rights of any party to this suit."

On remand, a hearing was held on the issue of the equality of the educational facilities at the newly established school as compared with the University of Texas Law School. Finding that the new school offered petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas," the trial court denied mandamus. The Court of Civil Appeals affirmed. 210 S. W. 2d 442 (1948). Petitioner's application for a writ of error was denied by the Texas Supreme Court. We granted certiorari, 338 U. S. 865 (1949), because of the manifest importance of the constitutional issues involved.

The University of Texas Law School, from which petitioner was excluded, was staffed by a faculty of sixteen full-time and three part-time professors, some of whom are nationally recognized authorities in their field. Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities,

scholarship funds, and Order of the Coif affiliation. The school's alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State. It may properly be considered one of the nation's ranking law schools.

The law school for Negroes which was to have opened in February, 1947, would have had no independent faculty or library. The teaching was to be carried on by four members of the University of Texas Law School faculty, who were to maintain their offices at the University of Texas while teaching at both institutions. Few of the 10,000 volumes ordered for the library had arrived; [2] nor was there any full-time librarian. The school lacked accreditation.

Since the trial of this case, respondents report the opening of a law school at the Texas State University for Negroes. It is apparently on the road to full accreditation. It has a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who has become a member of the Texas Bar.

Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law

[2] "Students of the interim School of Law of the Texas State University for Negroes [located in Austin, whereas the permanent School was to be located at Houston] shall have use of the State Law Library in the Capitol Building. . . ." Tex. Laws 1947, c. 29, § 11, Tex. Rev. Civ. Stat. (Vernon, 1949 Supp.), note to Art. 2643b. It is not clear that this privilege was anything more than was extended to all citizens of the State.

review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and

prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those held open to petitioner. That such a claim, if made, would be dishonored by the State, is no answer. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer,* 334 U. S. 1, 22 (1948).

It is fundamental that these cases concern rights which are personal and present. This Court has stated unanimously that "The State must provide [legal education] for [petitioner] in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633 (1948). That case "did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes." *Fisher* v. *Hurst,* 333 U. S. 147, 150 (1948). In *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 351 (1938), the Court, speaking through Chief Justice Hughes, declared that "petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity." These are the only cases in this Court which present the issue of the constitutional validity of race distinctions in state-supported graduate and professional education.

In accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State. We cannot, therefore,

agree with respondents that the doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), requires affirmance of the judgment below. Nor need we reach petitioner's contention that *Plessy* v. *Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation. See *supra*, p. 631.

We hold that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School. The judgment is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed.

McLAURIN *v.* OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 34. Argued April 3–4, 1950.—Decided June 5, 1950.

Appellant, a Negro citizen of Oklahoma possessing a master's degree, was admitted to the Graduate School of the state-supported University of Oklahoma as a candidate for a doctorate in education and was permitted to use the same classroom, library and cafeteria as white students. Pursuant to a requirement of state law that the instruction of Negroes in institutions of higher education be "upon a segregated basis," however, he was assigned to a seat in the classroom in a row specified for Negro students, was assigned to a special table in the library, and, although permitted to eat in the cafeteria at the same time as other students, was assigned to a special table there. *Held:* The conditions under which appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws; and the Fourteenth Amendment precludes such differences in treatment by the State based upon race. Pp. 638–642.

(a) The restrictions imposed upon appellant impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession. Pp. 640–641.

(b) That appellant may still be set apart by his fellow students and may be in no better position when these restrictions are removed is irrelevant, for there is a constitutional difference between restrictions imposed by the State which prohibit the intellectual commingling of students and the refusal of students to commingle where the State presents no such bar. P. 641.

(c) Having been admitted to a state-supported graduate school, appellant must receive the same treatment at the hands of the State as students of other races. P. 642.

87 F. Supp. 528, reversed.

The proceedings below are stated in the opinion. The judgment below is *reversed*, p. 642.

Robert L. Carter and *Amos T. Hall* argued the cause for appellant. With them on the brief were *Thurgood*

For "Sweatt v Painter"

Kluger, Richard, "The Spurs of Texas Are Upon You." In Simple Justice: The History of "Brown v Board of Education" and Black America's Struggle for Equality. New York: Vintage Books, 1975.

Crystal CHAMBERS, in her own Behalf and in behalf of her minor daughter, Ruth Chambers, Appellants,

v.

The OMAHA GIRLS CLUB, INC., a Nebraska Corporation; Mary Heng-Braun, Director; Mrs. Harold W. Andersen, and 80 other members of the Board of Directors, both individually and in their official capacities; the Omaha World Herald, a Nebraska Corporation; Harold W. Andersen, President; John Gottschalk, Vice President; Woodson Howe, Vice President, both individually and in their official capacities; the Nebraska Equal Opportunity Commission; Lawrence Myers, Executive Director; Daniel Wherry, Chairman; Carmen Gottschalk, Commissioner; Rose Marie Brandt, Commissioner; Peggy Schmidt, Commissioner; Frances Dunson, Commissioner; Patricia Dorwart, Commissioner; Susan Gorrea, Commissioner; Paul Douglas, former Attorney General of Nebraska; Charles Thone, former Governor of Nebraska, all both individually and in their official capacities; Allan Lozier; Clarence Barbee; N.P. Dodge, Jr.; Dennis R. Woods; Dana Bradford, III; Richard Kizer; Kermit Brashear, II; Eileen Wirth, members of the Board; Bobbie Kerrigan, Deputy Director, and the active members of the Girls Club Board, Appellees.

No. 86-1447.

United States Court of Appeals, Eighth Circuit.

Submitted March 9, 1987.

Decided Dec. 3, 1987.

Rehearing Denied Feb. 25, 1988.

Rehearing En Banc Denied Feb. 25, 1988.*

Unmarried staff member of private social club for girls brought discrimination action following her discharge under club's "negative role model" policy prohibiting continued employment of unmarried staff members who either became pregnant or caused pregnancy. The United States District Court for the District of Nebraska, 629 F.Supp. 925, Clarence Arlen Beam, Chief Judge, dismissed action, and staff member appealed. The Court of Appeals, Wollman, Circuit Judge, held that: (1) role model rule was justified by business necessity because there was manifest relationship between club's fundamental purpose and rule, and (2) role model rule qualified as bona fide occupational qualification.

Affirmed.

McMillian, Circuit Judge, dissented and filed opinion.

1. Civil Rights ⇐9.10

Plaintiff seeking to prove discrimination under disparate impact theory must show that facially neutral employment practice has significant adverse impact on members of protected minority group. Civil Rights Act of 1964, §§ 701(k), 703(a), as amended, 42 U.S.C.A. §§ 2000e(k), 2000e-2(a).

2. Civil Rights ⇐43

Once plaintiff has shown that facially neutral employment practice has significant adverse impact on members of protected minority group, employer has burden of showing that practice has manifest relationship to employment in question and is justifiable on ground of business necessity. Civil Rights Act of 1964, §§ 701(k), 703(a), as amended, 42 U.S.C.A. §§ 2000e(k), 2000e-2(a).

3. Civil Rights ⇐9.10

Even if employer accused of employment discrimination under disparate impact theory shows that discriminatory employment practice is justified by business necessity, plaintiff may prevail by showing that other practices would accomplish employer's objectives without attendant discriminatory effects. Civil Rights Act of 1964, §§ 701(k), 703(a), as amended, 42 U.S.C.A. §§ 2000e(k), 2000e-2(a).

4. Civil Rights ⇐9.14

"Role model rule" of private social club for girls, which was used as basis for discharge of unmarried staff member when she became pregnant, was justified by business necessity because there was manifest

* Editor's note: An opinion dissenting from the denial of rehearing en banc will be published.

relationship between club's fundamental purpose and rule. Civil Rights Act of 1964, §§ 701(k), 703(a), as amended, 42 U.S.C.A. §§ 2000e(k), 2000e–2(a).

5. Civil Rights ⇐9.14

Private social club for girls which used "role model rule" as basis for discharge of unmarried staff member who became pregnant was not required to grant staff member leave of absence or transfer her to position that did not involve contact with club's members as alternative to discharge; employing temporary replacement would have required six months of on-the-job training, use of temporary replacements would have disrupted atmosphere of stability that club attempted to provide, and transfer to "no contact" position was impossible because there were no positions at club that did not involve contact with club members. Civil Rights Act of 1964, §§ 701(k), 703(a), as amended, 42 U.S.C.A. §§ 2000e(k), 2000e–2(a).

6. Civil Rights ⇐9.14

"Role model rule" of private social club for girls, which was used as basis for discharge of unmarried staff member who became pregnant, was bona fide occupational qualification; role model rule had manifest relationship to club's fundamental purpose, and there were no workable alternatives to rule. Civil Rights Act of 1964, § 703(e), as amended, 42 U.S.C.A. § 2000e–2(e).

Mary Kay Green, Omaha, Neb., for appellant.

Robert D. Mullin, Omaha, Neb., for Omaha Girl's Club.

Sharon Lindgren, Asst. Atty. Gen., Lincoln, Neb. for other appellees.

Before McMILLIAN, BOWMAN, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Crystal Chambers appeals the district court's orders and judgment disposing of her civil rights, Title VII employment discrimination, and pendent state law claims. Chambers' claims arise from her dismissal as an employee at the Omaha Girls Club on account of her being single and pregnant in violation of the Club's "role model rule." The primary issue in this appeal is whether the Club's role model rule is an employment practice that is consistent with Title VII because it is justifiable as a business necessity or a bona fide occupational qualification.

I

The Omaha Girls Club is a private, nonprofit corporation that offers programs designed to assist young girls between the ages of eight and eighteen to maximize their life opportunities.[1] Among the Club's many activities are programs directed at pregnancy prevention. The Club serves 1,500 members, ninety percent of them black, at its North Omaha facility and 500 members, fifty to sixty percent of them black, at its South Omaha facility. A substantial number of youngsters who are not Club members also participate in its programs. The Club employs thirty to thirty-five persons at its two facilities; all of the

1. The Club's objectives are to:
   1. Create a safe and stable environment that fosters trusting relationships and individual value development through interaction with peers and adults.
   2. Develop and implement programs to enable girls to build positive self esteem through skill development and application.
   3. Make available quality health programs so girls may understand and deal with their own health problems and health maintenance.
   4. Establish a climate where girls participate in and experience the decision making process and have broad opportunity to take leadership roles.
   5. Provide opportunities for girls to explore the full range of their personal options in family roles and career choices in order to take control of their lives.
   6. Encourage a knowledge and understanding of the various cultures in our society. Promote a broad view of responsibility as a citizen of a larger community through education and civic activity.
   7. Encourage both individual and group responsibility.

   Record at 30.

non-administrative personnel at the North Omaha facility are black, and fifty to sixty percent of the personnel at the South Omaha facility are black.

The Club's approach to fulfilling its mission emphasizes the development of close contacts and the building of relationships between the girls and the Club's staff members. Toward this end, staff members are trained and expected to act as role models for the girls, with the intent that the girls will seek to emulate their behavior. The Club formulated its "role model rule" banning single parent pregnancies among its staff members in pursuit of this role model approach.[2]

Chambers, a black single woman, was employed by the Club as an arts and crafts instructor at the Club's North Omaha facility. She became pregnant and informed her supervisor of that fact. Subsequently, she received a letter notifying her that because of her pregnancy her employment was to be terminated. Shortly after her termination, Chambers filed charges with the Nebraska Equal Opportunity Commission (NEOC) alleging discrimination on the basis of sex and marital status. The NEOC found no reasonable cause to believe that unlawful employment discrimination had occurred. Chambers[3] then brought this action in the district court seeking injunctions and damages.[4]

Chambers ultimately alleged, after a series of amendments to her complaint, that her rights under the first, fifth, ninth, and fourteenth amendments had been violated. She asserted civil rights claims under 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988, and state law claims for bad faith discharge, defamation, invasion of privacy, intentional infliction of emotional distress, intimidation, and conspiracy to deprive her of her livelihood. She also alleged violations of Title VII. Chambers named as defendants numerous organizations and individuals associated with those organizations: the Club, its director, deputy director, and board of directors; the *Omaha World Herald* newspaper and three of its officers; the NEOC, its executive director, and its commissioners; Charles Thone, the Governor of Nebraska; and Paul Douglas, the Attorney General of Nebraska.[5]

On October 19, 1983, the district court[6] issued an order dismissing Chambers' sec-

2. The Club's personnel policies state the rule as follows:

> MAJOR CLUB RULES
> All persons employed by the Girls Club of Omaha are subject to the rules and regulations as established by the Board of Directors. The following are not permitted and such acts may result in immediate discharge:
> * * * * * *
> 11. Negative role modeling for Girls Club Members to include such things as single parent pregnancies.

Record at 28.

3. As the case caption indicates, Chambers also brought this action on behalf of her daughter Ruth, the child born of the pregnancy that brought about this litigation. The district court dismissed Ruth Chambers for lack of standing. Chambers challenges the district court's conclusion on the standing issue in this appeal. *See infra* at 704–705.

4. Chambers brought this action during the pendency of her appeal to the Equal Employment Opportunity Commission's (EEOC's) District Office. The EEOC later found reasonable cause to believe that Chambers' charge of employment discrimination was true, but did not enter into a conciliation agreement with or bring a civil action against the Club. Chambers amended her complaint to add the employment discrimination claims under Title VII after receiving a right-to-sue letter from the EEOC pursuant to 42 U.S.C. § 2000e-5(f)(1) (1982).

5. Several of the defendants were named as parties to this case primarily on the basis of Chambers' allegations that they were involved in a conspiracy to deprive her of her rights in violation of section 1985(3), section 1986, and state law. Although Chambers appeals the various determinations of the district court rejecting her conspiracy claims, *see infra* at 15–16, we find it unnecessary for the purposes of this opinion to recount in detail the alleged facts in support of these claims. Stated generally, Chambers alleged that the spouses of different *Omaha World Herald* officers were members of the NEOC and the Club's board of directors, that they caused the proceedings before the NEOC to be prejudiced and caused an editorial supporting the role model rule to be published in the *Omaha World Herald*, and that public officials knew of or aided the alleged conspiratorial activities.

6. The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska. On December 31, 1984, Judge Urbom granted Chambers' motion for his recusal. All orders entered after that date and referred to in this

tion 1983 claim against the Club,[7] finding the NEOC absolutely immune from liability under section 1983, dismissing Governor Thone and Attorney General Douglas for failure to state a claim against them, and dismissing all of the state law claims except the conspiracy and intimidation claims. On November 7, 1985, the district court entered an order granting the motion of the *Omaha World Herald* for summary judgment on the section 1985(3) and state conspiracy claims against it. On January 6, 1986, the matter went to trial. The claims remaining against the Club at the time of trial included: (1) conspiracy to deprive Chambers of her rights in violation of 42 U.S.C. § 1985(3), (2) conspiracy in violation of state law, (3) intentional race discrimination in violation of 42 U.S.C. § 1981, and (4) a combination of race and sex discrimination in the course of employment in violation of 42 U.S.C. § 2000e–2(a).[8] At the close of the plaintiff's case the court directed a verdict in favor of the Club on the section 1985(3), section 1981, and state conspiracy claims. The court explained its grounds for directing the verdict and announced its judgment in favor of the Club on the Title VII claims in its order of February 11, 1986. *Chambers v. Omaha Girls Club*, 629 F.Supp. 925 (D.Neb.1986).

opinion were issued by The Honorable C. Arlen Beam, Chief Judge, United States District Court for the District of Nebraska.

7. Hereinafter we refer to the Club defendants collectively as the "Club." Similarly, we will refer to the other groups of defendants as the "*Omaha World Herald*" and the "NEOC."

8. Chambers voluntarily dismissed her claim under the free exercise clause of the first amendment. The district court did not consider Chambers' other constitutional claims. Chambers challenges the district court's failure to do so in this appeal. *See infra* at 704–705. The district court also dismissed Chambers' state claim for intimidation.

9. Neither party challenges the district court's description of Chambers' Title VII claim as based on a "combination of race and sex discrimination." *Chambers*, 629 F.Supp. at 944. The court also noted that it was concerned with race discrimination "only insofar as [the role model rule] may have an impact upon the class of black women." *Id.*

10. 42 U.S.C. § 2000e–2(a) (1982) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise 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; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

A separate provision makes it clear that Title VII prohibits discrimination on the basis of pregnancy. 42 U.S.C. § 2000e(k) (1982) provides in part:

> For purposes of this subchapter—
>
> * * * * * *
>
> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work * * *.

II

We turn first to the district court's determination of the Title VII questions. The district court examined Chambers' allegations of employment discrimination [9] in violation of 42 U.S.C. § 2000e–2(a) under both the disparate impact and disparate treatment theories.[10] We review in turn the court's conclusions and Chambers' arguments under each of these theories.

A

[1–3] A plaintiff seeking to prove discrimination under the disparate impact theory must show that a facially neutral employment practice has a significant adverse impact on members of a protected minority group. The burden then shifts to the employer to show that the practice has a manifest relationship to the employment in question and is justifiable on the ground of

business necessity. Even if the employer shows that the discriminatory employment practice is justified by business necessity, the plaintiff may prevail by showing that other practices would accomplish the employer's objectives without the attendant discriminatory effects.[11] The district court found that "because of the significantly higher fertility rate among black females, the rule banning single pregnancies would impact black women more harshly." *Chambers*, 629 F.Supp. at 949.[12] Thus, Chambers established the disparate impact of the role model rule.[13] The Club then sought to justify the rule as a business necessity.

Establishing a business necessity defense presents an employer with a "heavy burden." *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir.1983). Business necessity exists only if the challenged employment practice has "'"a manifest relationship to the employment in question."'" *Id.* (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2725, 53 L.Ed.2d 786 (1977) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971))). The employer must demonstrate that there is a "'compelling need * * *' to maintain that practice,'" and the practice cannot be justified by "'routine business considerations.'" *Id.* (quoting *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 706 n. 6 (8th Cir.1980)); *see also EEOC v. Rath Packing Co.*, 787 F.2d 318, 331 (8th Cir.), *cert. denied*, — U.S. —, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986). Moreover, the employer may be required to show that the challenged employment practice is "'necessary to safe and efficient job performance,'" *McCosh v. City of Grand Forks*, 628 F.2d 1058, 1062 (8th Cir.1980) (quoting *Dothard*, 433 U.S. at 332 n. 14, 97 S.Ct. at 2728 n. 14); *see also Rath Packing Co.*, 787 F.2d at 328; *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1299 (8th Cir. 1978), or that the employer's goals are "significantly served by" the practice. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n. 31, 99 S.Ct. 1355, 1366 n. 31, 59 L.Ed.2d 587 (1979). *See generally Nolting v. Yellow Freight Sys., Inc.*, 799 F.2d 1192, 1199 (8th Cir.1986).

The district court found that the role model rule is justified by business necessity because there is a manifest relationship between the Club's fundamental purpose and the rule. Specifically, the court found:

> The Girls Club has established by the evidence that its only purpose is to serve young girls between the ages of eight and eighteen and to provide these women with exposure to the greatest number of available positive options in life. The Girls Club has established that teenage pregnancy is contrary to this purpose and philosophy. The Girls Club established that it honestly believed that to permit single pregnant staff members to work with the girls would convey the

11. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 446–47, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 328–29, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–32, 91 S.Ct. 849, 853–54, 28 L.Ed.2d 158 (1971); *McIntosh v. Weinberger*, 810 F.2d 1411, 1426–27 (8th Cir. 1987); *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 255 n. 7 (8th Cir.1985); *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir.1983); *Kirby v. Colony Furn. Co.*, 613 F.2d 696, 703 (8th Cir.1980).

12. The court relied on statistics showing that black women generally, and black women within certain age groups in Douglas County, Nebraska, specifically, are more likely to become pregnant than white women. *Chambers*, 629 F.Supp. at 949 n. 45.

13. The district court found that Chambers had established disparate impact under the first method articulated by this court in *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1293–94 (8th Cir.1975). *Chambers*, 629 F.Supp. at 948–49. The Club argues in its brief that the court erred in finding disparate impact. We are unpersuaded by the Club's argument and, furthermore, we are disinclined to devote further attention to the issue because of the Club's failure to assert a cross-appeal seeking reversal of the district court's finding of disparate impact. *See Wycoff v. Menke*, 773 F.2d 983, 985 (8th Cir.1985) (cross-appeal necessary to modify or alter lower court decision), *cert. denied*, 475 U.S. 1028, 106 S.Ct. 1230, 89 L.Ed.2d 339 (1986).

> impression that the Girls Club condoned pregnancy for the girls in the age group it serves. The testimony of board members * * * made clear that the policy was not based upon a morality standard, but rather, on a belief that teenage pregnancies severely limit the available opportunities for teenage girls. The Girls Club also established that the policy was just one prong of a comprehensive attack on the problem of teenage pregnancy. The Court is satisfied that a manifest relationship exists between the Girls Club's fundamental purpose and its single pregnancy policy.

Chambers, 629 F.Supp. at 950. The court also relied in part on expert testimony to the effect that the role model rule could be helpful in preventing teenage pregnancy.[14] Chambers argues, however, that the district court erred in finding business necessity because the role model rule is based only on speculation by the Club and has not been validated by any studies showing that it prevents pregnancy among the Club's members.

Business necessity determinations in disparate impact cases are reviewed under the clearly erroneous standard of review applied to factual findings. Fed.R.Civ.P. 52(a); *see Hawkins*, 697 F.2d at 815; *see also Reddemann v. Minnesota Higher Educ. Coordinating Bd.*, 811 F.2d 1208, 1209 (8th Cir.1987) (per curiam). Thus, we may reverse the district court's finding of business necessity only if we are " 'left with the definite and firm conviction that a mistake has been committed.' " *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948)).

[4] We believe that "the district court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.* 470 U.S. at 573–74, 105 S.Ct. at 1511–12. Therefore, we cannot say that the district court's finding of business necessity is clearly erroneous. The district court's conclusion on the evidence is not an impermissible one. Although validation studies can be helpful in evaluating such questions, they are not required to maintain a successful business necessity defense. *Hawkins*, 697 F.2d at 815–16; *see Davis v. City of Dallas*, 777 F.2d 205, 217–18 (5th Cir.1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1972, 90 L.Ed.2d 656 (1986). Indeed, we are uncertain whether the role model rule by its nature is suited to validation by an empirical study.[15] Consequently, the court's conclusion in *Hawkins* is apt in this case: "We cannot say * * * that validation studies are always required and we are not willing to hold under the facts of this case that such evidence was required here." *Id.* at 816.

[5] Chambers argues further, however, that the district court erred in discounting alternative practices that the Club could have used to ameliorate the discriminatory effects of the role model rule. Chambers contends that the Club either could have granted her a leave of absence or transferred her to a position that did not involve contact with the Club's members. The

14. Chambers' expert witness testified that the only way to resolve the teenage pregnancy problem was through economic opportunities such as education and jobs. The Club's expert agreed that these factors were important, but also testified concerning the value of role modeling and concluded that the role model rule "could be (and in her opinion is) another viable way to attack the problem of teenage pregnancy." *Chambers*, 629 F.Supp. at 951.

In addition to relying on the evidence concerning the Club's purpose and approach and the expert testimony, the district court found that the rule was adopted in response to two incidents involving Club members' reactions to the pregnancies of single Club staff members. *Id.* at 945.

15. Ironically, at oral argument Chambers' counsel responded in the negative to the court's question concerning whether the rule could ever be empirically proven to prevent pregnancy among the Club's members. Counsel's response must be construed to mean either that it is impossible to perform a meaningful empirical study of such matters, or that counsel believes that no such study would ever show the rule to have the effect desired by the Club. If we were to adopt the first construction it would be ludicrous for us to reverse for lack of validation studies. Moreover, the second construction presents nothing more than counsel's own belief concerning the role model rule, a belief rejected by the district court in favor of that held by the Club.

Club responds that neither of these alternatives was available in this case. The Club has a history of granting leaves of up to six weeks, but the purposes of the role model rule would have required a five to six month leave for Chambers, given that the pregnancy would have become visually apparent probably within three or four months. Moreover, employing a temporary replacement to take Chamber's position would itself have required six months of on-the-job training before the replacement would have been able to interact with the girls on the level that the Club's approach requires. The use of temporary replacements would also disrupt the atmosphere of stability that the Club attempts to provide and would be inconsistent with the relationship-building and interpersonal interaction entailed in the Club's role model approach. Furthermore, transfer to a "noncontact position" apparently was impossible because there are no positions at the Club that do not involve contact with Club members. The district court found that the Club considered these alternatives and determined them to be unworkable. *Chambers*, 629 F.Supp. at 945–46. We are unable to conclude that the district court's finding that there were no satisfactory alternatives to the dismissal of Chambers pursuant to the role model rule is clearly erroneous. Accordingly, we hold that the district court's finding that the role model rule is justified by business necessity and thus does not violate Title VII under the disparate impact theory is not clearly erroneous.

B

Unlike the disparate impact theory, the disparate treatment theory requires a plaintiff seeking to prove employment discrimination to show discriminatory animus. The plaintiff must first establish a prima facie case of discrimination. The burden of production then shifts to the employer to show a legitimate, nondiscriminatory reason for the challenged employment practice. If the employer makes such a showing, then the plaintiff may show that the reasons given by the employer were pretextual.[16] No violation of Title VII exists, however, if the employer can show that the challenged employment practice is a bona fide occupational qualification (bfoq).[17]

The district court found that Chambers had succeeded in establishing a prima facie case of discrimination but concluded that the Club's role model approach is a legitimate, nondiscriminatory reason for the role model rule. *Chambers*, 629 F.Supp. at 947. The court then found that Chambers was unable to show that the Club's reason for the rule was a pretext for intentional discrimination. *Id.* at 947–48. The court also stated in passing that the role model rule "presumably" is a bfoq. *Id.* at 941 n. 51.

Chambers argues alternatively that the district court erred in failing to find a violation of Title VII under the disparate treatment theory, and that this case should not be analyzed under the disparate treatment theory because Chambers' discharge on account of her pregnancy constitutes intentional discrimination without further analysis. Chambers also argues that the role model rule cannot be justified as a bfoq. Because we are persuaded that the role model rule qualifies as a bfoq, we find it

16. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252–53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S.Ct. 1817, 1824–25, 36 L.Ed.2d 668 (1973); *see, e.g., Johnson v. Legal Servs. of Ark., Inc.*, 813 F.2d 893, 896 (8th Cir.1987); *Netterville v. Missouri*, 800 F.2d 798, 802–03 (8th Cir.1986); *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 256 n. 10 (8th Cir. 1985).

17. The bfoq exception, unlike the business necessity defense, is statutorily based. 42 U.S.C. § 2000e-2(e) (1982) provides in part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *.

unnecessary to address Chambers' other arguments.[18]

The bfoq exception is " 'an extremely narrow exception to the general prohibition of discrimination on the basis of sex.' " *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1085 (8th Cir.), *cert. denied*, 446 U.S. 966, 100 S.Ct. 2942, 64 L.Ed.2d 825 (1980), (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334, 97 S.Ct. 2720, 2729, 53 L.Ed.2d 786 (1977)). In *Dothard v. Rawlinson*, 433 U.S. at 321, 97 S.Ct. at 2720, the Supreme Court found that a rule that prohibited employment of women in contact positions in all-male Alabama prisons was a bfoq under the particular circumstances of that case, which involved a prison system rife with violence. The statutory language, *see supra* note 17, is, of course, the best guide to the content of the bfoq exception; however, the courts, including the Supreme Court in *Dothard*, have noted the existence of several formulations for evaluating whether an employment practice is a bfoq. The formulations include: whether " 'the *essence* of the business operation would be undermined' " without the challenged employment practice, *Dothard*, 433 U.S. at 333, 97 S.Ct. at 2728 (quoting *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971)) (emphasis in original); whether safe and efficient performance of the job would be possible without the challenged employment practice, *id.* (citing *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir.1969)); and whether the challenged employment practice has " 'a manifest relationship to the employment in question.' " *Gunther*, 612 F.2d at 1086 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971)).

[6] Although the district court did not clearly conclude that the role model rule qualified as a bfoq, several of the court's other findings are persuasive on this issue. The court's findings of fact, many of which are relevant to the analysis of a potential bfoq exception, are binding on this court unless clearly erroneous. The facts relevant to establishing a bfoq are the same as those found by the district court in the course of its business necessity analysis. As already noted, *see supra* at 701–02, the district court found that the role model rule has a manifest relationship to the Club's fundamental purpose and that there were no workable alternatives to the rule. Moreover, the district court's finding of business necessity itself is persuasive as to the existence of a bfoq. This court has noted that the analysis of a bfoq "is similar to and overlaps with the judicially created 'business necessity' test." *Gunther*, 612 F.2d at 1086 n. 8. The various standards for establishing business necessity are quite similar to those for determining a bfoq. Indeed, this court has on different occasions applied the same standard—"manifest relationship"—to both business necessity and bfoq. *Compare Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir.1983) (business necessity) *with Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir.), *cert. denied*, 446 U.S. 966, 100 S.Ct. 2942, 64 L.Ed.2d 825 (1980) (bfoq).[19] Inasmuch as we already have affirmed the district court's finding of business necessity as not clearly erroneous, *see supra* at 703, we feel compelled to conclude that "[i]n the particular factual circumstances of this

18. Even if the district court erred in finding no discrimination under the disparate treatment theory, our conclusion that the role model rule is a bfoq means that there can be no violation of Title VII. Moreover, the *per se* intentional discrimination approach advocated by Chambers simply eliminates the burden-shifting procedure described *supra* at 703, leaving the bfoq exception as the employer's only defense. Thus, our conclusion on the bfoq issue also would prevent Chambers from prevailing under her proposed *per se* intentional discrimination approach.

19. Further indication of the similarity of business necessity and bfoq is provided in *Dothard*, 433 U.S. at 321, 97 S.Ct. at 2720, where the Court referred to the "necessary to safe and efficient job performance" standard in relation to both of the defenses. *Compare Dothard*, 433 U.S. at 332 n. 14, 97 S.Ct. at 2728 n. 14 (business necessity) *with Dothard*, 433 U.S. at 333, 97 S.Ct. at 2728 (bfoq).

case," *Dothard*, 433 U.S. at 334, 97 S.Ct. at 2729, the role model rule is reasonably necessary to the Club's operations. Thus, we hold that the role model rule qualifies as a bona fide occupational qualification.

III

Chambers also appeals the district court's dismissal of various other claims and parties. Specifically, she challenges the court's dismissal of the section 1983 claim against the Club for lack of state action, *Chambers v. Omaha Girls Club, Inc.*, No. CV 83-L-38, slip op. at 3-4 (D.Neb. October 19, 1983); dismissal of the NEOC on the ground of absolute immunity based on *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), *id.* at 4; dismissal of Governor Thone and Attorney General Douglas for failure to state a claim against them, *id.* at 4-6; grant of summary judgment in favor of the *Omaha World Herald* on the section 1985(3) and state conspiracy claims because of Chambers' failure to show conspiratorial agreement or other elements of the cause of action, *Chambers v. Omaha Girls Club, Inc.*, No. CV 83-L-38, slip op. at 3-6 (D.Neb. Nov. 7, 1985); dismissal of Ruth Chambers for failure to meet constitutional standing requirements, *Chambers v. Omaha Girls Club*, No. CV 83-L-38, slip op. at 3 (D.Neb. Jan. 13, 1986); dismissal of the constitutional claims for lack of state action, *Chambers v. Omaha Girls Club*, 629 F.Supp. 925, 931 n. 9 (D.Neb. 1986); grant of a directed verdict in favor of the Club on the section 1981 claim because Chambers failed to produce any evidence of intentional race discrimination, *id.* at 932-34; and grant of a directed verdict in favor of the Club on the section 1985(3) and state conspiracy claims because no evidence was presented to show that the Club was part of a conspiratorial agreement. *Id.* at 934-42. Our review of the record, the briefs, and the memorandum opinions of the district court satisfies us that Chambers' arguments on these issues are without merit.[20]

IV

In conclusion, we hold that the district court's finding that the Club's role model rule is justified by business necessity is not clearly erroneous, and we find further that the rule qualifies as a bona fide occupational qualification. Chambers' other allegations of error are without merit. Accordingly, the orders and judgment of the district court are affirmed.

McMILLIAN, Circuit Judge, dissenting.

I concur in Part III of the court's decision in this case, but I respectfully dissent from Part II of the opinion. I believe that Crystal Chambers alleged and proved discrimination based on race under a disparate impact theory and discrimination based on pregnancy under a disparate treatment theory in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. I would thus reverse the district court's judgment on the Title VII claims and remand for a determination of an appropriate remedy.

Today, the court, contrary to Title VII, upholds the Omaha Girls Club's (OGC) discharge of Chambers, a black, unmarried pregnant woman because of her pregnancy. Chambers, an arts and crafts instructor at OCG, was held to be a "negative role model" for the OGC members, who are girls and young women between the ages of eight and eighteen.

Title VII provides in part: "It shall be an unlawful employment practice for an employer ... to discharge ... or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's ... sex...." 42 U.S.C. § 2000e-2(a).

The Equal Employment Opportunity Commission and many courts interpreted

20. Chambers' claim that the defendants' exercise of their peremptory challenges was unconstitutionally discriminatory is unavailing inasmuch as it was not raised below and no jury verdict even exists to be challenged in this case. Chambers' argument that Judge Beam erred in refusing to recuse himself is also without merit.

this provision barring gender-based discrimination to prohibit discrimination based on pregnancy. C.F.R. § 1604.10(b) (1973); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651, 653–54 (8th Cir.1975); *In re National Airlines, Inc.*, 434 F.Supp. 249 (D.C. Fla.1977) (the airline's policy of requiring flight attendants to cease working when they became pregnant violated Title VII). *Contra Harriss v. Pan American World Airlines, Inc.*, 437 F.Supp. 413 (D.C.Cal. 1977), *aff'd in part, reversed in part*, 649 F.2d 670 (9th Cir.1980). However, the Supreme Court in *General Electric v. Gilbert*, 429 U.S. 125, 145–47, 97 S.Ct. 401, 412–13, 50 L.Ed.2d 343 (1976), determined that an employer could exclude pregnant employees from receiving benefits under a disability plan. The Court reasoned that the exclusion was not gender-based but was condition-based. *Id.* at 136–37, 97 S.Ct. at 408.

In 1978, Congress responded to the Supreme Court's decision in *General Electric v. Gilbert* by amending Title VII to "prohibit sex discrimination on the basis of pregnancy." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670, 103 S.Ct. 2622, 2624, 77 L.Ed.2d 89 (1983) (*Newport News*). The new amendment, entitled the Pregnancy Discrimination Act, added a new subsection "k" to the definition section of Title VII; the new subsection reads in part as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work....

42 U.S.C. § 2000e(k). This provision "made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Newport News*, 462 U.S. at 684, 103 S.Ct. at 2631; *see Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 647–48 (8th Cir.1987) (*Carney*).

An employer may justify discrimination otherwise prohibited by Title VII by showing either a business necessity or a bona fide occupational qualification (BFOQ) for the discriminatory policy or practice. *Carney*, 824 F.2d at 648. The business necessity exception applies to disparate impact cases involving facially neutral employment practices with a disproportionate impact on a protected group. The BFOQ exception applies to disparate treatment cases involving affirmative deliberate discrimination. *EEOC v. Rath Packing Co.*, 787 F.2d 318, 327 n. 10 (8th Cir.), *cert. denied*, — U.S. —, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986). In *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1085 (8th Cir.), *cert. denied*, 446 U.S. 966, 100 S.Ct. 2942, 64 L.Ed.2d 825 (1980), this court noted that a BFOQ analysis is similar to and overlaps the business necessity test. Essentially, both exceptions require proof that a discriminatory job qualification or practice is both necessary to and effective in promoting the employer's business and that no less discriminatory alternatives exist.

The BFOQ and the business necessity exception are narrow exceptions which impose a heavy burden on the employer. *E.g., Dothard v. Rawlinson*, 433 U.S. 321, 334, 97 S.Ct. 2720, 2729, 53 L.Ed.2d 786 (1977). The employer must show that the problem to be addressed by the discriminatory act or practice is concrete and demonstrable, not just "perceived"; and the challenged act must be essential to eliminating the problem, not simply reasonable or designed to improve the problem. *EEOC v. Rath*, 787 F.2d at 332–33; *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 249 (10th Cir.1970), *cert. denied*, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971).

I agree with the majority that the district court's determination of business necessity or BFOQ in the present case is to be reviewed under the clearly erroneous standard. However, even under this very deferential standard, I would reject the BFOQ or business necessity exceptions offered by OGC because there is no evidence to support a relationship between teenage pregnancies and the employment of an unwed

pregnant instructor, and therefore I am left with the definite and firm conclusion that the district court made a mistake. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

The district court, and now this court, accepts without any proof OGC's assumption that the presence of an unwed pregnant instructor is related to teenage pregnancies. *Chambers v. Omaha Girls Club*, 629 F.Supp. at 951 (D.Neb.1986) (*Chambers*). OGC failed to present surveys, school statistics or any other empirical data connecting the incidence of teenage pregnancy with the pregnancy of an adult instructor. OGC also failed to present evidence that other girls clubs or similar types of organizations employed such a rule. OGC instead relied on two or three highly questionable anecdotal incidents to support the rule.

The majority, while admitting to some uncertainty about whether the negative role model rule is subject to validation, places great weight on counsel's remarks during oral argument. Counsel's comments concerning the feasibility of such validation, however, are not a substitute for evidence demonstrating the validity or effectiveness of the role model rule. OGC had the burden of establishing a reasonable basis, that is a factual basis, for its belief, *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969), and in the absence of such proof, OGC may not implement the discriminatory rule.

Although there are no cases that have considered precisely the issue raised in this case,, a few courts have considered the role model defense in school settings and all have rejected the schools' role model defenses. In *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975), two unwed mothers challenged the school district's policy that prohibited the employment of teachers and teachers' aides who were unwed parents. Not unlike OGC, the school district defended the policy on the basis that such teachers would be poor role models for the children and that employing such teachers could lead to schoolgirl pregnancies. *Id.* at 613. The Fifth Circuit struck down the rule. *Id.* at 617.

> In the absence of overt, positive statements to which the children can relate, we are convinced that the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative. We are not at all persuaded by defendants' suggestions, quite implausible in our view, that students are apt to seek out knowledge of the personal and private life-styles of teachers or other adults within the school system (i.e. whether they are divorced, separated, happily married or single, etc.), and, when known, will approve and seek to emulate them.

Id., citing Andrews v. Drew Municipal Separate School District, 371 F.Supp. 27, 35 (N.D.Miss.1973).

Six years later, the Fifth Circuit had a chance to again consider the role model defense in *Avery v. Homewood Board of Education*, 674 F.2d 337 (5th Cir.1982). The school district justified its firing of an unwed pregnant teacher on the basis that she was a negative role model and her pregnancy would provoke teenage pregnancies. *Id.* at 339. Citing *Andrews v. Drew Municipal Separate School District*, 507 F.2d at 614, the Fifth Circuit, once again, rejected the role model defense.

> [W]e rejected all three rationales offered in support of ... the rule ... (1) that unwed parenthood is prima facie proof of immorality; (2) that unwed parents are unfit role models, and (3) that employment of an unwed parent in a scholastic environment materially contributes to the problem of school-girl pregnancies.

674 F.2d at 341.

In *Ponton v. Newport News School Board*, 632 F.Supp. 1056 (E.D.Va.1986) (*Ponton*), the district court also carefully considered the same issue. In *Ponton*, a pregnant unmarried teacher of vocational home economics at a magnet school in Newport, Virginia, was forced to take a leave of absence because the school district

alleged that it had an interest in "protecting schoolchildren from exposure to a single, pregnant teacher." *Id.* at 1062. The district court, noting that it had "serious doubt as to whether this is in fact a legitimate interest," concluded that the effect on students of the "mere sight of a single, pregnant teacher would be negligible, at best." *Id.* The court further commented that

> [e]ven if plaintiff's students would have known that she was single, the mere knowledge that their teacher had gotten pregnant out of wedlock would seem to have a fairly minimal impact on them. There was no evidence that plaintiff intended to proselytize her students regarding the issue of unwed pregnancy.

Id. at 1063. The district court in *Ponton* also determined that plaintiff's pregnancy had not affected her ability to implement the prescribed curriculum in her classes nor could her pregnancy be perceived as representing a "School Board-sponsored statement regarding the desirability of pregnancy out of wedlock; rather, such status could only be viewed as representing a personal decision made by plaintiff in her private capacity." *Id.* Although the plaintiff in *Ponton* alleged a constitutional right of privacy claim and the district court decided the case on this basis, the rationale is applicable to the present case because the employers in both cases contend that the policy prohibiting single pregnancies is necessary to the effectuation of its programs.

The district court in the present case, although correctly articulating the BFOQ and business necessity tests, failed to actually apply the tests. *Chambers*, slip op. at 951. Instead of requiring OGC to demonstrate a reasonable relationship between teenage pregnancy and the employment of single pregnant women, the district court accepted the beliefs and assumptions of OGC board members. *Id.* at 951. The district court stated that "the Girls Club established that it honestly believed that to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club condoned pregnancy for the girls in the age group it serves." *Id.* at 950. Based on this belief alone, the district court stated that "the court is satisfied that [OGC has] met the burden of showing that a manifest relationship exists between the Girls Club's fundamental purpose and its single pregnancy policy." *Id.* at 950. The district court, in discussing the BFOQ defense, further stated: "Here we have a rule made in an attempt to limit teenage pregnancy, and no data to support a finding that the rule either does, or does not, accomplish this purpose." *Id.* at 951. Despite this explicit recognition by the district court that there was no data to support a relationship between teenage pregnancy and the negative role model rule, the district court, nonetheless, stated: "This court believes that the policy is a legitimate attempt by a private service organization to attack a significant problem within our society." *Id.* at 951.

Neither an employer's sincere belief, without more, (nor a district court's belief), that a discriminatory employment practice is related and necessary to the accomplishments of the employer's goals is sufficient to establish a BFOQ or business necessity defense. The fact that the goals are laudable and the beliefs sincerely held does not substitute for data which demonstrate a relationship between the discriminatory practice and the goals. The district court, recognizing that there was no data to support such a relationship, should have held that OGC failed to carry its burden of showing a BFOQ or business necessity.

Even if I were to accept for purposes of argument that OGC established a relationship between the single pregnancy policy and the work of the club, the BFOQ and the business necessity exceptions must still fail because OGC did not establish that there were no less discriminatory alternatives available. Unlike the district court and the panel majority, I am unimpressed by OGC's rejection of alternatives with less discriminatory impact. OCG's personnel policy provided leave of absences for up to six weeks for pregnancies and other sicknesses and longer leaves upon approval of the board. It is clear that OGC could have accommodated its stated mission and the

pregnancy of Crystal Chambers by granting her a leave of absence or by placing her in a noncontact position. Administrative inconvenience is not a sufficient justification for not utilizing these less discriminatory alternatives.

In summary, OCG failed to carry the heavy burden of showing a nexus between its negative role model rule and teenage pregnancies and that implementation of the rule is essential to eliminating the problem, and thus failed to demonstrate that the single pregnancy policy was justified by either business necessity or was a BFOQ. Thus, I would reverse the judgment of the district court on the Title VII claims and remand this case with instructions to the district court to enter judgment in favor of Chambers on the Title VII claims and to grant appropriate relief.

Dennis P. GLICK, Appellant,

v.

Woodson D. WALKER, Chairman; A.L. Lockhart, Director; Larry Norris, Warden, Tucker Max. Sec. Unit; K. Howell, Records Supervisor, Tucker Max. Sec. Unit, Appellees.

No. 87-2054.

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 27, 1987.

Decided Dec. 4, 1987.

State prison inmate brought pro se § 1983 action, seeking damages for time spent in punitive isolation and relief concerning his institutional classification and good-time credits, after inmate's disciplinaries were reversed due to ineligibility of disciplinary committee member under Department of Corrections policy. The United States District Court for the Eastern District of Arkansas, H. David Young, United States Magistrate, granted summary judgment against inmate and he appealed. The Court of Appeals held that: (1) prison officials' lack of intent to deprive inmate of any interest defeated inmate's § 1983 action; (2) alleged failure to restore inmate's institutional classification and good-time credit after reversal of disciplinaries did not constitute deprivation of due process; (3) inmate was not entitled to damages for time spent in punitive isolation on subsequently reversed disciplinaries; and (4) deprivation of mattress, personal property and general correspondence while in punitive isolation did not constitute cruel and unusual punishment.

Affirmed.

1. Civil Rights ⇐13.4(5)

Even if inmate at state correctional institution had a liberty interest in state Department of Correction's policy requiring disciplinary committee members to have been employed for at least six months in department dealing firsthand with inmates, Department's lack of intent to deprive inmate of any interest defeated inmate's § 1983 claim for damages sustained in serving 82 days in punitive isolation based on disciplinaries which were subsequently reversed as result of ineligibility of a disciplinary committee member under the "six-month" requirement. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. § 1983.

2. Constitutional Law ⇐272(2)
Prisons ⇐13(10)

Failure to restore state prison inmate's institutional classification and good-time credit after reversal of disciplinaries after Compliance Attorney ruling due to ineligibility of a disciplinary committee member did not deprive inmate of due process, since failure to restore was based on a major disciplinary separate from and subsequent to reversal of the prior disciplinaries. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

stantial likelihood that the judicial relief requested will prevent or redress the claimed injury...." *INS v. Chadha*, 462 U.S. 919, 936, 103 S.Ct. 2764, 2776, 77 L.Ed. 2d 317 (1983) (quoting *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79, 98 S.Ct. 2620, 2633, 57 L.Ed.2d 595 (1978)). We are thus precluded from considering the issue of whether the EAJA applies to deportation proceedings. The majority's discussion and ultimate determination of this issue amounts to nothing more than an advisory opinion that we are powerless to render. U.S. Const. Article III, § 2; *FCC v. Pascifica Foundation*, 438 U.S. 726, 735, 98 S.Ct. 3026, 3033, 57 L.Ed.2d 1073, *reh. denied*, 439 U.S. 883, 99 S.Ct. 227, 58 L.Ed.2d 198 (1978); *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 101–02, 94 S.Ct. 313, 314–15, 38 L.Ed.2d 298 (1973); *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 959, 22 L.Ed.2d 113 (1969).

This case in fact illustrates most of the reasons why Article III, § 2 has been construed to forbid advisory opinions. One is a desire to conserve judicial time and effort by avoiding unnecessary adjudication. Secondly, a practice of giving advisory opinions would promote friction with the other branches of government. Thirdly, advisory opinions often turn out to have no consequence on the particular litigant involved. This is aptly illustrated in the majority's final paragraph. Finally, because an advisory opinion may be less consequential than a decision in an actual controversy, the parties may not invest sufficient resources in contesting the issues to give the court the information it needs to decide them correctly.

What the majority has done is render an advisory opinion. Escobar Ruiz did not demonstrate he was a prevailing party when he first appealed, *Escobar Ruiz v. INS*, 787 F.2d 1294, 1298 (9th Cir.1986), and he has not done so to date. *Majority Op.* at 1029 ("Escobar Ruiz is not presently a prevailing party").

If and when Escobar Ruiz shows prevailing party status on the merits of his claim, then we should decide whether the EAJA applies to deportation proceedings. Until then, we have circumvented our responsibility under Article III, § 2 to decide cases and have instead acted in a capacity reserved for the legislative branch. I would hold that Ruiz's appeal is not presently justiciable.

Alva GUTIERREZ, Plaintiff-Appellee,

v.

MUNICIPAL COURT OF the SOUTHEAST JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, incorrectly sued as "County of Los Angeles, a public entity; Porter de Dubovay; John W. Bunnett; and Russell F. Schooling, in their capacity as officials having authority to issue personnel rules for employees of the County of Los Angeles at the Municipal Court of the Southeast Judicial District," Defendants-Appellants.

Alva GUTIERREZ, Plaintiff-Appellee,

v.

Porter DE DUBOVAY; John W. Bunnett; and Russell F. Schooling, Defendants-Appellants.

Nos. 85–5931, 85–6532 and 86–5888.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 5, 1987.

Decided Jan. 27, 1988.

As Amended April 22, 1988.

Court employee brought suit and petition for preliminary injunction against municipal judges, after imposition and enforcement of English-only rule in court offices. The United States District Court for the Central District of California, Richard A. Gadbois, Jr., J., granted the preliminary injunction and denied judges' motion for summary judgment based on absolute and qualified immunity defenses. The Court of

Appeals, Reinhardt, Circuit Judge, held that: (1) employee was entitled to preliminary injunction; (2) judges were not entitled to absolute legislative immunity; (3) District Court had jurisdiction over claim; (4) qualified immunity was not defense to intentional discrimination claim; (5) judges were proper parties to suit; and (6) remand was necessary to determine whether complaint alleged intentional discrimination sufficiently to avoid summary disposition.

Affirmed in part, reversed and remanded in part.

1. Civil Rights ⇐9.10

Although an employer may have legitimate business reasons for requiring that communications be exclusively in English, an English-only rule is a burdensome condition of employment that is often used to mask national origin discrimination which must be carefully scrutinized; thus, while limited English-only rule may be permissible in some circumstances, no such rule will be deemed lawful unless employer can show that it is justified by business necessity and notifies employee of the general circumstances when speaking only in English is required and of consequences of violating the rule. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

2. Civil Rights ⇐9.10

Title VII of the Civil Rights Act is a broad remedial statute that was intended to strike at many forms of discrimination which may not be actionable under the Fourteenth Amendment. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a); U.S.C.A. Const.Amend. 14.

3. Civil Rights ⇐13.6

English-only speaking rules cannot be immunized from judicial scrutiny merely because employee challenging English-only rule is bilingual and can easily comply with it. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

4. Civil Rights ⇐9.10

Fact that United States is an English-speaking country and California is an English-speaking state was insufficient to justify rule that bilingual translators in municipal courts speak English exclusively except when acting as translators or in personal conversations during breaks or lunch. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

5. Civil Rights ⇐9.10

Municipal court rule, which required bilingual Spanish interpreters to speak English except during breaks, lunchtime, and when actually translating, was not justified under business necessity rule upon court's claim that restriction was necessary to prevent workplace from becoming "Tower of Babel" due to disruption caused by speaking Spanish, where Spanish was already being spoken as part of court's official business, and additional personal communication in that language would not detract from any office efficiency. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

6. Civil Rights ⇐9.10

Failure of municipal court to demonstrate that its English-only rule, except for official translating purposes, or while on breaks or lunch, added to racial harmony of workplace, or that Spanish-speaking employees were using Spanish to hide derogatory remarks about non-Spanish speaking employees, precluded finding that English-only rule was justified on grounds that rule was necessary to promote racial harmony. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

7. Civil Rights ⇐9.10

Even if there were evidence that a regulation mandating the use of English-only during working hours in municipal court would calm some employees' fears and thereby reduce racial tension to some extent, this reason would not constitute a business necessity for a rule that has an adverse impact on other persons based on

their national origin. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C. A. §§ 2000e–2, 2000e–2(a).

8. Civil Rights ⇐9.10

Existing racial fears or prejudices and their effects cannot justify a racial classification, nor may such fears or prejudice constitute business necessity for rule which burdens a protected class. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

9. Civil Rights ⇐9.10

Municipal court rule, which required bilingual translator employees to communicate with each other during office hours in English-only, except during course of official translating, was not justified by claim that rule enabled non-Spanish speaking supervisors to correctly oversee that court information was being properly disseminated, since supervisors themselves were unable to follow that dissemination, because it occurred in Spanish. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C. A. §§ 2000e–2, 2000e–2(a).

10. Civil Rights ⇐9.10

Municipal court rule, which required bilingual translator employees to communicate with each other during office hours in English, except during course of translating, was not required by State Constitutional requirement that English be used in all official state business, where State Constitutional Amendment was primarily symbolic statement concerning importance of preserving, protecting and strengthening the English language, speech between translators during office hours was private speech, and where use of Spanish for official communications was not only permitted by state government in some instances, but expressly mandated as well. West's Ann. Cal. Const. Art. 3, §§ 6, 6(a); Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

11. Civil Rights ⇐9.10

State enactment of constitutional provision or statute cannot constitute business justification for adoption of discriminatory rule in workplace, unless state measure itself meets business necessity test, otherwise, employees could justify discriminatory regulations by relying on state laws which encouraged or required discriminatory conduct; for purposes of federal law, it is immaterial whether inadequate justifications for discriminatory rules directly underly actions of a government agency, or incorporated in the Constitution of a state, because, if preferred justifications fail to meet business necessity test they are legally insufficient. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

12. Civil Rights ⇐46(10)

Failure of municipal court to justify its English-only speaking rule during office hours as business necessity, entitled bilingual employees to injunction suspending enforcement of rule during pendency of suit challenging the rule.

13. Civil Rights ⇐46(10)

Bilingual court employees were entitled to injunction suspending enforcement of municipal court English-only rule, upon court's failure to demonstrate business necessity for such rule, since deprivation of employees' right to speak Spanish in interoffice communication was not compensable by money damages. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C. A. §§ 2000e–2, 2000e–2(a).

14. Civil Rights ⇐46(10)

Evidence, which demonstrated that imposition of English-only rule by municipal court has contributed to workplace atmosphere which derrogates Hispanics, encourages discriminatory behavior by non-Hispanic supervisory and nonsupervisory employees, and heightened racial animosity between Hispanics and non-Hispanics, demonstrated that injury to Hispanic employees could not be fully recompensed by award of money damages; thus, Hispanic court employees were entitled to preliminary injunction suspending enforcement of English-only rule during pendency of suit challenging rule, upon court's failure to demonstrate business necessity which justified rule. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

15. Civil Rights ⇐46(10)

Preliminary injunction, halting discriminatory employment practices, was within purpose of Civil Rights Act, so long as customary prerequisites for an injunction are met. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

16. Civil Rights ⇐9.10

Public relations concerns do not constitute a business necessity under Civil Rights Act, because employers would be free to consider public prejudices when setting employment policies in determining employment practices, which would be wholly inconsistent with purposes of Act. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

17. Federal Courts ⇐269

A suit against state officers in their official capacity is simply another method of suing a state and is forbidden by the Eleventh Amendment. U.S.C.A. Const. Amend. 11.

18. Municipal Corporations ⇐744
States ⇐28(2), 78

Under California law, members of legislative bodies, whether state, local or regional, have absolute immunity from suit based on their acts which are taken as part of the legislative function.

19. States ⇐79

Under California law, individuals who are not legislators but whose acts are sufficiently legislative in nature are absolutely immune from liability for those legislative acts.

20. Judges ⇐36

The promulgation of a rule governing the conduct of clerical employees is best characterized as an administrative function rather than a legislative or judicial one; thus, municipal court judges who promulgated English-only rule in interoffice communication were not entitled to assert defense of legislative or absolute immunity.

21. Civil Rights ⇐13.8(1)

A work rule is not transformed into legislation merely because employer is a public entity; when supervisors promulgate personnel rules, they act in their capacity as an employer, not in a legislative capacity, and may not assert defense of legislative or absolute immunity.

22. Civil Rights ⇐13.4(6)

Section 1981 Civil Rights Claim always requires purposeful discrimination and cannot be based solely on a disparate-impact theory. 42 U.S.C.A. § 1981.

23. Civil Rights ⇐13.4(6)

A claim brought pursuant to § 1983 may or may not require intent; the requirements for such a claim are same as those for establishing the underlined constitutional or statutory violations. 42 U.S.C.A. § 1983.

24. Civil Rights ⇐13.4(6)

Employee who alleges a § 1983 claim based primarily upon violation of equal protection clause was required to prove intentional discrimination on part of employer. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

25. Federal Courts ⇐640

Because lower district court was not asked to rule on any motion to dismiss in civil rights action, Court of Appeals did not consider whether plaintiff had met requisite pleading requirements for her various causes of action; however, it may be necessary for district court to do so on remand.

26. Civil Rights ⇐13.8(1)

For purposes of determining whether government officials performing discretionary functions are entitled to qualified immunity, those officials are charged with knowledge of constitutional and statutory developments, including all available decisional law. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1981, 1983, 1985(3).

27. Civil Rights ⇐13.8(5)

Guidelines adopted by the Equal Employment Opportunity Commission, which generally questioned the validity of English-only rules in the workplace, but which

were adopted subsequent to contrary federal court precedent, did not serve to clearly establish the law regarding the validity of the English-only rule; thus, municipal court's adoption of such an English-only rule, was not in clear violation of established case law and, absent discriminatory intent, court officers were entitled to qualified immunity from suit in so adopting the rule. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

28. Civil Rights ⇐13.8(1)

In deciding whether a defendant is entitled to qualified immunity in cases in which unlawful motive is a critical element, the court must consider the actor's intent in carrying out the act that is alleged to have resulted in violation of the plaintiff's rights. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a); U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1981, 1983, 1985(3).

29. Civil Rights ⇐13.8(1)

Qualified immunity is not a defense in cases involving intentional racial or other similar discrimination, including national origin, since, if plaintiff does not establish that discrimination was intentional the claim fails, and if plaintiff does establish such intent, there can be no qualified immunity. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

30. Federal Civil Procedure ⇐1049, 1752

Upon being served with a complaint which lacks sufficient nonconclusory allegations of evidence of unlawful discriminatory intent, a public official would ordinarily be entitled to raise a qualified immunity defense, and, if he wishes to avoid discovery, he may either move for dismissal for failure to state a claim or file an answer and move for judgment on the pleadings. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. §§ 1981, 1983, 1985(3); Fed.Rules Civ. Proc.Rule 12(c), (h)(2), 28 U.S.C.A.

31. Federal Courts ⇐939

District court's failure to rule on sufficiency of employee's discrimination complaint, and failure of defendants to make any motion to dismiss and to call court's attention to any inadequacy in the complaint, confusing procedural posture of case, and unclear law regarding pleading of unconstitutional motive and qualified immunity, demonstrated that remand to district court would provide best vehicle for parties to have their pretrial disputes resolved in orderly and efficient manner, especially since district court judge was not afforded opportunity to consider these issues in an appropriate context.

32. Civil Rights ⇐38

District court did not lack jurisdiction over court employee's civil rights claim because employee filed action before receiving her right to sue letter, where no evidence in record supported contention that early filing interfered with conciliation attempts. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

33. Civil Rights ⇐38

Lack of right-to-sue letter from Equal Employment Opportunity Commission, at time of filing a lawsuit, may be cured by later issuance of that letter. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

34. Civil Rights ⇐41

Municipal court judges were proper defendants to civil rights claim brought to prevent enforcement of English-only rule in court offices, even though judges were not named individually in the Equal Employment Opportunity Commission charge, as the judges had the supervisory control over the working conditions of the municipal court. Civil Rights Act of 1964, §§ 703, 703(a), as amended, 42 U.S.C.A. §§ 2000e–2, 2000e–2(a).

35. Civil Rights ⇐41

Municipal court judges were proper defendants to court employee's civil rights suit, seeking to challenge enforcement of English-only speaking rule in court offices, despite judges' contention that employee was employed by county, where judges had authority to control working conditions in the office, and even if not the direct employers, they exercised supervisory authority over the employees.

Larry J. Roberts, Petersen & Ferguson, Santa Ana, Cal., for defendants-appellants.

Gerald Sato, Allred, Maroko, Goldberg & Ribakoff, Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before BROWNING, TANG and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Alva Gutierrez, a Hispanic–American, brought an action challenging an English-only rule enacted by the Southeast Judicial District of the Los Angeles Municipal Court. The district court granted Gutierrez's motion for a preliminary injunction enjoining enforcement of the rule. Appellants challenge the issuance of the injunction and also appeal the district court's denial of their motion for summary judgment on Gutierrez's section 1981, 1983, and 1985(3) claims. Their motion was based on the defenses of absolute and qualified immunity.

Because Gutierrez established both a likelihood of success on the merits and the possibility of irreparable injury, we hold that the district court did not abuse its discretion in entering the preliminary injunction. Further, we hold that appellants are not entitled to absolute legislative immunity. Finally, because the district court did not have the opportunity to consider whether Gutierrez's complaint satisfied the pleading requirements that apply when a qualified immunity defense is implicated, we remand for further proceedings.

FACTS & PROCEEDINGS BELOW

The Southeast Judicial District of the Los Angeles Municipal Court employs Alva Gutierrez and a number of other bilingual Hispanic–Americans as deputy court clerks. Gutierrez has held her position since 1978. Bilingual clerks, in addition to their other duties, translate for the non-English speaking public. In March, 1984, the Municipal Court promulgated a new personnel rule which forbade employees to speak any language other than English, except when acting as translators. In December, 1984, the rule was amended to exclude conversations during breaks or lunchtime. However, all other conversations conducted at work remained subject to the rule. The court's actions greatly disturbed Gutierrez and other Hispanic–American employees.

Gutierrez filed a complaint with the Equal Employment Opportunity Commission (EEOC) in December, 1984. Subsequently, in March 1985, she filed this action against Municipal Judges Porter de Dubovay, Russell F. Schooling, and John W. Bunnett, and the Southeast Judicial District of the Los Angeles Municipal Court, seeking monetary damages, injunctive relief, and attorneys fees.[1] In her district court complaint, Gutierrez contends that the municipal court rule constitutes racial and national origin discrimination with respect to a term or condition of employment in violation of Title VII, 42 U.S.C. § 2000e–2(a), and that such discrimination denies her the right to make contracts equally with white persons in violation of 42 U.S.C. § 1981. She further asserts that the rule denies her equal protection of the laws and infringes upon her right to free speech in violation of the first and fourteenth amendments to the United States Constitution, and seeks damages for interference with her constitutional rights under 42 U.S.C. §§ 1983 and 1985(3).[2] The district judge, finding a likelihood that the rule violated Title VII, granted Gutierrez's request for a preliminary injunction and enjoined appellants from enforcing the rule.[3]

1. Gutierrez originally named Los Angeles County as a defendant. The district court dismissed the County apparently determining that the County, of which the Municipal Court is a part, did not promulgate and could neither rescind nor enforce the rule. The question of the appropriateness of that dismissal is not presently before us.

2. Appellants argue that Gutierrez lacked standing to seek a preliminary injunction because her employment status was uncertain. They contend that it is unlikely that she will return to work. The record below was in dispute on this point and apparently the district court found in Gutierrez's favor. Even were we to review the record *de novo* (which we do not) we would not conclude that she lacks standing.

3. The injunction set forth an exception: it provided that the use of communications in a for-

Later, Gutierrez sought to depose the three judges, but they refused to answer questions relating to their reasons for adopting the rule and moved for summary judgment. The judges asserted the defenses of absolute legislative immunity and qualified immunity to Gutierrez's non-Title VII claims—i.e., those brought under 42 U.S.C. §§ 1981, 1983, and 1985(3). The district court denied the motion for summary judgment, ruling first—as to absolute immunity—that the judges did not act as legislators in promulgating a personnel rule for the clerk's office, and second, and without further explanation, that the judges were not entitled to qualified immunity. The district judge then certified the immunity issues to this court. Prior to these rulings, a magistrate had entered an order compelling the Municipal Court judges to answer the questions relating to their motives. The district judge stayed that order pending our further action. We subsequently agreed to decide the immunity issues along with the appeal from the preliminary injunction.[4]

ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in issuing the preliminary injunction restricting enforcement of the English-only rule.

2. Whether the district court erred in determining that the municipal court judges were not entitled to absolute immunity.

3. Whether the district court erred in determining that tne municipal court judges were not entitled to qualified immunity.

4. Whether the district court erred in asserting jurisdiction over Gutierrez's Title VII claim.

eign language could be forbidden where the prohibition was necessary for valid business or public relations purposes and the reasons for the ban were articulated to the workforce in writing. We discuss the exception *infra* at 1045–46.

4. The district court also certified, and we accepted, several Title VII jurisdictional issues for review. We discuss those issues in the last section of this Opinion.

DISCUSSION

I. THE PRELIMINARY INJUNCTION AND THE TITLE VII CLAIM

Appellants contend that the district court erred in issuing a preliminary injunction enjoining the enforcement of a personnel rule that provides:

> The English language shall be spoken by all court employees during regular working hours while attending to assigned work duties, unless an employee is translating for the non-English-speaking public. This rule does not apply to employees while on their lunch hour or work breaks.

Gutierrez challenges the English-only rule under Title VII using adverse impact and disparate treatment theories.[5] She asserts that a regulation mandating the speaking of English-only by its terms has a disproportionate adverse impact on Hispanics. She contends that the rule, although allegedly facially neutral, unfairly disadvantages Hispanics because their ethnic identity is linked to use of the Spanish language. She also notes that Hispanics constitute the vast majority of bilingual persons in the Southeast Judicial District. Gutierrez then separately avers that the rule was intentionally adopted for the purpose of discriminating against Hispanics, that any neutral appearance is pretextual, and, thus, that the rule violates Title VII's proscription against disparate treatment.

If Gutierrez is likely to succeed on the merits of her Title VII claim, under either a disparate impact or a disparate treatment theory, and she established the possibility of irreparable injury, or, if she raised serious questions for litigation regarding her Title VII claim and showed that the balance

5. In view of the result we reach with respect to Gutierrez's Title VII claim, we need not decide whether the preliminary injunction could also be based on her section 1983 claims that the rule denied her equal protection of the laws and violated her right to freedom of expression; nor, for the purposes of this part of our Opinion, need we consider whether her section 1981 and 1985(3) claims could justify issuance of the challenged order.

of hardships tipped sharply in her favor, she is entitled to a preliminary injunction. *See Dollar Rent A Car, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir.1985); *Benda v. Grand Lodge of the International Association of Machinists & Aerospace Workers*, 584 F.2d 308, 314–15 (9th Cir.1978), *cert. dismissed*, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979). In issuing its injunction, the district court determined that Gutierrez had shown a likelihood of success on the merits, and apparently ruled that irreparable injury could be presumed pursuant to *Berg v. Richmond Unified School District*, 528 F.2d 1208, 1212 n. 6 (9th Cir.1975), *vacated on other grounds*, 434 U.S. 158, 98 S.Ct. 623, 54 L.Ed.2d 375 (1977). Because *Berg* has been vacated it lacks precedential value. *See County of Los Angeles v. Davis*, 440 U.S. 625, 634 n. 6, 99 S.Ct. 1379, 1384 n. 6, 59 L.Ed.2d 642 (1979). Nevertheless, we will affirm the district court's order if Gutierrez met the criteria for the issuance of a preliminary injunction. *See Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985).

A. *Likelihood of Success on the Merits*

1. Introduction

Title VII prohibits discrimination in employment based on race, color, sex, religion, and national origin, 42 U.S.C. § 2000e–2, and was intended to assure equality of employment opportunities, eradicate discrimination in employment, and make the victims of employment discrimination whole. *See generally International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 348, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977). Employment discrimination is not limited to discrimination in hiring, firing, or the payment of wages, but includes discriminatory terms and conditions of employment. 42 U.S.C. § 2000e–2(a). Title VII forbids not only intentional discrimination with respect to conditions of employment, but also facially neutral rules which have a disparate impact on protected groups of workers, *see Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). A facially neutral rule which falls more harshly on a protected group—such as Hispanics—violates Title VII unless it is justified by business necessity, *see Pullman-Standard v. Swint*, 456 U.S. 273, 276, 102 S.Ct. 1781, 1783, 72 L.Ed.2d 66 (1982); *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir.1987) (en banc) [hereinafter cited as *Atonio I*], while a rule or practice that is adopted for the purpose of discriminating against a protected group violates the statute unless it meets the stricter bona fide occupational qualification test. *See Dothard v. Rawlinson*, 433 U.S. 321, 333, 97 S.Ct. 2720, 2728, 53 L.Ed.2d 786 (1977); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 387–88 (5th Cir.), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed. 2d 267 (1971). The first type of case is generally said to present a disparate or adverse impact claim and the second a disparate treatment claim. A disparate treatment claim requires more of a showing by the plaintiff, but also requires the defendant to meet a greater burden in order to overcome that showing. *See Atonio v. Wards Cove Packing Co.*, 827 F.2d 439, 442 (9th Cir.1987) [hereinafter cited as *Atonio II*] and n. 8 *infra*. A plaintiff may bring both types of claims in the same proceeding where the facts alleged warrant relief under either theory.

2. Disparate Impact

In the United States, persons of Asian and Hispanic origin constitute large minorities. Numerous members of these two groups regularly communicate in a language other than English. For many of these individuals Spanish, Mandarin, Cantonese, or some other language is their primary tongue. Members of these minority groups have made great contributions to the development of our diverse multicultural society and its tradition of encouraging the free exchange of ideas. *See generally* Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L.Rev. 303, 361–69, 376–77 (1986) (discussion of assimilation, diversity, and American ideology). The multicultural character of American society has a long and venerable history and is widely recognized as one of

the United States' greatest strengths. *See id.*; Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 Hous. L.Rev. 885, 898–900 (1986).

Few courts have evaluated the lawfulness of workplace rules restricting the use of languages other than English. Commentators generally agree, however, that language is an important aspect of national origin. *See generally* Piatt, *supra*, at 894–98 (discussing the relationship between language and culture); Karst, *supra*, at 351–57; Comment, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. Marshall L.Rev. 667, 676 (1982) [hereinafter Comment, *Language Discrimination*]; Note, *"Official English"*: Federal Limits on Efforts to Curtail Bilingual Services in the States, 100 Harv.L.Rev. 1345, 1354 (1987) [hereinafter Note, *Official English*]; 29 C.F.R. § 1606.7 (1987). The cultural identity of certain minority groups is tied to the use of their primary tongue. *See* Comment, *Native-Born Acadians and the Equality Ideal*, 46 La.L.Rev. 1151, 1165–67 (1986). The mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin. *See* Karst, *supra*, at 351–57. Although an individual may learn English and become assimilated into American society, his primary language remains an important link to his ethnic culture and identity. *See id.* The primary language not only conveys certain concepts, but is itself an affirmation of that culture. Piatt, *supra*, at 894–99.

From the standpoint of the Anglo-American, another person's use of a foreign language may serve to identify that individual as being of foreign extraction or as having a specific national origin. *See* Note, *Official English*, *supra*, at 1355; *cf. Carino v. University of Oklahoma Board of Regents*, 750 F.2d 815, 817, 819 (10th Cir. 1984); *Berke v. Ohio Department of Public Welfare*, 30 Fair Empl.Prac.Cas. (BNA) 387 (S.D. Ohio 1978) (foreign accents identify persons as members of foreign national origins), *aff'd*, 628 F.2d 980 (6th Cir. 1980) (per curiam).[6] Because language and accents are identifying characteristics, rules which have a negative effect on bilinguals, individuals with accents, or non-English speakers, may be mere pretexts for intentional national origin discrimination. *See* McArthur, *Worried About Something Else*, 60 Int'l J.Soc.Language 87, 90–91 (1986).

[1] Although Title VII does not specifically prohibit English-only rules, the EEOC has promulgated guidelines on the subject.[7] *See* 29 C.F.R. § 1606.7 (1987). The EEOC recognizes that "[t]he primary language of an individual is often an essential national origin characteristic," and that an English-only rule may "create an atmosphere of inferiority, isolation and intimidation." *Id.* § 1606.7(a); *see also* Piatt, *supra*, at 888, 897. Although an employer may have legitimate business reasons for requiring that communications be exclusively in English, an English-only rule is, according to the EEOC, a burdensome condition of employment that is often used to mask national origin discrimination and that must be carefully scrutinized. *See, e.g., Decision 83–7*, 31 Fair Empl.Prac.Cas. (BNA) 1861, 1862 (EEOC 1983); *see also* Piatt, *supra*, at 905; Note, *Official English*, *supra*, at 1358–59. Accordingly, the EEOC concluded that while a limited English-only rule may be permissible in some circumstances, no such rule will be deemed lawful unless the employer can show that it is justified by *business necessity* and notifies the employees "of the general circumstances when speaking only in English is required and of the consequences of violating the rule." 29 C.F.R. § 1606.7(b, c) (1987).

6. This point was also made effectively in *Olagues v. Russoniello*, 797 F.2d 1511, 1520–21 (9th Cir.1986) (en banc), *vacated on ground of mootness*, — U.S. —, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987). Although we agree with the analysis contained in the vacated opinion, we do not, of course, rely on it as precedent.

7. We note that EEOC guidelines are generally entitled to considerable deference so long as they are not inconsistent with Congressional intent. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94–95, 94 S.Ct. 334, 339–40, 38 L.Ed.2d 287 (1973).

The EEOC's conclusion appears to be based on its determination that rules prohibiting use of foreign languages generally have an adverse impact on protected groups.[8]

We agree that English-only rules generally have an adverse impact on protected groups and that they should be closely scrutinized. We also agree that such rules can "create an atmosphere of inferiority, isolation, and intimidation." *Id.* § 1606.7(a). Finally, we agree that such rules can readily mask an intent to discriminate on the basis of national origin. *See* Note, *Official English, supra,* at 137–58; Piatt, *supra,* at 894–95; Comment, *Language Discrimination, supra,* at 676 nn. 37, 38. The EEOC guidelines, by requiring that a business necessity be shown before a limited English-only rule may be enforced, properly balance the individual's interest in speaking his primary language and any possible need of the employer to ensure that in particular circumstances only English shall be spoken. The business necessity requirement prevents an employer from imposing a rule that has a disparate impact on groups protected by the national origin provision of Title VII unless there is a sufficient justification under the Civil Rights Act of 1964 for doing so. Accordingly we adopt the EEOC's business necessity test as the proper standard for determining the validity of limited English-only rules.[9]

[2, 3] Gutierrez asserts that the limited English-only rule she is challenging has a disparate impact on Hispanic employees of the Southeast Judicial District.[10] There can be no doubt that the use of disparate impact analysis is appropriate here. *See Atonio I,* 810 F.2d at 1482–86 (majority op.) and 1489–91 (Sneed, J., concurring).[11] Appellants do not disagree. However, they argue, relying on *Garcia v. Gloor,* 618 F.2d 264 (5th Cir.1980), *cert. denied,* 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981), that, whatever the impact of English-only rules in other circumstances, in this case the impact is not disparate or adverse because Gutierrez is bilingual and can easily comply with the rule.[12] Appellants assert that where an employee can readily observe an English-only rule, a failure to comply is nothing more than a matter of personal preference. For the reasons already given, we do not think English-only

8. The EEOC guidelines distinguish between blanket prohibitions, which require English to be spoken at all times, and limited prohibitions, which require English to be spoken only at certain times or under certain conditions. *See* 29 C.F.R. § 1606.7(a, b) (1987). A blanket prohibition will rarely, if ever, be upheld. It is presumed invalid. Limited English-only rules fare only somewhat better. They will be held valid only if they pass the business necessity test. *Id.* § 1606.7(b). See discussion of test *infra* at 1041.

9. We note that the part of the EEOC guidelines that refers to business necessity is, under general principles of equal employment opportunity law, applicable only to cases in which the employer has acted without invidious intent. Where a rule is shown to have been adopted for the *purpose* of discriminating against a protected group, the employer's conduct is permissible only if the discriminatory rule constitutes a bona fide occupational qualification (BFOQ) for the job. Thus, even a limited English-only rule must meet the stricter BFOQ test, *see supra* at 1038, if it is the product of discriminatory intent.

10. The original version of the municipal court's rule provided for a blanket prohibition (notwithstanding the exception for translation duties). However, Gutierrez's action is directed at the amended rule which, by virtue of the lunchtime and break provisions, qualifies as a limited ban.

11. Because we conclude below that Gutierrez was entitled to a preliminary injunction on her disparate impact claim, we need not consider whether the order could be supported by her disparate treatment claim as well. In the event the parties proceed to a trial on the merits, Gutierrez is, of course, free to pursue both claims.

12. Appellants also claim that Gutierrez has not stated a claim under the fourteenth amendment, relying on *Carmona v. Sheffield,* 475 F.2d 738 (9th Cir.1973), and therefore, that she cannot state a claim under Title VII, apparently arguing that Title VII is coextensive with the fourteenth amendment. We disagree. The *Carmona* case did not involve a Title VII claim, but rather a constitutional challenge. Title VII is a broad remedial statute that was intended to strike at many forms of discrimination that may not be actionable under the fourteenth amendment. *See, e.g., Griggs,* 401 U.S. at 431–33, 91 S.Ct. at 853–54.

rules can so easily be immunized from judicial scrutiny.

We note that in *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410–11 (9th Cir. 1987), a case decided after oral argument, we cited *Garcia v. Gloor* in support of our decision that a radio station's English-only rule, with which its disc-jockey employee could readily comply, did not have an adverse impact on that employee. However, the issues involved in *Jurado* were far different from the ones presently before us. The *Jurado* rule was considerably more restricted than and bore little or no resemblance, either in purpose or effect, to the edict of the Municipal Court judges. The *Jurado* rule was clearly a reasonable one that met *the business necessity test:* further, it had only a minimal impact on the protected group of employees. *Jurado* involved an order by a radio station to a single disc jockey to cease his occasional on-the-air use of Spanish because the station had determined that his interspersing of comments in a foreign language during his broadcasts confused the audience and was potentially damaging to the station's ratings. *Id.* at 1410. The *Jurado* order pertained solely to on-the-air broadcasting —the product the employer was offering the public. The employer did not require Jurado, or any other employee, to conduct his off-the-air conversations in English; it sought only to control the essential nature of its product. Clearly there can be no question that the employer in *Jurado* had the right to decide that it would offer its broadcasts entirely in the English language, and clearly the impact of its decision on the single affected employee was slight.[13]

In contrast, the English-only rule in the case before us is concerned primarily with intra-employee conversations, work-related and non-work-related. It is in no way limited to the sale or distribution of the employer's product[14] and there is no contention that the employees' conversations among themselves in Spanish have any effect on those who use the courts. Yet, the prohibition on intra-employee communications in Spanish is sweeping in nature and has a direct effect on the general atmosphere and environment of the work place. Under these circumstances, ease of compliance has little or no relevance; certainly, it is not a factor that could preclude a finding of disparate impact.

3. Business Necessity

We next address appellants' argument that their English-only rule is justified by business necessity. Appellants offer five alleged justifications. In examining these justifications, we begin with the proposition that business necessity means more than business purpose. *See Atonio II*, 827 F.2d at 442. In order to meet the business necessity exception the justification must be sufficiently compelling to override the discriminatory impact created by the challenged rule. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971) (cited with approval in *Atonio II*, 827 F.2d at 443). In addition, the practice or rule must effectively carry out the business purpose it is alleged to

13. Significantly, at the same place in *Jurado* that we cited *Garcia* we cited with approval the EEOC English-only guidelines, and specifically mentioned the business necessity requirement. 813 F.2d at 1411.

Also significantly, had Jurado had difficulty in complying with the English-only rule, that fact would not have affected our decision. A disc jockey may be required to speak English as a condition of employment and, as we concluded, may be required to broadcast exclusively in that language if the station owner so desires. The ability to speak the language in which the program is to be broadcast is obviously a bona fide occupational qualification for any broadcaster. Thus, despite our reference to *Garcia*, the determinative issue in *Jurado* was not the fact that Jurado was able to comply with the rule; it was that the employer had the right to insist that the broadcast be conducted exclusively in English.

14. In fact the rule does not appear to apply at all to contacts between employees and the public. To the contrary, the employees affected by the rule are compelled, as part of their job, to speak Spanish with members of the public on numerous occasions. Among their official duties is the answering of questions by, and the providing of information to, Spanish-speaking persons seeking access to the courts.

serve, and there must be available no acceptable less discriminatory alternative which would accomplish the purpose as well. *Id.* As the Tenth Circuit put it: "The practice must be essential, the purpose compelling." *Williams v. Colorado Springs School District No. 11,* 641 F.2d 835, 842 (10th Cir.1981) (quoted with approval in *Atonio II,* 827 F.2d at 442).

[4] The first justification offered by appellants is that the United States is an English-speaking country and California an English-speaking state. That self-evident fact provides little support for the restrictive rule the municipal court judges imposed on their Spanish-speaking employees. While appellants vigorously urge that there is a substantial state interest in having a single language system, the prohibition of intra-employee Spanish communication does little to achieve that result, especially since as a part of their official duties the Court's bilingual employees are required to communicate in Spanish on a regular basis with numerous members of the non-English-speaking public. Thus, the rule cannot be said to effectively carry out the asserted purpose, and the first justification cannot support a finding of a business necessity. *See Blake v. City of Los Angeles,* 595 F.2d 1367, 1383 (9th Cir.1979), *cert. denied,* 446 U.S. 928, 100 S.Ct. 1865, 64 L.Ed.2d 281 (1980); *Robinson,* 444 F.2d at 798.

[5] Second, appellants contend that the rule is necessary to prevent the workplace from turning into a "Tower of Babel." This claim assumes that permitting Spanish (or another language) to be spoken between employees is disruptive. Even if appellants' unspoken premise were true, the argument fails in part for some of the reasons already suggested. Since Spanish is already being spoken in the Clerk's office, to non-English-speaking Hispanic citizens, part of the "babel" that appellants purport to fear is necessary to the normal press of court business. Additional Spanish is unlikely to create a much greater disruption than already exists. Because the "babel" is necessary and has an apparently permanent status, its elimination in the area of intra-employee communication cannot be termed essential to the efficient operation of the Clerk's office. *See Atonio II,* 827 F.2d at 442; *Robinson,* 444 F.2d at 798.

[6] Third, appellants assert that the rule is necessary to promote racial harmony. They contend that Spanish may be used to convey discriminatory or insubordinate remarks and otherwise belittle non-Spanish-speaking employees. Appellants, however, have failed to offer any evidence of the inappropriate use of Spanish.[15] In contrast, there is evidence indicating that racial hostility has increased between Hispanics and non-Spanish-speaking employees because Hispanics feel belittled by the regulation. There is also evidence that non-Spanish-speaking employees have made racially discriminatory remarks directed at Hispanics. As the EEOC has warned, prohibiting the use of the employees' native tongue may contribute to racial tension. 29 C.F.R. § 1606.7(a) (1987). Appellants' argument that the English-only rule fosters racial harmony is unsupported by evidence and is otherwise generally unpersuasive. *See* Piatt, *supra,* at 897.

[7, 8] Appellants further contend that whatever the actual facts may be, non-Spanish-speaking employees believe that Spanish-speaking employees use Spanish to conceal the substance of their conversations and that the English-only rule is necessary to assuage non-Spanish-speaking employees' fears and suspicions. Appellants' contention is based on a single com-

15. Three supervisors submitted affidavits on this aspect of appellants' case. However, all three supervisors acknowledge that they do not speak Spanish and therefore cannot know whether employees are using Spanish to convey discriminatory or insubordinate remarks. The affidavits, in the absence of any evidence of the misuse of Spanish, indicate only that the speaking of Spanish unnerves the supervisors. The supervisors' feelings toward the use of the Spanish language may reflect a prejudice toward the use of a tongue that they do not understand, and also may indicate a bias against Hispanic-Americans. Unfortunately, monolingual persons may be threatened by the speaking of a language that they themselves cannot speak. Piatt, *supra,* at 894–95.

plaint allegedly made by an employee, a complaint based, at most, on suspicion. Again, there is simply no probative evidence of the Spanish language being used to conceal the substance of conversations. However, even if there were evidence that a regulation mandating the use of English during working hours would calm some employees' fears and thereby reduce racial tension to some extent, this reason would not constitute a business necessity for a rule that has an adverse impact on other persons based on *their* national origin. Existing racial fears or prejudices and their effects cannot justify a racial classification. *Palmore v. Sidoti*, 466 U.S. 429, 433–34, 104 S.Ct. 1879, 1882–83, 80 L.Ed.2d 421 (1984). Nor may such fears or prejudices constitute the business necessity for a rule that burdens a protected class. *See id.; see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, 450, 105 S.Ct. 3249, 3259, 3260, 87 L.Ed.2d 313 (1985).

[9] Fourth, appellants assert that the English-only rule is necessary because several supervisors do not speak or understand Spanish and cannot discern whether employees are correctly disseminating information unless English is spoken. This argument is illogical as well as unpersuasive. Bilingual employees are required to speak Spanish when dealing with the non-English-speaking public; they are specifically hired for that purpose because Spanish is the primary tongue of the majority of the members of the public who use the courts in the Southeast Judicial District. Supervisors may well be unable to determine whether the information disseminated to the public by bilingual employees is correct but that is only because when the bilingual employees are communicating with the non-English-speaking public in the only language that those persons understand, the supervisors are incapable of following the discussion. The municipal court rule in question in no way enables supervisors more effectively to evaluate or control the dissemination of information to the public. *Compare Decision 83-7*, 31 Fair Empl.Prac.Cas. (BNA) at 1862 (limited English-only rule was necessary to ensure safe performance of emergency and abnormally hazardous procedures). It is apparent that the best way to ensure that supervisors are apprised of how well the bilingual employees are performing this part of their assigned tasks would be to employ Spanish-speaking supervisors. Because appellants are willing to allow persons who communicate with the public in Spanish to be supervised by non-Spanish-speaking employees, we find their explanation that supervisors must be able to understand intra-employee communications to be disingenuous at best.

[10] Next, appellants argue that the English-only rule is required by the California Constitution. Cal. Const. art. III, § 6. Appellants assert that section 6, added by the voters as a ballot initiative in 1986, requires the use of English in all official state business, and thus requires Hispanic employees to communicate in English while at work.[16]

Appellants' argument is unpersuasive for three basic reasons. First, a fair reading of section 6 does not support appellants' interpretation of the measure. Section 6 does not provide that English must be spoken under the circumstances specified in

16. Section 6 provides:

(a) *Purpose*

English is the common language of the people of the United States of America and the State of California. This section is intended to preserve, protect and strengthen the English language, and not to supersede any of the rights guaranteed to the people by this Constitution.

(b) ...

English is the official language of the State of California.

(c) *Enforcement*

The Legislature shall enforce this section by appropriate legislation. The Legislature and officials of the State of California shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced. The Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California.

(d) ...

Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this section....

the municipal court's rule, or even suggest that such should be the general policy of the state. Section 6 declares only that "English is the official language of the State of California," Cal. Const. art. III, § 6(b), and mandates only that "[t]he Legislature shall enforce this section by appropriate legislation," Cal. Const. art. III, § 6(c). While section 6 may conceivably have some concrete application to official government communications, if and when the measure is appropriately implemented by the state legislature, it appears otherwise to be primarily a symbolic statement concerning the importance of preserving, protecting, and strengthening the English language. Cal. Const. art. III, § 6(a); *cf. Puerto Rican Organization for Political Action v. Kusper*, 490 F.2d 575, 577 (7th Cir.1973).

Second, appellants contend, relying on the arguments contained in the ballot initiative, that section 6 was intended to require that all communication occurring at a governmental place of business be conducted in English.[17] Accordingly, they reason, section 6 applies, inter alia, to casual intra-employee or supervisor-employee conversations. Even giving the broadest possible construction to the legislative history of section 6, as set forth in the ballot initiative materials,[18] and even assuming we would give that history conclusive weight, we cannot agree. Although the precise question of private conversations among public employees was not addressed in the ballot arguments, it appears that the distinction the proponents attempted to draw was between official communications and private affairs. While the initiative addressed, and arguably may have sought to regulate, the former subject, most if not all of the speech barred here would fall in the latter category. Again, we note that, ironically, while the English-only rule at issue here totally bars *private* speech in Spanish during on-duty periods, use of the Spanish language for *official* communications is not only permitted by the government employer, but in a large number of instances is expressly mandated.[19]

[11] Third, contrary to appellants' arguments, the adoption of a constitutional provision or a state statute does not *ipso facto* create a business necessity. *See Dothard*, 433 U.S. at 331 n. 14, 97 S.Ct. at 2728 n. 14. A state enactment cannot constitute the business justification for the adoption of a discriminatory rule unless the state measure itself meets the business necessity test; otherwise employers could justify discriminatory regulations by relying on state laws that encourage or require discriminatory conduct. *Id.* For federal law purposes, it is immaterial whether inadequate justifications directly underlie the actions of a government agency or are incorporated in the constitution of a state. In either case, if the proferred justifications fail to meet the business necessity test they are legally insufficient.

For the above reasons, section 6 cannot serve as a justification for the municipal court's rule.

4. Summary

[12] English-only rules generally have an adverse impact on protected groups and ordinarily constitute discriminatory conditions of employment. Here, none of the justifications appellants offer for their English-only rule meets the rigorous business necessity standard. *See Robinson*, 444 F.2d at 798. Thus there appears to be

17. Where a measure is enacted by the voters rather than the legislature, the ballot materials are recognized as important guides for determining legislative intent. *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal.3d 208, 245–46, 149 Cal.Rptr. 239, 257–58, 583 P.2d 1281, 1300 (1978) (voter materials helpful in determining the probable meaning of uncertain language), *overruled on other grounds sub nom. Los Angeles County Transportation Comm'n v. Richmond*, 31 Cal.3d 197, 182 Cal.Rptr. 324, 643 P.2d 941 (1982).

18. "Government must protect English ... by functioning in English...." Argument in Favor of Proposition 63, *California Ballot Pamphlet* 46 (Nov. 4, 1986).

19. We also note that if the Municipal Court rule forbade communication in Spanish with the non-English-speaking public, serious questions of denial of access to the courts would be presented, and possibly other constitutional questions as well.

no basis for making an exception to the general rule. Accordingly, the district court correctly determined that Gutierrez established a likelihood of success on the merits on her adverse impact claim.

B. *Irreparable Injury and Balance of Hardships*

Although the district court presumed irreparable harm in reliance on invalid legal authority, its decision to issue the preliminary injunction was not erroneous. Gutierrez has established a likelihood of success on the merits as to her adverse impact claim. *See supra* at 1039–1045. To qualify for a preliminary injunction on that claim she must show only that she faces the possibility of irreparable injury from enforcement of the rule. *See Dollar Rent A Car*, 774 F.2d at 1374.

[13] Gutierrez has clearly established a possibility of irreparable injury. " 'When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.' " *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir.1984) (quoting 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2948, at 440 (1973)); *see also Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976) (plurality opinion). Similarly, when the right the plaintiff is allegedly deprived of constitutes an important aspect of a person's identity—as does the right involved here—no additional injury need be shown. Money damages are inadequate compensation for the threatened loss in either case.

[14] Moreover, permitting the English-only rule to be enforced pending trial might well have other deleterious effects. Prohibiting the exercise of one right protected by Title VII may discourage employees from exercising other rights protected by that statute. *See Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 938–39 (9th Cir.1987); *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir.1986). Further, a rule that has the effect of creating or heightening racial or national origin tension in the workplace raises the specter of ongoing discrimination. Gutierrez has offered evidence that the imposition of the English-only rule has contributed to a workplace atmosphere that derogates Hispanics, encourages discriminatory behavior by non-Hispanic supervisory and non-supervisory employees, and heightens racial animosity between Hispanics and non-Hispanics. *Compare Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 2405–06, 91 L.Ed.2d 49 (1986) (pervasive sexual harassment may create an intimidating, hostile, or offensive working environment actionable under Title VII). For these reasons also, the injury to Gutierrez cannot be fully recompensed by an award of money damages.

C. *Conclusion*

[15] Entry of a preliminary injunction halting the enforcement of a discriminatory employment practice is within the purpose of the Civil Rights Act of 1964, so long as the customary prerequisites for an injunction are met. Gutierrez established a likelihood of success on the merits as well as the possibility of irreparable injury. Therefore, the district court properly issued a preliminary injunction.[20]

[16] Finally, we note that the district court's injunction is more favorable to the employer than the business necessity test permits: the injunction allows restrictions to be imposed based on public relations concerns.[21] Public relations concerns do

20. We note, incidentally, that the effect of the injunction will be to maintain the status quo. There is no indication in the record that the municipal court will be unable to function normally and efficiently without the English-only rule, nor does the record show that an injunction will seriously disrupt or inconvenience municipal court operations. *Cf. Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1203–04 (9th Cir.1980).

21. The injunction provides that:
[D]efendants, ... are ... enjoined and prohibited *pendente lite*, from requiring plaintiff and other employees of the Municipal Court of the Southeast Judicial District of Los Angeles County to communicate only in the English language during working hours; provided that, defendants may restrict employee communication in other than the the English language under any circumstances dictated by

not constitute a business necessity. *See Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388-89 (5th Cir.), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971); *Decision 81-25*, 27 Fair Empl.Prac.Cas. (BNA) 1820, 1822 (EEOC 1981). If such concerns were sufficient a major goal of Title VII would be thwarted because employers would be free to consider public prejudices when setting employment policies and determining employment practices. Such a result would be wholly inconsistent with Title VII, which was intended to overcome the effect of prejudice on employment opportunities. *See Diaz*, 442 F.2d at 389. Having already discussed the proper definition of the business necessity test, *see supra* at 1041, we simply mention the "public relations concerns" issue for the court's guidance in its further proceedings.[22]

II. IMMUNITY AND THE DAMAGE CLAIMS

A. *Absolute Legislative Immunity*

[17] Following issuance of the preliminary injunction, Gutierrez proceeded with discovery and deposed appellants. The municipal court judges refused to answer certain questions until the district court determined whether the defenses of absolute and qualified immunity entitled them to summary judgment. Appellants first assert that they are absolutely immune from suit because they acted in a legislative capacity in enacting the English-only rule.[23] We review the district court's determination regarding immunity de novo. *Cf. Capoeman v. Reed*, 754 F.2d 1512, 1513 (9th Cir.1985).

[18, 19] Members of legislative bodies, whether state, local, or regional, have absolute immunity from suit based on their acts undertaken as part of the legislative function. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-33, 100 S.Ct. 1967, 1974-75, 64 L.Ed.2d 641 (1980); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405, 99 S.Ct. 1171, 1179, 59 L.Ed.2d 401 (1979); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982). Absolute immunity protects the legislative process by shielding lawmakers from civil liability based on their legislative role which necessarily involves the balancing of social needs and rights of different groups. *See Kuzinich*, 689 F.2d at 1350-51. Individuals who are not legislators but whose acts are sufficiently legislative in nature are also absolutely immune from liability for those acts. *See Supreme Court of Virginia*, 446 U.S. at 731-33, 100 S.Ct. at 1974-75. A legislative act involves " 'the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct.' " *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir.1984) (quoting *Yakus v. United States*, 321 U.S. 414, 424, 64 S.Ct. 660, 667, 88 L.Ed. 834 (1944)), *cert.*

valid *business and public relations concerns* articulated to the work force in writing. (Emphasis added in final clause.)

22. We also note that we seriously doubt the propriety of using the term "business concerns" as a substitute for "business necessity." We have previously concluded that "business necessity" means more than "business purpose." *Atonio II*, 827 F.2d at 442. Similarly it would appear to mean more than "business concerns".

23. Appellants argued below, but do not assert here, that Gutierrez sued them in their official capacity as state officers, and thus was attempting to sue the State of California. The Eleventh Amendment prohibits suits for damages against the states in federal court. *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S.Ct. 3099, 3107, 87 L.Ed.2d 114 (1985). A suit against state officers in their official capacity is simply another way of suing the state. *Id.; see also Cory v. White*, 457 U.S. 85, 90, 102 S.Ct. 2325, 2328, 72 L.Ed.2d 694 (1982). Assuming *arguendo* that municipal court judges are state officers, to the extent that Gutierrez seeks damages from appellants in their official capacity, her claim would be barred. The district court originally certified the eleventh amendment issue to this court for review but at appellants' request, amended its certification order to omit that contention and add several others. Appellants sought the amended order on the ground that the record no longer supported an eleventh amendment defense. The district court, in altering its certification order, apparently agreed, concluding either that Gutierrez had sued the defendants individually, in their personal capacities as her employers, rather than in their official capacities, or that municipal court judges are not state officers.

denied, 471 U.S. 1054, 105 S.Ct. 2115, 85 L.Ed.2d 480 (1985).

[20, 21] The promulgation of a rule governing the conduct of clerical employees is best characterized as an administrative function, rather than a legislative or judicial one. *See Goodwin v. Circuit Court of St. Louis County, Missouri*, 729 F.2d 541, 549 (8th Cir.1984), *cert. denied*, 469 U.S. 1216, 105 S.Ct. 1194, 84 L.Ed.2d 339 (1985); *cf. Supreme Court of Virginia*, 446 U.S. at 731–33, 100 S.Ct. at 1974–75; *Crooks v. Maynard*, 820 F.2d 329, 334 (9th Cir.1987) (order and contempt order issued to correct administrative problem was a judicial act); *Cinevision*, 745 F.2d at 580. Personnel rules govern what are essentially internal affairs of a particular employer and are in that respect markedly dissimilar from state bar disciplinary rules or land-use ordinances, for example, which are of general applicability, at least within an affected profession, industry or type of business. *Cf. Supreme Court of Virginia*, 446 U.S. at 721–24, 100 S.Ct. at 1969–71; *Lake Country Estates*, 440 U.S. at 394, 99 S.Ct. at 1173; *Kuzinich*, 689 F.2d at 1350. A work rule is not transformed into legislation merely because the employer is a public entity. Because, in promulgating the challenged personnel rule, appellants acted in their capacity as an employer, and not in a legislative capacity, they are not entitled to assert the defense of legislative, or absolute, immunity.[24]

B. *Qualified Immunity and the Pleading of Unconstitutional Motive*

1. Introduction

[22–25] Appellants next assert that they are entitled to qualified immunity from suits brought under sections 1981, 1983, and 1985(3). Claims pleaded pursuant to those sections have varying requirements, but in some instances it is necessary to allege intentional discrimination. For example, a section 1981 claim always requires purposeful discrimination and therefore cannot be based solely on a disparate impact theory. *See General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 386–88, 102 S.Ct. 3141, 3147–49, 73 L.Ed.2d 835 (1982). On the other hand, a claim brought pursuant to section 1983 may or may not require intent; the requirements for section 1983 claims are the same as those for establishing the underlying constitutional or statutory violations. *See Baker v. McCollan*, 443 U.S. 137, 140 & n. 3, 99 S.Ct. 2689, 2692 & n. 3, 61 L.Ed.2d 433 (1979). Here, Gutierrez alleges a section 1983 claim based primarily upon a violation of the equal protection clause. Because purposeful discrimination is an essential element of an equal protection clause violation, Gutierrez's section 1983 claim requires her to prove intentional discrimination. *See Personnel Administrator v. Feeney*, 442 U.S. 256, 276, 99 S.Ct. 2282, 2294, 60 L.Ed.2d 870 (1979).[25] Finally, a claim brought under section 1985(3) requires a direct or indirect purpose to "depriv[e] ... any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws," and a classor race-based animus. *Griffin v. Breckenridge*, 403 U.S. 88. 102–03, 91 S.Ct. 1790, 1798–99, 29 L.Ed.2d 338 (1971); *see Bretz v. Kelman*, 773 F.2d 1026, 1028 (9th Cir.1985) (en banc). Because the district court was not asked to rule on any motion to dismiss, we do not now consider whether Gutierrez has met the requisite pleading requirements for her

24. Appellants specifically disclaim any reliance on absolute judicial immunity although they suggest that the defense might have been available, citing *Forrester v. White*, 792 F.2d 647 (7th Cir.1986). The Supreme Court has just reversed *Forrester* and held that when supervising employees a judge "act[s] in an administrative capacity" and is not protected by absolute judicial immunity. *Forrester v. White*, — U.S. —, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988).

25. Other section 1983 claims have different requirements. *See, e.g., Little v. City of North Miami*, 805 F.2d 962, 967 (11th Cir.1986) (per curiam) (discussing requirements for section 1983 claim alleging unlawful retaliation in connection with exercise of first amendment rights.). On this appeal, Gutierrez does not rely on her Title VII claim as the triggering provision for her section 1983 action. Thus we need not consider here whether that statutory provision, which itself does not provide for damages, may indirectly serve as the basis for such relief.

various causes of action; however, for reasons we explain *infra* at 1052–1053, it may be necessary for the district court to do so on remand.

2. Clearly Established in General

[26, 27] In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Supreme Court held that government officials performing discretionary functions are entitled to qualified immunity unless, in taking the challenged action, they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. at 2738; *see also Anderson v. Creighton*, — U.S. —, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987); *Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir.1986). For purposes of *Harlow*, government officials are charged with knowledge of constitutional and statutory developments, including all available decisional law. *Ward*, 791 F.2d at 1332; *see also Capoeman*, 754 F.2d at 1513–14.

There is little authority on the question how a court should determine whether a constitutional or statutory right is clearly established. *Capoeman*, 754 F.2d at 1514; *see also Anderson*, 107 S.Ct. at 3039. Ordinarily, courts begin by attempting to determine whether the statutory or constitutional provision creating the right is unambiguous. Where the existence of the right is clear from the face of the provision, courts usually need go no further. However, where ambiguities exist, we "look to whatever decisional law is available to ascertain whether the law is clearly established." *Capoeman*, 754 F.2d at 1514; *see also Ward*, 791 F.2d at 1332. In doing so, we may also consider the likelihood that we would reach the same conclusion as other courts that have previously considered the issue. *Capoeman*, 754 F.2d at 1515; *see also Ward*, 791 F.2d at 1332. Finally, we should note that the term "clearly established right" may be somewhat misleading in that in some cases the relevant inquiry may more properly be described as: whether it is clearly established that the particular act by the public official constitutes a violation of the right involved, rather than whether the right itself is clearly established. *Cf. Anderson*, 107 S.Ct. at 3038–39 (while right to be free from unlawful warrantless searches of one's home is clearly established, court of appeals should have focused on the particular facts of the search under challenge to see whether it was clearly established that the officer's conduct was unlawful). The latter type of inquiry is not, however, appropriate in cases in which intentional or purposeful discrimination is an element of the offense. See section II.B.4. *infra*, at 1049–1051.

3. Pre-existing Law and the English-Only Rule

When the municipal court adopted its English-only rule, there was no binding decisional authority on point in this circuit. In fact, as we previously noted, *supra* at 1039, there was a dearth of judicial authority concerning English-only rules. The only outstanding federal appellate court decision was *Garcia v. Gloor*, 618 F.2d 264 (5th Cir.1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). In that case, the Fifth Circuit had upheld an English-only rule saying that it only prevented some employees from exercising "a preference to converse in Spanish" and did not constitute national origin discrimination. *Id.* at 271.

On the other hand, shortly after the Fifth Circuit decided *Garcia*, the Equal Employment Opportunity Commission, the agency charged with administering employment discrimination law, adopted a contrary position. In December of 1980, the EEOC promulgated guidelines providing that a total prohibition on speaking languages other than English will be presumed invalid, and that a limited prohibition will be found permissible only when it is justified by a clear business necessity. 45 Fed.Reg. 85632, 85636 (1980) (codified at 29 C.F.R. § 1606.7 (1986)). Subsequently, the guidelines were construed in two significant EEOC decisions which shed considerable light on their proper interpretation.

See Decision 81–25, 27 Fair Empl.Prac.Cas. (BNA) at 1821–22 (customer preference does not constitute business necessity); *Decision 83–7*, 31 Fair Empl.Prac.Cas. (BNA) at 1862 (English-only rule limited to communication during emergencies and while conducting inherently dangerous procedures constituted business necessity). While the EEOC guidelines are not binding on the courts, they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank*, 106 S.Ct. at 2405 (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141–42, 97 S.Ct. 401, 410–11, 50 L.Ed.2d 343 (1976), quoting in turn *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944)).

We need not decide in this case, whether, in the absence of decisional law, EEOC guidelines and decisions can constitute clearly established law. Here, judicial precedent existed and it appears to have been inconsistent, at least in part, with the guidelines. If contrary judicial precedent had been issued subsequent to the guidelines, there is no question that we would hold that the guidelines do not "clearly establish" the law. Although the answer is not as certain when the guidelines are issued *after* a judicial decision, where that decision has been rendered by a federal circuit court and the subsequently issued guidelines remain largely untested, we think it appropriate to reach the same conclusion. Thus, we hold that in the case before us the EEOC guidelines did not serve to clearly establish the law regarding the validity of English-only rules.

4. Purposeful Discrimination

[28] Our conclusion that the invalidity of English-only rules was not clearly established does not end our inquiry, for, as we have noted, Gutierrez has alleged that appellants imposed the rule *for the purpose and with the intent of* discriminating against Hispanics, in violation of Title VII and the equal protection clause of the Fourteenth Amendment. She now argues that because appellants purposefully discriminated against Hispanics, they violated clearly established law. In support of this argument, she points out that both the Fourteenth Amendment and Title VII unequivocally forbid *intentional* racial or national origin discrimination. Thus, she concludes, appellants clearly knew they could not engage in purposeful acts of discrimination, and since they acted with a discriminatory motive, they are not entitled to claim qualified immunity.

Gutierrez's argument raises an interesting and important question which requires us to consider the history and purpose of the qualified immunity rule. The current rule is designed to protect government officials from "broad-reaching discovery" and "trial" in cases involving insubstantial claims. *Harlow*, 457 U.S. at 817, 102 S.Ct. at 2737. Prior to *Harlow*, an official was entitled to qualified immunity unless he "knew or reasonably should have known that the action he took ... would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* at 815, 102 S.Ct. at 2737 (quoting *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975)). The rule was largely subjective in nature and permitted plaintiffs to subject government officials to exhaustive legal inquiries on the basis of unsupported suspicions. The *Harlow* Court, in seeking to protect government officials from vexatious litigation based on bare allegations of malice, decreed that thereafter the availability of the qualified immunity defense would depend on objective considerations, rather than on the subjective intent of the government actor. The Court then set forth its "clearly established" test.

While the *Harlow* rule provided clear answers to a number of questions, it initially resulted in considerable uncertainty regarding some types of claims, and particularly those in which unlawful motivation or intent was an essential element of the alleged violation. The issue that arose post-*Harlow* was whether, notwithstanding that decision, courts could consider the actor's discriminatory intent or motive in cases in

which the existence of a violation was dependent on proof of such intent. The courts were faced with an awkward choice. On the one hand, it would appear that judicial consideration of the actor's motive would restore in at least one important category of cases the subjective test that *Harlow* sought to eliminate. On the other hand, if intent or motive could not be considered, courts would be unable to reach a significant number of acts that are unlawful solely because of the actor's motivation. For example, if a public employer terminates a black employee because he is black, that act clearly violates federal constitutional and statutory law. If, however, the employer terminates the black employee because of incompetence, then the discharge obviously does not violate the law at all. The act itself—the act of discharge—is neutral; it is the motive or intent that makes the act both actionable and violative of clearly established law. *See Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, 1433 n. 17 (D.C.Cir.1987); *Goodwin*, 729 F.2d at 545–46; *see also Lowe v. City of Monrovia*, 775 F.2d 998, 1010–11 (9th Cir.1985).

The United States Court of Appeals for the District of Columbia soon recognized the problem that would be created by too literal a reading of *Harlow* and quickly resolved the dilemma in a manner that was thereafter followed, either explicitly or implicitly, by all other circuits that have considered the question. The District of Columbia Circuit concluded that where unlawful intent or motive is an essential element of the challenged conduct, the act cannot be analyzed apart from the actor's intent and the court *must* consider that intent in determining whether the defense of qualified immunity is available. *Martin*, 812 F.2d at 1431; *Hobson v. Wilson*, 737 F.2d 1, 26–29 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985).[26] In *Hobson*, Judges Edwards, Scalia (now Justice Scalia), and Starr held that while each "individual act ... shown to have [been] committed was lawful," the defendants were not entitled to qualified immunity because of their motive: the court found that the individual acts were undertaken "in a specific effort 'to disrupt and interfere with the plaintiffs' political activities.'" *Hobson*, 737 F.2d at 26–27. The District of Columbia Circuit unequivocally reaffirmed its *Hobson* analysis earlier this year in *Martin* and explained its original reasoning in greater detail. It said that an interpretation of *Harlow* that excluded all inquiry into motivation would "insulate officials from liability in all cases in which *the substantive prescription makes the official's state of mind an essential component of the alleged constitutional violation.*" *Martin*, 812 F.2d at 1433 (emphasis added). The court added that such a result was not intended by *Harlow*. It then concluded that "when the governing precedent identifies the defendant's intent (unrelated to knowledge of the law) as an essential element of plaintiff's constitutional claim, the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of proof of the defendant's alleged unconstitutional purpose." *Id.* (citation omitted).[27]

Our circuit has also previously held that a government official is not entitled to

26. Since *Harlow*, the Supreme Court has not considered a qualified immunity case in which intent or motive was an element of the offense. *Compare Anderson v. Creighton*, — U.S. —, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), in which the issue was whether under the particular facts and circumstances "a reasonable officer could have believed Anderson's warrantless search to be lawful," an inquiry the Court described as "objective (albeit fact-specific)." *Id.* 107 S.Ct. at 3040.

27. Judge Starr dissented from the majority opinion, but only on the issue of how much evidence of unlawful motive a plaintiff was required to plead before discovery could be had under the test established in *Hobson*. Significantly, Judge Starr concurred fully in the portion of the decision we discuss here. We note that, originally, the District of Columbia Circuit granted rehearing en banc and vacated part IV of the *Martin* opinion, the part Judge Starr objected to. *Martin v. D.C. Metro. Police Dep't*, 817 F.2d 144 (D.C.Cir.1987). The court has since reconsidered its decision to grant an en banc hearing, denied the petition for rehearing en banc, and reinstated part IV of the opinion. *Martin v. D.C. Metro. Police Dep't*, 824 F.2d 1240 (D.C.Cir. 1987).

qualified immunity from a Section 1981 or 1983 action that is based on a claim of intentional discrimination. *See Lowe*, 775 F.2d at 1011. As we said there, it is well-established that an individual has a "right not to be refused employment ... because of her race or sex. A reasonable person would have been aware that the practices ... were unlawful if ... they were intended to deprive Blacks or women of employment opportunities." *Id.* Similarly, the Eighth Circuit has held that qualified immunity is not a defense in a case in which invidious discrimination on the basis of sex has been established. *Goodwin*, 729 F.2d at 546. The Eighth Circuit explained that intentional discrimination is not subject to a *Harlow*-type qualified immunity defense because "[t]he right to be free of invidious discrimination on the basis of sex certainly is clearly established, and no one who does not know about it can be called 'reasonable' in contemplation of law." *Id.* In so holding the court quoted our language from *Flores v. Pierce*, 617 F.2d 1386, 1391–92 (9th Cir.), *cert. denied*, 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980):

> No official can ... impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it.

Goodwin, 729 F.2d at 546 (quoting *Flores*, 617 F.2d at 1391–92).[28] Intentional invidious discrimination was an essential element of the claims in *Lowe* and *Goodwin*. Whether the qualified immunity defense was available in these cases turned on whether the act was taken for the purpose and with the intent of discrimination. Both cases held that if discriminatory animus was present, then the act alleged to have resulted in a deprivation of rights violated clearly established law. The same is true in the case before us.

[29] We hold, along with the District of Columbia Circuit, that where the lawfulness of a challenged act is dependent upon the actor's motive or intent, the purpose for which the act was undertaken must be analyzed and not just the act itself. We also hold that in deciding whether a defendant is entitled to qualified immunity in cases in which unlawful motive is a critical element, the court must consider the actor's intent in carrying out the act that is alleged to have resulted in the violation of the plaintiff's rights. Specifically, we reaffirm our *Lowe* decision and agree with the Eighth Circuit that qualified immunity is not a defense in cases involving intentional racial or other similar discrimination, including national origin.[29]

5. Pleading Requirements and Limited Discovery

The District of Columbia Circuit recognized that the rule it adopted in *Hobson* could provide the means for an end run around the *Harlow* objective test. The court acknowledged that "[I]n some instances, plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive, and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits. The result would be precisely the burden *Harlow* sought to prevent." *Hobson*, 737 F.2d at 29. In an effort to pretermit the use of such tactics, the court held that in cases involving contentions that defendants acted with an unlawful motive, plaintiffs must present nonconclusory allegations containing evidence of unlawful intent in their complaint or the case would be subject to dismissal prior to the taking of any discovery. *Id.; see also Elliott v. Perez*, 751 F.2d 1472, 1479–81 (5th

28. The Eighth Circuit found our *Flores* language still applicable in the post-*Harlow* era, and we agree. *Cf. Lowe*, 775 F.2d at 1011.

29. If the plaintiff fails to establish that the discrimination was intentional, the claim fails. If the plaintiff does establish such intent, there can be no qualified immunity. Thus, it seems simpler to say that qualified immunity is not a defense in such cases, rather than that the defense prevails where proof of intentional discrimination is not established.

Cir.1985). The allegations, the court said, must be sufficiently precise to place "defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion." *Hobson*, 737 F.2d at 29; *and compare Elliott*, 751 F.2d at 1482 ("Once a complaint ... adequately raises the likely issue of immunity ... the district court should on its own require of the plaintiff a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained."). While, unlike the Eighth Circuit, we do not place the burden on the district court to police the pleadings, we adopt the District of Columbia Circuit's rule that, in order to survive a motion to dismiss, plaintiffs must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent.

[30, 31] Upon being served with a complaint which lacks sufficient nonconclusory allegations of evidence of unlawful intent, a public official who would ordinarily be entitled to raise a qualified immunity defense, and who wishes to avoid discovery, may either move for dismissal for failure to state a claim, or file an answer and move for judgment on the pleadings. *See Mitchell v. Forsyth*, 472 U.S. 511, 526–27, 105 S.Ct. 2806, 2815–16, 86 L.Ed.2d 411 (1985); Fed.R.Civ.P. 12(c) and (h)(2). Here, appellants answered the complaint but did not file either of those motions. Instead, at their depositions, they asserted a "legislative and administrative" privilege and refused to answer questions concerning their motives in enacting the English-only rule. When Gutierrez moved to compel answers, appellants asserted the defenses of absolute and qualified immunity and filed their own motion for summary judgment. The gist of appellants' argument on appeal is that because Gutierrez's claim of unlawful motive is based on bare allegations of malice, the defense of qualified immunity must be upheld. That argument, properly stated, would be as follows:

> Gutierrez is alleging intentional discrimination. In order to plead such a claim against a public official, she must allege specific facts. She has failed to do so.

Thus, although appellants' motion was titled a motion for summary judgment, as appellants now appear to recognize, the motion in actuality challenges the sufficiency of the complaint and functions properly as a motion to dismiss for failure to state a claim or for judgment on the pleadings.

Although the district court might have, *sua sponte*, treated appellants' summary judgment motion as a motion to dismiss and applied the *Hobson* standards, it was not required to, and did not, do so.[30] In short, the district court never ruled on the sufficiency of Gutierrez's complaint; rather, without explanation, it simply stated that the appellants were not entitled to rely on a qualified immunity defense. The court's failure to rule on the sufficiency of Gutierrez's complaint is certainly understandable, since appellants failed to make a motion to dismiss and failed to call the court's attention to any inadequacy in the complaint. Moreover, the law regarding the pleading of unconstitutional motive and qualified immunity was far from clear and the procedural posture of the case was, to say the least, confused. Now, on appeal, appellants suggest that Gutierrez should be permitted to amend her complaint and that the district court should then determine whether the amended pleading can withstand a motion to dismiss. Although appellant's suggestion is belated, it has considerable merit. Because of the uncertainty that existed as to the law and because the district judge was not afforded an opportunity to consider the complex legal issues in an appropriate context, we think a remand may provide the best vehicle for allowing the parties to have their pre-trial disputes resolved in an orderly and

30. We assume without deciding that with proper notice the court could have reclassified the motion in that manner. It would then, however, have been required to disregard all supporting factual material not contained in the pleadings.

efficient manner.[31] Other courts have followed that course in similar circumstances. *See, e.g., Elliott,* 751 F.2d at 1479–80.

We note that, subsequent to *Hobson,* the District of Columbia Circuit suggested that where a defendant asserts on a summary judgment motion that the plaintiff has failed to plead the facts with sufficient specificity, rather than making that claim in connection with a motion to dismiss, a somewhat different rule applies. In *Martin,* the court said that in summary judgment cases the plaintiff should be permitted to conduct a limited amount of discovery, if the discovery is narrowly confined to "particularized interrogation of the defendants for the circumscribed purpose of ascertaining whether there is any substance to" the plaintiff's assertions of unconstitutional motive. 812 F.2d at 1438. Thus, where the defendant relies on factual material, the plaintiff is afforded some opportunity to discover the critical facts before being compelled to defend his complaint.

While the District of Columbia Circuit's limited discovery rule for summary judgment cases makes considerable sense, and while the appeal before us is from a summary judgment motion, we need not now determine whether to follow that portion of *Martin.* Here, Gutierrez was entitled to the order compelling defendants to answer the questions as to motive because of her Title VII claims for permanent injunctive relief. Gutierrez's right to pursue those claims was not challenged in the district court or before us, and defendants do not assert any immunity as to them. Defendants assert both absolute and qualified immunity as to the non-Title VII claims only. Since Gutierrez has the right to pursue her Title VII claims, and immunity is not an issue, appellants cannot refuse to answer deposition questions relevant to those claims, including questions relating to motive, or insist that their responses to those questions be postponed until after the court rules on their motions relating to the other claims. Thus, whether or not we follow the discovery rule laid down in *Martin,* Gutierrez is entitled to obtain the answers to her pending questions without further delay.

31. We note that in keeping with the purpose of this remand—the district judge should, as appellants suggest, allow Gutierrez to amend her complaint before considering any motion to dismiss.

6. Conclusion

At the time appellants adopted their English-only rule, it was not clearly established that such rules were unlawful. Accordingly, to the extent that any claim for monetary damages is based on a disparate impact theory, appellants' qualified immunity defense would serve as a bar. However, Gutierrez's damage claims, including her section 1983 claim, are based primarily, if not exclusively, on allegations of purposeful discrimination. Discriminatory intent is an essential element of a 1983 action where the underlying claim is a violation of the equal protection clause. Qualified immunity is not a defense in such cases. Nevertheless, the concerns that led to *Harlow* have also led to the adoption of rules requiring plaintiffs alleging purposeful discrimination by public officials to set forth in their complaints non-conclusory allegations containing evidence of unlawful intent. Gutierrez's complaint has not been tested under that standard. Accordingly, we remand for further proceedings with respect to the pleadings issues. Finally, for the reasons we have explained, appellants must now answer the questions regarding their motives in accordance with the order of the magistrate.

III. JURISDICTION UNDER TITLE VII

Appellants also contend that the district court lacked jurisdiction over Gutierrez's Title VII claim for three reasons. These challenges can be readily resolved.

A. *The Right to Sue Letter*

[32, 33] Appellants assert that the district court lacked jurisdiction over Gutierrez's Title VII claim because she filed this action in March, 1985 but did not receive

her right-to-sue letter from the EEOC until September, 1985. They contend that her early filing interfered with conciliation attempts. There is no evidence in the record to support this contention, and appellants admit that the lack of a right-to-sue letter at the time of filing a lawsuit may be cured by the later issuance of the letter. *See Jones v. Bechtel*, 788 F.2d 571, 573 (9th Cir.1986); *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1351 (9th Cir. 1984). Established precedent is controlling. Any jurisdictional problem created by the initial lack of a right-to-sue letter was cured. *Wrighten*, 726 F.2d at 1351.

B. *The EEOC Charge*

[34] Appellants next contend that they are not proper defendants because they were not named individually in the EEOC charge which Gutierrez filed against the Municipal Court. "EEOC charges should be construed liberally." *Wrighten*, 726 F.2d at 1352. In *Wrighten*, we said that a Title VII action may be brought against persons not named in the EEOC charge "as long as they were involved in the [challenged] acts." *Id.* Subsequently, in *Carter v. Smith Food King*, 765 F.2d 916, 924 n. 10 (9th Cir.1985), we stated that plaintiffs could bring actions against defendants not named in the prior administrative proceeding "under certain circumstances." From the examples we gave in *Carter*, it is clear that several types of connections between the party named in the charge and a new party named in the legal action are sufficient: for example, a connection between a corporate or governmental employer and a supervisor, a union and one of its officials, a union and a related organization, and an employer and an independent contractor that trains and supervises its employees. Appellants do not dispute that such a connection exists here, specifically the connection between governmental employer and supervisor. The municipal court judges have supervisory control over certain working conditions of the municipal court's employees. Accordingly, whether we apply the all-encompassing *Wrighten* standard or look to the type of connection that *Carter* suggests may be required, the failure to list appellants in the EEOC charge does not preclude Gutierrez from naming them as defendants in the current litigation.

C. *Appellants As Employers*

[35] Appellants finally argue that Los Angeles County is Gutierrez's employer and that Gutierrez may not sue individuals who do not employ her.[32] More to the point, it is the Clerk of the Municipal Court, Joseph Sharar, who supervises her, and the Clerk is appointed by appellants. Cal.Govt. Code § 71181. Further, the municipal court judges are authorized by statute to promulgate personnel rules for court employees. Cal.Govt.Code § 72002.1. The record establishes that the Clerk is responsible for enforcement of those rules. The judges thus possess authority to control working conditions in the Clerk's office. Cal.Govt.Code § 72002.1. If not the direct employers, appellants exercise supervisory authority over the employees. As such, they are proper parties. *See Carter*, 765 F.2d at 918 n. 1.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION.

32. We note that at least for some purposes, appellants are county officials. *See Villanazul v. City of Los Angeles*, 37 Cal.2d 718, 724, 235 P.2d 16 (1951); 68 Op.Cal.Att'y Gen. 127, 133 (1985). Recently, a California appeals court held that a municipal court judge is a county rather than a state employee. *Hamilton v. Workers' Compensation Appeals Bd.*, 196 Cal. App.3d 542, 242 Cal.Rptr. 67 (1987).

V. Breach of Contract—Fourth Cause of Action

Westinghouse has moved to dismiss Con Ed's claim for breach of contract on grounds that it is merely duplicative of the first three causes of action alleging breach of express and implied warranties. Both parties have addressed this contention only in passing, and in any event if the claim is indeed merely duplicative of others its dismissal will have little practical effect. Accordingly, this portion of Westinghouse's motion to dismiss is also denied without prejudice.

* * * * * *

The motion to dismiss the fifth cause of action is granted insofar as it alleges negligence in the provision of defective equipment and improper operating instructions. The motion to dismiss the sixth cause of action for strict liability is granted. To the extent that the fifth and sixth causes of action are dismissed, that portion of the seventh cause of action seeking a declaratory judgment as to Westinghouse's liability under the fifth and sixth causes of action is also dismissed. In all other respects, the motion to dismiss is denied without prejudice.

It is so ordered.

Martin NELSON, et al.

v.

Richard THORNBURGH, et al.

Civ. A. No. 81-5115.

United States District Court,
E.D. Pennsylvania.

July 12, 1983.

Blind income maintenance workers brought action against Department of Public Welfare officials, in their official capacities, for alleged discrimination under the Rehabilitation Act, seeking relief both by way of injunction and damages. The District Court, Louis H. Pollak, J., held that: (1) with respect to workers who, with assistance of readers, met requirements of their position as well as their sighted colleagues and therefore were "otherwise qualified" handicapped individuals under the Rehabilitation Act to perform their functions with the Department, the Department was required to provide and to absorb the expense of reasonable accommodation of the blind workers, whether by readers, electronic devices, or other suitable means, at least where cost represented minute fraction of the Department's administrative budget and the Department otherwise failed to meet burden of showing undue hardship, and (2) relief would be limited to injunction, in light of legislative silence as to any congressional intent to provide damages remedy, as for cost to the workers of having had to absorb expense of hiring readers in the past to assist in job functions, and consequent overriding policy of the Eleventh Amendment to deny damage recovery as against the state.

Judgment for plaintiffs.

1. **Statutes** ⇐219(1)

Administrative regulations, if consistent with purposes of statute in question, are entitled to judicial deference, particularly where proper resolution of case cannot be deduced by logical process from words of the statute, but must instead represent quantitative judgment, that is, quasi-legislative compromise between competing interests.

2. **Civil Rights** ⇐9.16

With respect to Department of Public Welfare income maintenance workers, who were blind and who had employed, at their own expense, readers to read various mate-

Resolution of this question, too, should be postponed pending a final determination of the legal principles applicable in this case to interpretation of the disclaimers.

rials and assist in completion of standardized public assistance forms used in federally funded program, but who, with assistance of the readers, met requirements of their position as well as their sighted colleagues and were therefore "otherwise qualified" handicapped individuals under the Rehabilitation Act, the Department was required to provide and to absorb cost of reasonable accommodation of the blind workers, whether by readers, electronic devices, or other suitable means. Rehabilitation Act of 1973, §§ 2 et seq., 305(a)(2), 504, as amended, 29 U.S.C.A. §§ 701 et seq., 775(a)(2), 794.

3. Action ⇐3

Touchstone of deciding whether statute creates private right of action is legislative intent.

4. Federal Courts ⇐265

Eleventh Amendment normally operates to bar recovery of damages in action if judgment would be collected against state, even where the state is not named as a party. U.S.C.A. Const.Amend. 11.

5. Federal Courts ⇐265

The Eleventh Amendment protections against recovery of damages in an action if judgment would be collected against the state may be overridden when Congress acts within its grant of plenary power under section 5 of the Fourteenth Amendment. U.S.C.A. Const.Amends. 11, 14, § 5.

6. Civil Rights ⇐13.17
Federal Courts ⇐265

Relief in action brought under the Rehabilitation Act against state Department of Public Welfare and others for discrimination against blind income maintenance workers by refusing to provide workers with half-time readers or their mechanical equivalent was limited to injunctive relief, in light of legislative silence as to any congressional intent to provide for damages remedy, as for cost to the workers of having had to absorb expense of hiring readers in the past to assist in job functions, and consequent overriding policy of the Eleventh Amendment to deny damages recovery against the state. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794; U.S.C.A. Const.Amend. 11.

7. Federal Courts ⇐265

While Congress may abrogate the Eleventh Amendment by conditioning receipt of federal funds on state's surrender of Eleventh Amendment immunities, it must do so expressly. U.S.C.A. Const.Amend. 11.

Andrew F. Erba, Community Legal Services, Philadelphia, Pa., for plaintiff.

Stephen F. Gold, Philadelphia, Pa., for plaintiff-intervenor.

Maura A. Johnston, Deputy Atty. Gen., Harrisburg, Pa., for defendants.

OPINION

LOUIS H. POLLAK, District Judge.

Plaintiffs Martin Nelson, Paula Buntele and Thomas Mobley are income maintenance workers ("IMWs") employed by the Department of Public Welfare ("DPW") of the Commonwealth of Pennsylvania, and assigned to neighborhood offices of the Philadelphia County Board of Assistance ("PCBA"). Defendants, all sued in their official capacities, are Governor Richard Thornburgh, Secretary of Welfare Helen O'Bannon and PCBA Executive Director Dan Jose Stovall.[1]

Plaintiffs are blind. Because their job entails extensive paperwork, they are unable to perform their duties satisfactorily without the aid of a reader. Plaintiffs have therefore hired readers on a part-time basis. With the assistance of these readers, plaintiffs meet the requirements of their position as well as their sighted colleagues.

Plaintiffs, up to now, have borne the expense of these readers, despite requests by plaintiffs and the Office of Civil Rights of the Department of Health and Human Services that DPW assume this cost. Plain-

1. The Commonwealth, initially named as a party defendant, was dismissed on sovereign immunity grounds in an Order entered on September 13, 1982.

tiffs claim in this lawsuit that DPW's refusal to accommodate them by providing readers or, in the alternative, mechanical devices capable of helping them accomplish the reading functions, constitutes "discrimination" within the meaning of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, which provides in relevant part:

> No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance....

Plaintiffs seek declaratory and injunctive relief, as well as damages for reader expenditures made in the past.

Defendants contend that plaintiffs are not "otherwise qualified" within the meaning of section 504 because they do not possess an essential qualification of the IMW position: the ability to read. Alternatively, defendants argue that, even if "otherwise qualified," plaintiffs are not entitled to the accommodation that they seek because the cost of readers or mechanical devices would be an undue hardship on DPW and PCBA. Finally, defendants insist that, even if they are found obligated to assume the cost of accommodating plaintiffs' blindness in the future, this court is without authority to require defendants to reimburse plaintiffs for reader expenses incurred heretofore.

The issues in this case have been fully developed through plaintiffs' unsuccessful motion for a preliminary injunction, defendants' partially successful motion for summary judgment, supplemental memoranda on the issue of damages, and a four-day trial. On the basis of the evidence presented, I make the following:

FINDINGS OF FACT

I. *The Parties*

Plaintiffs Martin Nelson, Paula Buntele and Thomas Mobley, all blind since birth, are employed by DPW as IMWs. Each is assigned to a different district of the PCBA. Defendants Thornburgh, O'Bannon and Stovall have ultimate responsibility for the policies and practices complained of in this lawsuit.

DPW is a department of the Commonwealth of Pennsylvania, charged with administering the federal and state programs, such as cash assistance, food stamps and medical assistance, designed to aid those in need. *See* 62 Pa.Stat.Ann. § 401. In the fiscal year which ended on June 30, 1983, DPW was authorized to disburse $4,310,000,000; of this sum, a little under half came from the federal government through block grants. An additional $300,000,000 is devoted to administering the funds, $141,000,000 of which is contributed by the federal government. Eighty percent (80%) of the administrative budget is used to pay salary and benefits for DPW's 38,000 employees.[2]

Since 1979, budgetary constraints have considerably reduced the work-force of the county assistance offices, including the offices in Philadelphia County administered by the PCBA. For instance, 160 clerical employees have been furloughed in Philadelphia County, and a hiring freeze has been in effect since 1979. During that same period, caseloads have increased by about 100,000 cases statewide, with a proportional increase in Philadelphia. This combination of diminished resources and enlarged responsibilities has resulted in a growing backlog of work in many offices, increasing the strain on clerical, caseworker and supervisory employees.

II. *The Functions of the IMW*

The IMW is, as a rule, the only point of contact between the individual recipient and the massive apparatus of the state and federal welfare system. Historically, the focus of the IMW's responsibilities was on social work: accompanying the provision of material aid with counselling and referrals

2. 8,900 of the Department's employees work in county assistance offices scattered across the state. 3200 of these employees work in Philadelphia County.

to other helping agencies (e.g., vocational training programs). The caseworker, as the IMW used to be known, interviewed the client, sometimes in a home visit, and then described in a narrative the results of the interview and the reasons for granting or denying aid.

By the mid-1970's the nature of the job had shifted away from traditional social work. The central function of the job is now the determination of the client's initial and continued eligibility for federal and state benefits. The practice of reporting the outcome of the interview through a narrative recital is a casualty of this trend; it has been almost fully replaced by computerized standard forms. The standard forms are designed to maximize efficient processing of benefits and minimize mistakes by making it easier to control the IMWs' discretion and keep the client files uniform.

The principal form used by the IMW in the interview with the client is the "743," part of the "121 series" adopted by DPW in the mid-1970's. The IMW elicits from the client all the information required by the five-page form, which includes everything relating to the client's financial, vocational and family situation that could conceivably bear upon the question of eligibility.[3] DPW's normal procedure calls for the IMW to copy this information by hand on the appropriate block of the 743 form. Depending on the client's situation, the IMW may also have to fill out other forms, such as a food stamp application worksheet or a child support form. During the interview, the IMW often will have to review documents provided by the client. Some documents, such as rent receipts, are used to verify the client's address; others, such as medical reports, are used to evaluate the client's medical fitness for work, an important component of the eligibility requirement.

After a form is completed, the IMW hands it to the client for review. If the information is correct, the client signs the form. The typical IMW spends about half the day conducting interviews.

After the client leaves the office, the IMW makes the determination of eligibility for benefits. To do this, the IMW consults the DPW Income Maintenance Manual ("the Manual"). The Manual is over one thousand pages long, and filled with regulations, procedures, charts and tables. New materials are added to the Manual almost daily, reflecting changes in the amount of aid or the policies affecting its distribution.[4] From the standards contained in the Manual, the IMW determines if the information on the 743 entitles the client to receive or continue to receive benefits.[5] Some of the benefits are distributed under federal programs, such as Aid to Families with Dependent Children, Old Age Assistance, and foodstamps. Other benefits exist under state programs, like General and Medical Assistance.

After determining eligibility under these programs, the IMW fills out an instruction sheet encoding the decision on the amount of benefits, and sends it with the 743 to the clerical department. The clerical staff then enters all the data into the central computer.

The IMW must then perform the post-interview procedures, which include completing forms in order to update client information, sending copies of forms to appropriate offices and personnel and notifying the client of DPW's decision on his or her eligibility.

Another important function of the IMW is attending to "special projects." Special

3. These interviews now generally take place in the district office, as DPW is attempting to phase out home interviews whenever possible.

4. The IMWs attend frequent training sessions at which they learn about changes in the Manual.

5. For redeterminations of eligibility, required to take place every six months for each client, the IMW follows the same basic procedures as in the initial determination of eligibility. Prior to the redetermination interview, however, the IMW must take the added step of reviewing the case file in search of factors, such as the possibility of new income sources, that may affect eligibility.

projects are undertaken at the direction of higher level administrators and are designed to correct errors that may have escaped scrutiny in individual cases. For example, the IMW may receive a list of his or her clients who receive Social Security benefits as well as assistance, to determine whether that income source was disclosed at the time of the eligibility decision. Or, the IMW may receive a list of clients receiving more than the maximum grant or less than the minimum, and be asked to justify or rectify the discrepancy.

The IMW must also be prepared to handle client emergencies by being able to calm distraught clients, replace lost checks, or track down bureaucratic error.

Changes in the last ten years have operated to limit the range of discretion associated with the IMW position. Yet the IMW remains a professional-level position, with significant responsibilities. The capacity to read without aid is certainly helpful in carrying out the duties of the job, as are the abilities to hear or to move about without help. The essential qualifications for this career, however, are dedication to the work, sufficient judgment and life-experience to enable one accurately to assess the legitimate needs of clients, and the ability to work effectively under the pressure of competing demands from clients and supervisors.

III. *The Blind IMW*

A. *The Plaintiffs' Experiences*

With the aid of readers, plaintiffs perform their job as well as sighted IMWs. By employing readers on a part-time basis, plaintiffs have earned fully satisfactory evaluations from their supervisors.

The experience of plaintiff Martin Nelson as a blind IMW is typical of the other plaintiffs, with relevant differences noted in footnotes. Mr. Nelson came to work for DPW in 1970,[6] and has employed a reader on a part-time basis since that time. As long as records were being kept in narrative form, Mr. Nelson's need for a reader was limited, for the narratives were dictated into a machine and then transcribed by the typing pool. With the advent of the standardized form, demanding meticulous attention to detail, Mr. Nelson's use of a reader increased dramatically. He currently uses his reader an average of 32.5 hours per week.

Mr. Nelson pays his reader $3.80 per hour, spending approximately $480 per month for reader salary, or about $5,100 per year. Mr. Nelson earns $21,379 in salary, plus fringe benefits of about $4,000.[7] Plaintiffs are able to afford a reader on their salary because they receive $316 per month in Supplemental Security Income (SSI). They receive SSI benefits to help defray work-related expenses that result from their blindness. That portion of the reader expenses not covered by SSI is paid out of salary, and is tax deductible. Were the SSI benefits to cease, plaintiffs would be unable to employ readers.

When conducting a client interview, Mr. Nelson uses his reader to fill out the forms according to his instructions and to read aloud any documents the client may have brought in. Mr. Nelson takes notes of the interview in braille, with a slate and stylus.[8] After the form is completed, Mr. Nelson confirms that the information given is accurately inscribed, and then has the client sign the form. Mr. Nelson later has his reader review specific sections of the Manual in order to determine eligibility. The reader also helps Mr. Nelson carry out the special projects.

When the reader is not there, Mr. Nelson

6. Mobley began work in 1975, Buntele in 1972.

7. Mr. Mobley, who also earns $21,379 per year, employs two part-time readers, costing him $1,000–$1,200 per year. Ms. Buntele earns $22,804 per year, and employs a reader five hours per day, at a cost of $100 per week.

8. A slate is a small sheet of hinged metal inscribed with a series of dots, corresponding to the braille alphabet. After inserting paper into the slate, a piercing tool known as a stylus is used to punch the raised dots onto the paper and thus encode information.

reviews his file of brailled client cards.[9] But, as Mr. Nelson testified, after he has organized his work, "there are times when time lies rather heavily on my hands," and all there is left to do is "read two or three articles of National Geographic." N.T. 133–34.

Ms. Buntele follows a procedure similar to Mr. Nelson's and, like Mr. Nelson, experiences periods of inactivity when the reader is not present. On the other hand, Mr. Mobley, by varying the routine slightly, has been able to reduce significantly both his demand for a reader and his idle time. Mr. Mobley schedules his interviews with clients for the afternoons. Like Mr. Nelson, he takes notes on a slate and stylus. But Mr. Mobley's reader is not present during interviews.[10] His reader works mornings, helping Mr. Mobley to fill in the 743 and the instruction sheet for the previous day's interviews. The client returns sometime during that day, or soon thereafter, to verify and sign the completed form. By following this procedure, Mr. Mobley needs a reader for only four hours per day.

B. *The Demand for Readers and DPW's Response*

As DPW's increased use of standardized forms spawned the plaintiffs' increased use of readers, each plaintiff separately requested that DPW assume the reader expenses. When informal attempts to reach a settlement on the issue proved futile, Nelson filed a complaint in July 1980 with the Office of Civil Rights (OCR) of the Department of Health and Human Services. Buntele filed a similar complaint a few months later. On investigating these complaints, OCR concluded that DPW was not in compliance with section 504's implementing regulations because it was not providing the complainants and other blind IMWs with sufficient accommodation. OCR requested that DPW reimburse blind employees for past and current reader expenses pending creation of a civil service position of reader. DPW refused to comply and efforts at reaching a negotiated settlement failed.

In October or November, 1981, plaintiffs met with representatives of the PCBA to discuss possible accommodations. Plaintiffs requested that DPW either provide them with readers, or restructure the IMW position to reduce the need for readers by, for example, brailling the Manual, forms and training material, or by allowing the IMWs to type or dictate client information. Marie DeLuca, Deputy Executive Director of PCBA, directed a study of the feasibility of plaintiffs' requests. She determined that providing readers or brailling the Manual would be prohibitively expensive, and that modifying the standard form would impede accuracy and efficiency. She did not consult any rehabilitative experts before reaching her decision.[11]

PCBA has taken some steps to accommodate plaintiffs. For example, they are supplied with braille paper, and supervisors seem to make a special effort to review their work. During training sessions, supervisors spend extra time instructing plaintiffs on changes in the Manual or procedures to be followed on a special project. Mr. Nelson is supplied with a typewriter, and he was given some special consideration when caseloads were redistributed. These accommodations, though helpful, are insufficient to allow plaintiffs to perform the essential functions of their job without readers.

C. *Types of Accommodation*

Three expert witnesses testified concerning the methods and costs of accommodating the plaintiffs to enable them to perform

9. The card contains the name, address, and last and next date of redetermination.

10. Mr. Mobley's testimony did not address how he examines documentary evidence. That problem is presumably handled by asking coworkers for help, by copying the documents, or by retaining the documents until the reader comes in the next day.

11. Ms. DeLuca's decision not to provide readers for the plaintiffs was endorsed by Secretary O'Bannon. The essence of the Secretary's position is that it is wasteful to have "two people doing one person's work." Trial deposition of O'Bannon at 22.

the essential functions of their job. John Halverson and Patrick Camorato testified on behalf of plaintiffs; Frederick Noesner testified on behalf of defendants. All three are blind and all three presented impressive credentials in the field of work-place accommodations for the blind.

The experts' testimony, in sum, suggested four types of accommodation DPW could pursue:

(1) The first may more accurately be called an "alternative technique" than an accommodation, N.T. 87, for it involves relatively costless adjustments in the agency's procedures. One such technique would be to braille the forms to make them easier for a blind IMW to follow and explain to a reader. Another such technique would be to allow blind IMWs to require clients to return the next day to sign the face sheet of the 743, enabling the IMWs to conduct interviews without the presence of a reader, as Mr. Mobley already does.

(2) A second type of accommodation would be to print the thousand-page manual in braille. The cost of brailling fifty copies of the Manual—enough for blind IMWs throughout the state—would be approximately $34,000.

(3) A third type of accommodation is technological: DPW could purchase one of a number of kinds of new machines that combine microchip technology and braille. The most promising of these inventions is the Versabraille. The Versabraille is a portable [12] mini-computer that uses a standard cassette to store and retrieve information in braille.

Versabraille information is organized by chapters, pages and paragraphs. The blind IMW could use the Versabraille to encode all the information gathered from a client interview by plugging in the name of the client as the chapter, and the specific information—say eligibility for foodstamps—as a page. The blind IMW could later "read back" the information by recalling the name of the client and "foodstamps," and touching the display. The display is the "readout" on the Versabraille. Dots raised on the plastic display represent twenty braille characters at one time. For the next twenty characters the blind IMW would merely press the advance bar.

The Versabraille, if linked with a printer, also has the capability of transcribing from the braille into the English alphabet. This feature could enable the IMW to arrange the information received during the interview into the order required by a standard form, and print out that information directly onto the form.

Additionally, it is quite possible that the Versabraille could be linked to the existing DPW computer system. This would allow the IMW to enter information directly into, or take information from, the DPW data base. When the Manual is computerized, the Versabraille could encode it into paperless braille.[13]

Each Versabraille would cost at most $7,000, plus $700 for a printer. A maintenance contract would cost another $700 per year. Because they already know braille, the plaintiffs in this case could learn to use Versabraille in two or three days.[14]

The Versabraille would substantially reduce the need for a reader but it would not eliminate it entirely. Handwritten documents would still require reading, as would mail and material not produced by or entered into the DPW computer.

(4) The fourth type of accommodation is providing a reader.

D. *The Cost of Reasonable Accommodation*

Of the four types of accommodation referred to above, the provision of readers is

12. The Versabraille measures 14" × 9" × 5", and weighs 11 pounds.

13. The Versabraille has been used with success by the Social Security Administration, the Internal Revenue Service, and Bell of Pennsylvania.

14. Other devices of recent invention are equally ingenious, though less well suited to meet these plaintiffs' needs. One is an Opticon, which can scan typewritten material and convert it to braille. There is also a voice computer able to read and pronounce, although imperfectly, typewritten script. These machines, however, are not portable and have no memory.

required to enable a blind IMW to perform the essential functions of the position. But a full-time reader is not required, because it is not necessary to have a reader in attendance while determination and redetermination interviews are being conducted. Those interviews consume approximately half of a working day. If the PCBA were to permit each blind IMW to function as Mr. Mobley does, a blind IMW could gather client information one day and, on the following day, use the reader to prepare the form, with client verification on that day or soon thereafter. By using this method a blind IMW could perform the essential functions of the job by using a reader four hours a day or less. During the rest of the day, a person capable of serving as a reader should be "on call" on an emergency basis.

Assigning a clerical worker already in the office to double as a reader would seem the most sensible method of accommodation. That clerk/reader could spend approximately half the day attending to reading duties. During the other half of the day, the clerk/reader could perform clerical tasks, but be available to serve as a reader whenever truly necessary.

The Clerk Typist I—the basic clerical position within the DPW—earns $13,276 per year. Since plaintiffs could perform the essential functions of their position if DPW supplied each of them with a half-time reader, the cost of accommodation would be approximately half the salary of a Clerk Typist I, or roughly $6,638 per year for each plaintiff.

Adoption of the first two types of accommodations—changing agency procedures and brailling the Manual—could enhance the efficiency and productivity of readers, and thus lower the cost of accommodation. Investment in the third type of accommodation—new technology and most particularly the Versabraille—could also be expected to lower the cost of accommodation by significantly reducing the blind IMW's dependence on the availability of readers. None of these accommodations, however, would eliminate entirely the need for readers.

Assuming accommodation is found to be required as a matter of law, it will be up to defendants to determine whether readers alone would be utilized or whether use would also be made of one or more of the other types of accommodation. If defendants were to employ other accommodations in addition to readers, the governing principle would be that the aggregate remedial package would, as to each plaintiff, be as effective as providing each of the plaintiffs with (a) daily access to a reader for half of the working day, and (b) emergency access to a reader as required during the other half of the working day.

DISCUSSION

Three issues are raised by plaintiffs' claims.[15] The first is whether plaintiffs are "otherwise qualified" within the meaning of section 504. If they are, next to be decided would be whether the accommodation required to enable plaintiffs to perform the essential functions of their job—half-time readers or their equivalent—would be reasonable, or whether it would instead impose an undue hardship on DPW and the PCBA. Finally, if that accommodation is reasonable, the question would be raised whether plaintiffs are entitled to damages for past reader expenditures, or are instead barred from recovering by one of a number of statutory and constitutional doctrines.

I. *Otherwise Qualified*

Section 504 prohibits only "otherwise qualified" individuals from being discriminated against by reason of handicap. Plaintiffs contend that they are "otherwise qualified" because, with accommodation, they are able to perform all the job functions associated with the IMW position.

15. Two issues yet to be decided by the Supreme Court have been resolved in the Third Circuit. The first is that section 504 creates a private right of action, *NAACP v. Wilmington Medical Center*, 599 F.2d 1247 (3rd Cir.1979). The second is that this right of action exists whether or not the primary purpose of the federal assistance is to provide employment. *LeStrange v. Consolidated Rail Corp.*, 687 F.2d 767 (3rd Cir.1982), *cert. granted*, —— U.S. ——, 103 S.Ct. 1181, 75 L.Ed.2d 429 (1983).

Defendants respond by arguing the following syllogism: plaintiffs are "otherwise qualified" only if they possess all the abilities necessary to perform their job; that one of the most important abilities for the IMW to possess is the ability to read; that plaintiffs cannot read; and therefore that plaintiffs are not "otherwise qualified."

The legislative history of the Rehabilitation Act does not explain the Congressional intent in choosing the phrase "otherwise qualified." However, the Supreme Court, in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), has closely examined the meaning of the phrase. *Davis*, a unanimous opinion, remains the only directly relevant Supreme Court decision. It therefore provides an appropriate starting place for analysis of the issues posed in the present controversy.

A. *Davis*

Francis Davis suffered from a hearing disorder. By wearing a hearing aid, she was able to detect the presence of sounds almost as well as a person with normal hearing, but still had trouble locating the source of the sounds or discriminating among them sufficiently to understand spoken speech. She therefore had to rely primarily on her lipreading skills for oral communication.

Ms. Davis hoped to be trained as a registered nurse. To achieve that ambition, she enrolled during the 1973–74 academic year in Southeastern Community College's Parallel Program: a program designed to fulfill the prerequisites for the College's Associate Degree Nursing Program. Upon completing the Parallel Program, however, Ms. Davis was refused entry into the nursing program. The decision, made after considerable deliberation, was based on plaintiff's handicap.

Ms. Davis brought suit under section 504. The district court, after a hearing, analyzed her claim first by defining "otherwise qualified" in this context to mean "otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." 424 F.Supp. 1341, 1345 (E.D.N.C.1976). The court then found that Ms. Davis would pose a potential danger as a student or registered nurse because a patient or doctor might be unable to secure her attention and be quickly understood in a medical emergency. Because Ms. Davis could not under certain circumstances perform her functions safely, she could not perform them sufficiently. Therefore, she was not "otherwise qualified," and judgment was entered for the defendant.

The Court of Appeals for the Fourth Circuit reversed. Relying upon its interpretation of regulations newly promulgated by the Department of Health and Human Services (then, the Department of Health, Education and Welfare), the Fourth Circuit held that "otherwise qualified" meant qualified "without regard" to handicap. The case was ordered remanded to the district court to consider whether Ms. Davis met all the other criteria for admission. If she did, the college must accept her, modifying its program in whatever ways were necessary in order to accommodate her handicap. 574 F.2d 1158, 1160–62 (1978).

The Supreme Court, speaking through Justice Powell, reversed. After reviewing the proceedings and opinions below, and examining the language of the statute and the implementing regulations, the Court endorsed the district court's view of the meaning of "otherwise qualified": "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." 442 U.S. at 406, 99 S.Ct. at 2367. Because plaintiff could not meet these requirements, she was not "otherwise qualified."

Justice Powell's opinion then went on to consider whether the nursing program requirements might be modified to accommodate Ms. Davis. The Court first noted that even the most radical alteration in the program would avail Ms. Davis little, for while the paramount concern for patient safety demanded that Ms. Davis be closely supervised in her practical training, such supervision would frustrate the program's goal of encouraging the assumption of responsibili-

ty. Moreover, the Court found that section 504 requires no "affirmative action"—that is, no modifications "in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals." *Id.* at 410, 99 S.Ct. at 2369. The Court then acknowledged the fineness of the line it was drawing "between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons." *Id.* at 412, 99 S.Ct. at 2370. The Court explained:

> It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.

Id. The Court then charged the Department of Health and Human Services with the "important responsibility" of "[i]dentification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped." *Id.* at 413, 99 S.Ct. at 2370.

16. Both *Accommodating the Handicapped* and *Prewitt* rely in part on two other scholarly pieces: Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 De Paul L.Rev. 953 (1978) and Note, *Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern*, 80 Colum.L.Rev. 171 (1980).

17. An example of a neutral-standards barrier is a rule against allowing dogs into a federal courthouse, which would operate to impair a blind lawyer relying on a seeing-eye dog. *See also Majors v. Housing Authority*, 652 F.2d 454 (5th Cir.1981) (housing project may have to permit exception to "no pet" rule for woman with acute psychological dependency on her dog).

B. *Applying Davis*

A useful framework for evaluating a handicap discrimination claim after *Davis* is advanced in a student note, *Accommodating the Handicapped: The Meaning of Discrimination under Section 504 of the Rehabilitation Act*, 55 N.Y.U.L.Rev. 881 (1980) (*Accommodating the Handicapped*). The analysis, adopted by the Fifth Circuit in *Prewitt v. United States Postal Service*, 662 F.2d 292, 305 (1981),[16] points out that the handicapped face four types of barriers to equality in the employment area. Two types of barriers—social bias and disparate impact from neutral standards[17]—are common to any member of a disfavored group. Two other types of barriers, however, are unique to the handicapped, for these barriers result from the nature of the handicap in combination with the requirements of the position in question. One type is "surmountable impairment barriers," referring to barriers to job performance that can be fully overcome by accommodation. The other is "insurmountable employment barriers," where the handicap itself prevents the individual from fulfilling the essential requirements of the position.

Davis presents an example of an insurmountable employment barrier, because the ability to hear is an essential requirement for a nurse in order to insure patient safety. Thus *Davis* at least stands for the proposition that an individual facing an insurmountable barrier is not "otherwise qualified" within the meaning of section 504.[18]

18. Two recent cases in this court have relied on this strand of *Davis* in ruling that plaintiffs do not fit within the definition of "otherwise qualified." In *Strathie v. Department of Transportation*, 547 F.Supp. 1367 (E.D.Pa.1982), Judge Ditter ruled that a hearing-impaired school bus driver was not otherwise qualified within the meaning of the Act, because his inability to localize sounds meant that he could not perform two necessary functions of his position: insuring control over and safety for the riders. *Id.* at 1381. In *Bey v. Bolger*, 540 F.Supp. 910 (E.D.Pa.1982), Judge Bechtle held that plaintiff, who suffered from uncontrolled hypertension and cardio-vascular disease, could not safely perform even light duties with the Postal Service without endangering his health and safety. *Id.* at 926.

Davis also teaches that an individual facing a surmountable employment barrier is not "otherwise qualified" if accommodation would require a substantial modification in the requirements of the position, or would result in an undue administrative or financial burden upon the federally assisted program sought to be charged pursuant to section 504. The Court characterized accommodations which it considered excessive as "affirmative action." 442 U.S. at 410, 412, 99 S.Ct. at 2369, 2370.

There is no claim in the present case that accommodation of these plaintiffs would entail substantial modifications of the requirements of the position, or impose a new administrative burden on DPW. The claim is simply that the accommodation called for would cost too much. Thus, the arguments over "otherwise qualified," "reasonable accommodation," "undue burden" and "affirmative action" all collapse into one issue: would the cost of providing half-time readers be greater than the Act demands?

II. *Reasonable Accommodation/Undue Burden*

A. *The Administrative Regulations*

[1] *Davis* describes the parameters in which a solution to the problem must be found, but does not resolve it. To advance the inquiry whether unwillingness to accommodate amounts to discrimination, *Davis* instructs that the administrative regulations implementing section 504 should be examined. Administrative regulations, if consistent with the purposes of the statute, are entitled to judicial deference. *Davis*, 442 U.S. at 411, 99 S.Ct. at 2369. And they deserve particular deference where, as here, the proper resolution of the case cannot be deduced by logical process from the words of the statute, but must instead represent a quantitative judgment: a quasi-legislative compromise between competing interests.

[2] The HHS regulations that bear on the issue in this case are the product of an extended rule-making process carried out in 1976 and 1977.[19] Now codified at 45 C.F.R. § 84.1 *et seq.* (1982), these regulations reflect a conscious effort at balancing the needs of the handicapped with the budgetary realities of programs receiving federal funds.

The regulations define a "qualified handicapped person" as one who "with reasonable accommodation, can perform the essential functions of the job in question." *Id.* at § 84.3(k)(1). As examples of reasonable accommodations, the regulations include: "job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, *the provision of readers* or interpreters, and other similar actions." *Id.* at § 84.12(b)(2) (emphasis added).

The recipient must make such accommodations unless it "can demonstrate that the accommodation would impose an undue hardship on the operation of its program." *Id.* at § 84.12(a). The regulations do not spell out precisely how that showing can be made, but they do list the following "factors to be considered" in the determination of undue hardship:

> (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
>
> (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

19. After the District Court for the District of Columbia ordered that regulations be promulgated, *Cherry v. Mathews*, 419 F.Supp. 922 (D.D.C.1976), the Secretary, in May of 1976, published a Notice of Intent to Issue Proposed Rules, with a draft of those rules enclosed. 41 Fed.Reg. 20,296 (1976). More than 300 written comments were received in response. In addition, a series of ten meetings were conducted at various locations across the country. *See* 42 Fed.Reg. 22,676 (1977).

In July of 1976, the Secretary issued a Notice of Proposed Rulemaking, with proposed regulations, revised in light of the comments received. 41 Fed.Reg. 29,548 (1976). Another 850 comments were received, supplemented by 22 public meetings. After assessment of all this information, the final regulations were promulgated on May 4, 1977. 42 Fed.Reg. at 22,676–77.

(3) The nature and cost of the accommodation needed.

Id. at § 84.12(c)(1–3). In addition, Appendix A to the regulations illustrates how these factors should be applied in determining whether the recipient of federal funds has discharged the burden of showing undue hardship:

> The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. *Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.*

Appendix A—Analysis of Final Regulations, 45 C.F.R. § 84 at 300 (emphasis added).

Applying the regulations to the facts of this case reveals that the answer called for by the regulations is clear. "[T]he provision of readers" is an express HHS example of reasonable accommodation. Moreover, in view of DPW's $300,000,000 administrative budget,[20] the modest cost of providing half-time readers, and the ease of adopting that accommodation without any disruption of DPW's services, it is apparent that DPW has not met its burden of showing undue hardship. To be sure, DPW's financial resources are limited. But there is no principled way of distinguishing DPW on this basis from the large school district employing an aide for a blind teacher, or from the state welfare agency providing an interpreter for a deaf employee.[21]

For all these reasons, accommodation must be provided unless these regulations "constitute an unauthorized extension of the obligations imposed" by section 504. *Davis*, 442 U.S. at 410, 99 S.Ct. at 2369. To that question we now turn.

B. *Congressional Intent*

Nothing in the legislative history of section 504 suggests that regulations requiring reader accommodation should be considered beyond the scope of the statute. While the 1973 Rehabilitation Act is silent on the subject of monetary expenditures,[22] the 1978 amendments to the Act[23] strongly suggest that Congress was well aware that compliance with Section 504 could be costly, and that Congress was prepared to underwrite a part of that price. Section 115(a) of the 1978 Amendments calls for grants to states to establish and operate comprehensive rehabilitation centers. Part of the mandate of these centers is to provide "to local governmental units . . . such information and technical assistance (*including support personnel such as interpreters for the deaf*) as may be necessary to assist those entities in complying with this chapter, particularly the requirements of section 794 [section 504]." 29 U.S.C. § 775(a)(2) (emphasis added).

That Congress expressed no disapproval of the regulations defining reasonable accommodation and undue burden, which

20. DPW allocates $600,000 for travel reimbursement for County employees alone. O'Bannon at 41.

21. The United States has filed an amicus brief in support of interpreting these regulations to require accommodation of these plaintiffs.

22. As one court has noted, "this may be more the result of Congressional inattention to the costs of implementing the policy of nondiscrimination announced in section 504 than a Congressional determination that such expenditures would not be necessary to effectuate that policy." *American Public Transp. Assoc. v. Goldschmidt*, 485 F.Supp. 811, 826 (D.D.C. 1980).

23. The Rehabilitation Act of 1973 was substantially amended by the Rehabilitation, Comprehensive Services, and Development Disabilities Amendments of 1978, Pub.L. No. 95–602, 92 Stat. 2955 (codified in scattered sections of 29, 32 and 42 U.S.C.).

were promulgated prior to the 1978 amendments, may also be regarded as evidence that Congress understood that combating discrimination against the handicapped would cost money. *Cf. Bob Jones University v. United States*, —— U.S. ——, ——, 103 S.Ct. 2017, 2032–34, 76 L.Ed.2d 157 (1983) (Congressional failure to modify well-known administrative regulations may be viewed as Congressional endorsement of agency's interpretation of statute).

C. *The Case Law*

Cases interpreting section 504 have uniformly recognized that preventing discrimination against the handicapped may mean that recipients of federal funds will have to expend funds of their own. The *Davis* Court recognized that "on occasion the elimination of discrimination might involve some costs." 442 U.S. at 411 n. 10, 99 S.Ct. at 2369 n. 10. While the Third Circuit has not directly addressed the issues posed in this litigation,[24] cases from other Circuits support the conclusion reached here.

A recent example of such a case in the field of transportation is *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir.1982). In *Dopico*, plaintiff, representing a class of wheelchair-bound handicapped persons, sued the New York City transportation system seeking to make the system accessible to them. Judge Weinfeld had dismissed the claim for failure to state a cause of action, because, under *Davis*, the plaintiffs were not entitled to the "massive relief" they were seeking under section 504. 518 F.Supp. 1161, 1175 (S.D.N.Y.1981). The Second Circuit, speaking through Judge Newman, reversed, pointing out that even if plaintiffs could not prevail in their attempt to overhaul the entire transportation system of the city, they still may be entitled to some relief under section 504: "We believe that section 504 does require at least 'modest, affirmative steps' to accommodate the handicapped in public transportation. Every court that has considered the question has concluded as much." 687 F.2d at 652 (*quoting American Public Transit Assoc. v. Lewis*, 655 F.2d 1272, 1278 (D.C.Cir.1981)). In remanding the case, Judge Newman called upon the lower court to give weight to the regulations implementing section 504. *See also United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir.1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir.1977).

The Fifth and Tenth Circuits have also interpreted *Davis* as requiring that states spend money to bring about reasonable accommodation. In *Camenisch v. University of Texas*, 616 F.2d 127 (1980), the Fifth Circuit affirmed an order requiring the University of Texas to procure and compensate an interpreter to assist a deaf graduate student in his classes. Although the Supreme Court vacated the opinion as moot without reaching the merits of the section 504 issue, 451 U.S. 390 (1981), the panel's reasoning was endorsed in subsequent Fifth Circuit opinions: *Majors v. Housing Authority*, 652 F.2d 454 (1981), *Tatro v. Texas*, 625 F.2d 557 (1980) (*Tatro I*) and *Tatro v. Texas*, 703 F.2d 823 (1983) (*Tatro II*).[25] In *New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir.1982), the Tenth Circuit held that section 504 may require the state to modify its educational system to accommodate its retarded schoolchildren by providing them with, *inter alia*, occupational, physical and speech therapy services. The case was remanded to the district court to consider whether the financial burden of such accommodation would

24. *Gurmankin v. Costanzo*, 556 F.2d 184 (3rd Cir.1977), *cert. denied*, 450 U.S. 923, 101 S.Ct. 1375, 67 L.Ed.2d 352 (1981), affirmed the lower court's ruling that the School District of Philadelphia discriminated against a blind teacher when it refused to award her seniority status dating from the time she first attempted to secure a teaching position and was denied appointment because of her handicap. The Court of Appeals relied on an "irrebuttable presumption" analysis rather than section 504, because the Rehabilitation Act had not been passed at the time the discrimination took place. *See id.* at 188. It bears noting, however, that the teacher would require a full-time teacher's aide.

25. In *Tatro II*, a panel of the Fifth Circuit upheld the district court's order requiring the school district to accommodate a schoolchild who had to be catheterized several times daily.

be "excessive" under the guidelines set forth in *Davis*.

D. *Conclusion*

I conclude that accommodating plaintiffs to enable them to perform the essential functions of their position is consistent with the mandates of section 504 and with the administrative regulations and case law interpreting it. I am not unmindful of the very real budgetary constraints under which the DPW and PCBA operate, and recognize that accommodation of these plaintiffs will impose some further dollar burden upon an already overtaxed system of delivery of welfare benefits. But the additional dollar burden is a minute fraction of the DPW/PCBA personnel budgets. Moreover, in enacting section 504, Congress recognized that failure to accommodate handicapped individuals also imposes real costs upon American society and the American economy. But for the fortuitous availability of supplemental benefits from the federal government—benefits which heretofore have enabled plaintiffs to hire and pay readers on their own—these plaintiffs, despite their education, experience and commitment, would have been barred by their handicap from the position of IMW, where they now serve as examples of how handicaps can be overcome. When one considers the social costs which would flow from the exclusion of persons such as plaintiffs from the pursuit of their profession, the modest cost of accommodation—a cost which seems likely to diminish, as technology advances and proliferates—seems, by comparison, quite small.[26]

III. *Damages*

The decision to grant injunctive relief raises the question whether plaintiffs are also entitled to damages for past reader expenditures. That question has two subparts. Does section 504 create a private cause of action for damages? If so, is the recovery of damages against an agency of the state nevertheless barred by the Eleventh Amendment to the United States Constitution?

A. *Damages under Section 504*

[3] The touchstone of deciding whether a statute creates a private right of action is legislative intent. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15–16, 100 S.Ct. 242, 245, 62 L.Ed.2d 146 (1979). With near unanimity, the courts have inferred from the legislative scheme Congress's intent to create a private right of action under section 504. Unfortunately, there is no legislative history instructive on the extent of the remedy Congress intended to make available to a private plaintiff in a section 504 action. In the absence of legislative guidance, the courts have split on the issue of whether the remedy is limited to injunctive relief or also includes a right to collect damages.

The courts holding that no damage remedy for violations of section 504 was intended by Congress view the legislative plan as relying primarily on governmental enforcement of the rights of the handicapped, with the ultimate remedy of cutting off federal funds to recipients engaging in discrimination. Further, it is argued that implying a damage remedy which could reach massive proportions might discourage the acceptance of federal funds, working against the goal of expanded workplace opportunities for the handicapped. *Ruth Anne M. v. Alvin Independent School District*, 532 F.Supp. 460, 473 (S.D.Tex.1982); *Boxall v. Sequoia Union High School*, 464 F.Supp. 1104 (N.D.Cal.1979).

Cases deciding that private plaintiffs may collect damages reason that the availability of a damage remedy increases the deterrent effect of the non-discrimination law. The

26. It is worth noting in this connection that DPW considers employable, and thus ineligible for benefits, handicapped applicants for public assistance who are "fully employable with reasonable accommodation." Reasonable accommodation for this purpose is defined as "structural modifications, modified work schedules, acquisition or modification of equipment or devices, *provision of readers or interpreters*, job restructuring and other similar actions." N.T. 195; Ex. P–35 (emphasis added). It does not seem wholly unfair to impose upon DPW the same requirements that DPW apparently imposes upon its clients and their would-be employers.

opinions also rely on the seminal case of *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), for the proposition that where a federal right has been invaded, the courts are normally empowered to use any available remedy to make good the wrong done. *Id.* at 684, 66 S.Ct. at 776. Assuming Congressional awareness of this principle, these cases interpret the lack of legislative discussion as tacit acceptance of the presumption "that a wrong must find a remedy." *Miener v. Missouri*, 673 F.2d 969, 978 (8th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 215, 74 L.Ed.2d 171 (1982); *Hutchings v. Erie Library Bd. of Directors*, 516 F.Supp. 1265, 1268–69 (W.D.Pa.1981); *Patton v. Dumpson*, 498 F.Supp. 933, 939 (S.D. N.Y.1980); *Poole v. South Plainfield Bd. of Ed.*, 490 F.Supp. 948 (D.N.J.1980).

I am persuaded by the perception of the legislative scheme and the reasoning put forward in the second group of cases. The Supreme Court has stated that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239, 90 S.Ct. 400, 405, 24 L.Ed.2d 386 (1969). Congress certainly has the power to limit remedies if it so chooses. In the absence of any indication that Congress intended to exercise that power to create a limited remedial scheme for section 504, it is a fair canon of statutory interpretation to indulge the presumption that Congress intended that the full panoply of remedies be available to the private plaintiff under section 504.

B. *The Eleventh Amendment*

[4] Mere presumptions and canons of statutory construction will not, however, suffice to overcome the Eleventh Amendment. That Amendment normally operates to bar the recovery of damages in an action if judgment would be collected against the state, even where, as here, the state is not named as a party. *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974) (§ 1983 does not abrogate Eleventh Amendment).

[5–7] Plaintiffs do not dispute that a recovery of damages against the named defendants in reality would come from the state. Their primary argument is that Congress has acted to abrogate the Eleventh Amendment when it passed section 504.[27] There is no doubt that Eleventh Amendment protections may be overridden when Congress acts within its grant of plenary power under section 5 of the 14th Amendment. *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) (Attorney's Fees Awards Act abrogates Eleventh Amendment); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447, 96 S.Ct. 2666, 2667, 49 L.Ed.2d 614 (1976). (Title VII of the 1964 Civil Rights Act abrogates Eleventh Amendment). Assuming *arguendo* that section 5 is the source of section 504,[28] respect for the constitutional status of the principle of state sovereignty embodied in the Eleventh Amendment requires at least persuasive legislative history that Congress intended to abrogate the Amendment. Here, the legislative silence does not speak louder than the words of the Eleventh Amendment, and plaintiff's claim for damages must fall. *Miener v. Missouri*, 673 F.2d at 982.

CONCLUSIONS OF LAW

In light of the preceding findings of fact and discussion, I conclude that:

27. Plaintiffs also characterize their request for relief as equitable rather than compensatory. But no matter how labelled, any payment ordered would represent a remedy for a *past* violation of section 504. Retrospective relief is not available against a state, unless the Eleventh Amendment has been abrogated. *Edelman*, 415 U.S. at 668–669, 94 S.Ct. at 1358; *Quern v. Jordan*, 440 U.S. 332, 338, 99 S.Ct. 1139, 1143, 59 L.Ed.2d 358 (1979).

28. Defendants contend that section 504 was passed pursuant to Congress's spending power, because it reaches only recipients of federal funds. While Congress may abrogate the Eleventh Amendment by conditioning the receipt of federal funds on a state's surrender of Eleventh Amendment immunities, it must do so expressly. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981); *Employees v. Dep't of Health and Welfare*, 411 U.S. 279, 285, 93 S.Ct. 1614, 1618, 36 L.Ed.2d 251 (1973). If Congress were viewed as acting under its spending power in passing section 504, the clear statement of intent to waive the Eleventh Amendment required of Congress would be lacking.

(1) This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343;

(2) Plaintiffs are "otherwise qualified" within the meaning of section 504 of the Rehabilitation Act, 29 U.S.C. § 794;

(3) Defendants, acting in their official capacity, have discriminated against plaintiffs by refusing to provide them with half-time readers or their mechanical equivalent;

(4) Plaintiffs are barred from recovering damages by the Eleventh Amendment.

An appropriate order follows.[29]

ORDER

For the reasons recited in the accompanying Opinion, it is hereby ORDERED that:

(1) Judgment is entered for the plaintiffs and against the defendants;

(2) The parties, within thirty (30) days of the date of this Order, shall submit a form of order outlining a remedy not inconsistent with this opinion;

(3) Defendants, within ten (10) days of the date of this Order, shall declare whether they continue to oppose class certification, and, if so, submit a memorandum explaining why class certification should not be ordered. A responsive memorandum, if necessary, shall be filed within ten (10) days thereafter, and argument, if necessary, shall follow promptly.

29. Thomas Mobley intervened as a plaintiff purporting to represent a class of similarly situated blind IMWs. The motion for class certification was opposed by defendants, and disposition of the motion was deferred pending this opinion. In the accompanying order, I will direct defendants either to stipulate to the applicability of this opinion to the class or to show cause why class certification should not issue.

Sandra L. GERMAIN, Jesus Gonzales, Jr., Faye A. Sieg, Milton Frankwick, individually and on behalf of all other persons similarly situated, Plaintiffs,

v.

RECHT–GOLDIN–SIEGEL PROPERTIES, Grant Park Square Apartments Co., North Meadows Apartments–No. 3, individually and on behalf of all other owners/managers similarly situated; Samuel R. Pierce, Jr., Secretary of the United States Department of Housing and Urban Development, Richard J. Franco, Milwaukee Area Manager of the United States Department of Housing and Urban Development, Defendants.

Civ. A. No. 81–C–472.

United States District Court,
E.D. Wisconsin.

July 12, 1983.

Applicants for public housing brought action to force owners and state officials to provide hearings and reasons for denial. The District Court, Terence T. Evans, J., held that plaintiffs did not have any property interest protected by due process clause.

Dismissed.

1. Constitutional Law ⇐251

Inconvenience is not a reason for denying a person due process of law; due process may be required even in situations where it causes some inconvenience.

2. Constitutional Law ⇐277(1)

Protectible property interest arises not out of the Constitution itself or out of any inherent obligation of the government to treat its citizens fairly but, rather, out of a statutory entitlement, a contract, or some other item granting a legitimate claim of entitlement.

DECISIONS WITHOUT PUBLISHED OPINIONS—Continued

Title	Docket Number	Date	Disposition	Appeal from and Citation (if reported)
Leonard, Appeal of	83-5609	3/9/84	AFFIRMED	D.N.J.
Liberati v. Secretary of Health and Human Services	83-1399	3/7/84	AFFIRMED	E.D.Pa.
Love v. Secretary of Dept. of Health & Human Services	83-5491	3/5/84	AFFIRMED	W.D.Pa., Bloch, J.
Lumbermens Mut. Cas. Co., Appeal of	83-5001	3/5/84	AFFIRMED	W.D.Pa., Weber, J.
Luzerne County v. U.S. Dept. of Labor	83-3335	3/9/84	PETITION FOR REVIEW DENIED	Dept. of Labor
McDonald Coal Co. v. Thorp	83-3315	3/12/84	PETITION FOR REVIEW DENIED	Ben.Rev.Bd.
McIntosh v. Arabian American Oil Co.	83-1414	3/1/84	AFFIRMED	D.Del.
McNeill v. J.E. Brenneman Co.	83-1518	3/5/84	AFFIRMED	E.D.Pa., Ditter, J.
Margate City Yacht Club v. Federal Emergency Management Agency	82-2291	3/29/84	AFFIRMED	D.N.J.
Martino, Appeal of	83-3329	3/14/84	REMANDED	M.D.Pa.
Martino v. U.S. Parole Com'n	83-3329	3/14/84	REMANDED	M.D.Pa.
Medical Economics Co., Inc. v. Anthony J. Jannetti, Inc.	83-5671	3/5/84	AFFIRMED	D.N.J., Gerry, J.
Miller v. Blower	83-5177	3/13/84	VACATED AND REMANDED	W.D.Pa.
Mitman v. Glascott	83-1389	3/5/84	AFFIRMED	E.D.Pa., Lord, J., 557 F.Supp. 429
M.S.R. Imports, Inc. v. R.E. Greenspan Co., Inc.	83-1373	3/7/84	AFFIRMED	E.D.Pa., VanArtsdalen, J., 574 F.Supp. 31
Napier, Appeal of	83-5477	3/2/84	AFFIRMED	E.D.Pa., Stern, J.
Napier v. Schwieker	83-5477	3/2/84	AFFIRMED	E.D.Pa., Stern, J.
Negrich, Appeal of	84-3088	3/14/84	AFFIRMED	W.D.Pa.
Nelson v. Thornburgh	83-1626	3/6/84	AFFIRMED	E.D.Pa., Pollak, J., 567 F.Supp. 369
New York, Susquehanna and Western R. Co., Matter of	83-5484	3/9/84	AFFIRMED	D.N.J., Fisher, J.
Nicholas, Appeal of	82-1659	3/2/84	AFFIRMED	E.D.Pa., Cahn, J.
N.L.R.B. v. Fairleigh Dickinson University	83-3148	3/5/84	AFFIRMED	N.L.R.B.
O'Brien, Appeal of	82-5803	3/30/84	AFFIRMED	D.N.J., Fisher, J.

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Disability as the Basis for a Social Movement: Advocacy and the Politics of Definition

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Many people with disabilities do not identify themselves as disabled or choose not to be part of a politically active community of disabled persons. This paper discusses both the barriers to the formation of a social movement of disabled people and the ways in which these barriers have been overcome. The role of public policy in the evolution of this movement is discussed, as are the current status and prospects of the disability rights movement.

Although 1 in 11 Americans of working age identify themselves as having a disability (McNeil, 1983), for most of them such self-identification does not translate into group consciousness or political action. Disabled individuals face many barriers to full participation in American society, but until recently there has not been a significant social movement of disabled people dedicated to removal of those barriers. Disabled individuals in noninstitutional settings are geographically and socially dispersed, and this fact constitutes a barrier to collective political action.

Nevertheless, in the past quarter century, a small but growing number of disabled people have formed a community, both through informal interaction and the establishment of formal organizations. Following in the wake of the racial, gender, and other civil rights movements of the 1960s, increasing numbers of disabled people embraced activism and political action, and demanded integration into the mainstream of American society. Groups first formed among individuals with similar disabling conditions, such as blind people and deaf people,

An earlier version of this paper was presented at the meeting of the Society for the Study of Chronic Illness, Impairment, and Disability in Fort Worth, Texas in April 1985. The author is grateful to Adrienne Asch and Michelle Fine for their comments on earlier drafts.

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and among disabled war veterans. By the 1970s, organizations had been formed that crossed disability lines and encompassed individuals with a wide range of physical and mental impairments.

This paper discusses the barriers disabled people face in forming a social movement and how such barriers have been overcome. In addition, the relationship between the disability rights movement and public policies of the past two decades is explored, together with the current status and prospects of the disability rights movement.

This paper builds on research on the growth of the disability rights movement since the 1960s, and the relationship between that developing movement and the passage and implementation of federal civil rights legislation affecting disabled people (Scotch, 1984). Drawing on archival materials and a series of interviews with advocates and public officials, this research traced organizational histories and the development of linkages among movement organizations and between such groups and government agencies. While this previous work focused on a particular statute, Section 504 of the Rehabilitation Act, the current paper concerns the more general topic of the formation and mobilization of the disability rights movement.

Barriers to Organization

As the study of social movements and collective behavior indicates, exclusion and discriminatory treatment alone do not inherently generate collective identity or collective political action. For the estimated 36 million Americans with disabilities (Bowe, 1980), the creation of an effective social movement may be even more problematic than for other excluded groups. With the exception of a few organizations based in particular geographical locations or on particular physical impairments, people with disabilities do not constitute a group that acts politically "for itself." Nondisabled excluded groups such as racial and ethnic minorities may share geographical communities, workplaces, or religious and other voluntary associations. Many groups develop their own subcultures based on their collective history or social position. For the most part, this has not been true for disabled people.

The social and political isolation of the vast majority of the disabled population is reinforced by a number of factors. Disability is concentrated among the least powerful members of American society—those with low incomes, low education, and low work-force participation (Asch, 1984a). Individuals with physical impairments may face major barriers to obtaining education and entering the work force; furthermore, there are many risk factors associated with working-class and lower-class life in the United States that may contribute to the onset of disability.

While those lacking economic and political resources are more likely to
disabled, disability is nonetheless spread across the various social classes a
status groups in our society. If a disabled person's impairment does not result
institutionalization, that person may spend nearly all of his or her time in t
company of nondisabled individuals. Parents, neighborhood friends, scho
classmates, fellow employees—most of the people with whom a disabled pers
associates are likely to be nondisabled. Even where circumstances lead to i
teraction with other individuals with disabilities, the physical or mental impa
ments involved may be so disparate as to discourage mutual recognition of
shared social status. Thus, disability is an individualized experience for mo
people.

Of course, there are exceptions. People with disabilities stemming from
single cause may already have a great deal in common, particularly if the
already share occupational or other ties, as in the case of disabled war veterans
miners with black lung disease. In cases such as these, perceptions of relatedne
may lead to joint activities ranging from mutual support to political action. Ev
so, the medicalization of these disabilities has often forced individuals to give u
control over their lives and to experience undertones of moral stigma, whic
make political identification and action problematic (Zola, 1983).

Another exception is the shared subculture that may develop among dis
abled residents of institutions. Individuals being treated in long-term-care facil
ties may construct a patient culture as a means of coping with common impai
ments or in response to the indignities of life in a total institution (Goffmar
1961a). However, only in rare instances have such bonds led to activism upo
departure from institutional confines. (One notable exception is the case o
associations of ex-mental patients—Anspach, 1979.)

In most circumstances, it may be more accurate to characterize people wit
disabilities as members of a social category rather than as an identifiable social o
political group (Goffman, 1963). Disabled people not only lack the commo
demographic conditions to foster group awareness and activism, but the socia
status of being disabled can create serious disincentives for many to identif
themselves as disabled and act collectively on that basis. To be perceived a
disabled is typically to be seen as helpless and incompetent, and many indi
viduals with physical impairments seek to disassociate themselves from dis
ability, exercising what Goffman (1961b) calls "role distance." Such dis
association may or may not be successful, since disabling images are reinforce
by the proliferation of architectural barriers, by providers of services to disable
individuals (Gartner, 1984), and by the very language used to characterize dis
ability (Longmore, 1985). In either case, however, the unattractiveness of the
role of disabled person can serve to discourage both self-identification as a
member of an excluded group and the likelihood of political action flowing from
that identification.

This lack of disability consciousness has been noted by Hahn, who wrote, "Persons with disabilities often are understandably reluctant to focus on that aspect of their identity that is most negatively stigmatized by the rest of society and to mobilize politically around it" (1985, p. 310). Boyte (1984), in discussing research on blind men and women, noted,

> Escape out of the ghetto created by pervasive social expectations and assigned roles has almost always meant individual attempts to deny or render irrelevant one's disability—not to challenge the expectations themselves. . . . Thus the story of how a movement of self-assertion among the disabled emerged in the 1970s and continues today involves an exploration into changing self-perceptions as well as dominant social attitudes. (p. 116)

Interaction among disabled people may reflect and even exaggerate the stigmatization of disability practiced by the rest of society. In such instances, disabled individuals can deliberately distance themselves from each other or make invidious distinctions between good and bad impairments, rather than seek to develop social ties on the basis of common experiences and similar social positions.

The stigmatization of disabled persons is reinforced and even created by the attitudes of providers of rehabilitation services (Krause, 1976). Limitations and dependency are attributed to disability and the disabled person is encouraged to accept these as part of the rehabilitation process (Anspach, 1979; Scott, 1969;). By promoting the image of disabled people as dependent and in need of professional help, medical and rehabilitation professionals retain control over program beneficiaries at the cost of severely constraining the disabled person (Zola, 1983). Those who seek to avoid such constraint may choose to present themselves and to conceive of themselves as nondisabled.

Even to accept one's disability while rejecting ascriptions of dependency is in itself no guarantee of participation in collective political activity. Those people who are most severely impaired, and thus perhaps most likely to identify themselves as disabled, may face the greatest handicaps to effective political action.

Perhaps more importantly, the rejection of prejudicial stereotypes can often be an act of individual self-assertion against personal troubles, rather than an attempt to correct public problems (Mills, 1959). In a society that celebrates the individual (Bellah, Madsen, Sullivan, Swidler, & Tipton, 1985), it is all too natural to seek solutions to our problems as individuals rather than as members of an excluded class. Those individuals best able to reject the disabled role may refuse to identify themselves as disabled, thus avoiding political involvement as a disabled person. On the other hand, those individuals who accept the role are at risk of accepting its handicapping connotations of dependency and thus also avoiding political involvement.

Who, then, is left as potential organizers and participants in a social movement of disabled people? Those who accept an identity as disabled while denying the associations of incapacity that our society attempts to impose. In order to do this, it may be necessary to conceive of a world in which physical impairment need not be disabling and in which prejudicial exclusion is proscribed.

However, "disability" as a unifying concept that includes people with a wide range of physical and mental impairments is by no means an obvious category. Blind people, people with orthopedic impairments, and people with epilepsy may not inherently see themselves or be seen by others as occupying common ground. Even greater divisions may exist between individuals with physical impairments and those with mental disabilities. Thus another prerequisite for collective action may be the social construction and promulgation of an inclusive definition of disability.

Anspach (1979) has termed the efforts by disability rights activists to redefine disability "identity politics," an attempt to create a new public perception of disabled people as independent. In such politics, she writes, "political goals and strategies often become a vehicle for the symbolic manipulation of persons and the public presentation of self" (p. 766). Anspach describes identity politics as "a sort of phenomenological warfare, a struggle over the social meanings attached to attributes" (p. 773). However, while redefining disability may be an important prerequisite for the emergence of a social movement of disabled persons, redefinition has not been the only aim of that movement. Disability rights activists have also sought a number of policy goals, from changes in admissions and hiring practices to the literally concrete changes involved in increased architectural accessibility. Nevertheless, in order for an active and broadly based social movement of disabled people to come about, a redefinition of disability was required—one that treated disability as a label for a group of people who had the potential for political action and who were unfairly excluded from mainstream social institutions on the basis of their physical or mental impairments. The next section of this paper briefly reviews the history of political organizations among disabled people and discusses how disability rights activists attempted to promote new definitions of disability through political action.

Growth of the Social Movement of Disabled People

Some of the earliest formal associations of disabled people in the United States were organized between the two world wars (Lenihan, 1976–77). These included the Disabled American Veterans (DAV) and the National Federation of the Blind (NFB). Each stressed the needs of its own constituency rather than more universal disability issues. While the DAV focused essentially on expanding government benefits for disabled veterans, the NFB challenged the paternalistic practices of rehabilitation agencies and was often a militant supporter of equal rights for blind people. The NFB promoted some of the earliest civil rights laws guaranteeing access regardless of disability, the white cane and guide dog laws. It is not surprising that blind people, because their disability allows a

relatively high degree of participation in the mainstream of everyday life, were particularly active in claiming full social participation as their due.

Other organizations of disabled persons were established in the 20 years following World War II, including the Paralyzed Veterans of America, the National Association of the Deaf, and the American Council of the Blind. These groups had varying degrees of political involvement, but none were oriented toward the general issue of civil rights for all disabled people (Asch, 1984c). For the most part, each sought to advance the position of its particular constituency group.

This situation changed dramatically in the late 1960s. At that time, important changes were affecting those who identified themselves as disabled. Medical technology was extending the lives of those with a variety of medical problems or injuries who previously would not have survived, and thus the number of active disabled adults increased. Medical and rehabilitative advances were giving those who in earlier times would have been totally incapacitated the potential to function in society—for instance, many who had contracted polio in the final epidemics of the 1950s. For growing numbers of disabled people, physical impairment was becoming less handicapping than the barriers of stereotyped attitudes and architectural constraints.

Another development was the increase in the number of people who remained socially active despite disabling injuries in childhood, adolescence, and young adulthood. Most individuals who experienced disability as the result of polio, teenage automobile or diving accidents, or the Vietnam War had clear memories of themselves as nondisabled, and many retained expectations of full economic and social participation. They had not incorporated a self-image of dependency and sought to live as normal young adults, which was increasingly technologically possible.

Even for children whose disabilities came at birth and who grew up in the 1950s and 1960s, individual potential was stressed by the Spock-influenced middle-class parents of that affluent era, who promoted self-confidence and achievement in their children. This "new generation" of disabled people was encouraged to think of themselves as capable of participation. As Asch has written, "many activists, then, are not people who were kept out of the mainstream as children; they had been in the mainstream and had never questioned their right to be there. So, when others questioned it, they were ready with armor and anger to fight to preserve their sense of themselves that the adult world was trying to shatter" (1984b, p. 551).

These aspirations of participation were promoted by the politics of the times. In the communities and colleges there were many other groups seeking greater participation in social institutions, and more autonomy and control in their lives. Demands for full access by disabled people occurred in the wake of the widespread and highly visible social conflicts of the 1960s: the struggle for

civil rights by black people and other racial minorities, the antiwar and student movements, and a revitalized feminist movement. A number of disabled people who had been active participants in these movements came to see their disability in the same political sense as blacks viewed their race or women their gender.

Along with this new consciousness came an appreciation of how change strategies used by other movements could be adopted: While models of change-oriented advocacy did not guarantee success, they did suggest a method for stirring up latent support among a constituency and among the general public, and for channeling that support toward influencing governmental and institutional decision makers. The potential of integration into the societal mainstream motivated disabled people to form new organizations at the local and state levels and to rebuild existing groups. A number of the newly formed organizations included individuals with a variety of disabilities—e.g., the Centers for Independent Living organized in Berkeley and a number of other communities, and Disabled in Action in several East Coast cities.

The growing potential for political activism, however, was not sufficient to ensure the growth of a broadly based and effective social movement. By the early 1970s, many grass-roots groups had been formed, but there had been little or no attempt made by these local organizations to join in influencing public policy. Contacts among the various organizations had begun, however, through the networking opportunities provided by the annual meetings of the President's Committee on the Employment of the Handicapped (PCEH). PCEH had been founded after World War II in order to promote the employment of disabled veterans. While PCEH was, for the most part, dominated by service providers and traditional emphases on education, rehabilitation, and incrementalist approaches to change, it did sponsor annual meetings that attracted people concerned with disability issues from around the country. These meetings became a forum for communication among the younger, more militant disability rights activists. Several remained in contact between meetings, and this evolving network helped organize demonstrations against President Nixon's vetoes of the Rehabilitation Act in 1972 and 1973. The demonstrations, in turn, helped strengthen personal and organizational ties among disabled activists.

This loose network evolved into a formal organization at the 1974 PCEH meeting. Alternative workshop sessions were held in the conference hotel lobby, bringing together about 150 people to discuss discrimination issues not included in the formal program. This group became the first national coalition of disability activists when it organized itself as the American Coalition of Citizens with Disabilities (ACCD), linking several local and single-disability organizations while retaining the autonomy of each constituent organization.

A steering committee was formed, and ACCD held its first formal meetings at the 1975 PCEH conference. Bylaws were adopted, a board of directors chosen, offices opened in New York and Washington, and in 1976 a grant was

obtained from the federal Rehabilitation Services Administration to permit the hiring of staff. ACCD was to become a major coordinating network of disability rights groups through the 1970s, and a major advocate for incorporating civil rights guarantees for disabled people into federal laws and regulations.

ACCD was not the only cross-disability organization to develop in the mid-1970s. One of its major constituent groups, Disabled in Action, developed affiliates in a number of states, while in many localities and states, coalitions of existing groups were organized. Several nonmembership organizations that claimed national constituencies were formed as well, including the National Center for Law and the Handicapped in South Bend, Indiana, and the Disability Rights Center in Washington, D.C., one of the Ralph Nader advocacy centers. Some advocacy groups not exclusively oriented toward disability issues, such as the Children's Defense Fund, became heavily involved in disability advocacy efforts. Furthermore, a number of established single-disability organizations built up their advocacy components, including the American Council of the Blind, the National Association of the Deaf, and the Paralyzed Veterans of America.

Increasingly, the attention of the evolving disability rights movement became focused on events in Washington, D.C., as the federal government considered and enacted policies prohibiting discrimination on the basis of disability in a number of institutional spheres. A community had grown up among the Washington-based advocates for disability rights, who met regularly to compare notes, develop strategies, and divide up the various lobbying tasks. Positions on issues were debated and agreements were reached on public stances. Although frequently consensus was not obtained, a viable movement had been constructed. Changes in public policy by the federal government had been critical elements in the growth of this movement.

The Role of the State in Redefining Disability

The above discussion of barriers to political activism by disabled people suggested that a prerequisite to such activism was a redefinition of disabilities as impairments that are limiting only to the extent that constraints are imposed by the physical and social environment. The activists who created the various disability rights organizations redefined disability in this way and sought to have this redefinition institutionalized and accepted in public policy and by the general public.

However, the political and financial resources of most of the disability rights organizations were extremely limited. A major proportion of their budgets in the late 1970s was provided by the federal government in the form of grants and contracts, and substantial amounts of this federal funding were used for

newly initiated political activity. (Several organizations were major excepti such as the NFB.) The political impact of many disability rights organizatio the late 1970s was extremely dependent on the support of agencies of the fe government.

The contribution of the federal government to the growth of the disab rights movement, however, extended far beyond financial support. The s movement of disabled people became better organized and more broadly b as the result of federal civil rights activities. Contracts for training and techr assistance to local groups were received by a wide range of disability organ tions. Disability rights leaders were often sought out by federal policy mak thus making lobbying even easier to pursue. Activists were routinely aske review draft policies and to testify at congressional hearings. These cont served the further function of reinforcing the visibility of disability rights ac ists and of legitimating their leadership role, both within the disability comm ty and outside it.

The consultations and meetings organized by federal officials seeking icy input had another important impact on the disability rights movement fostering a network among locally based activists around the country. network was also furthered by a number of federal agencies that created advis committees on disability rights issues, as well as by the annual PCEH con ences.

More important still, the government contributed to the redefinition disability. Through such legislation as Section 504 of the Rehabilitation Ac 1973 and the Education for All Handicapped Children Act of 1975 (P 94-142), federal policy makers established disabled people as a class to protected from discrimination by federal law, and made it illegal to exclude th from publicly supported programs and activities. The programmatic effects these statutes were far-reaching: They dramatically increased the accessibilit public education, employment, government services, and public facilities disabled people. Of equal or greater importance, however, were the definiti included in the new laws, which focused on a broad group of people in a way aided the formation of a social movement.

There were two types of statutory definitions of disability, both extrem broad. The first, employed in P.L. 94-142, was categorical. Section 121a.5 the law defined handicapped children as those evaluated as being mentally tarded, hard of hearing, deaf, speech impaired, visually handicapped, seriou emotionally disturbed, orthopedically impaired, other health impaired, de blind, multihandicapped, or as having specific learning disabilities. P.L. 94-1 guaranteed these children a free and appropriate public education and rela services in the least restrictive possible environment. Schools were mandated provide individually appropriate services to children defined as handicapped, procedurally all disabled children were accorded the same rights.

The second type of statutory definition was more functional in nature. Section 504, for example, defined a handicapped individual as any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Disabled people falling within this broad group were protected from discrimination in all federally supported programs and activities.

The centrality of government-sponsored definitions is emphasized by Hahn and Longmore (no date), who state that "the definition of disability is essentially determined by public policy. In other words, disability is whatever laws and implementing regulations say it is" (p. 5). They point out that government definitions of disability have historically been influenced by rehabilitation and medical professionals. However, in the 1970s, federal definitions of disability were specified with the assistance of disability rights advocates, and in several cases they were actually written by representatives of movement organizations (see Scotch, 1984).

Conventional interest-group explanations of policy changes characterize advocacy groups as shaping the development and implementation of public policies. In the case of disability rights legislation in the 1970s, this process was largely reversed. Advocates for the disability rights movement did not apply political pressure that resulted in the passage of these laws. Rather, the adoption and implementation of the laws contributed to the growth of national advocacy organizations representing disabled people and reinforced their involvement with civil rights issues. Civil-rights-oriented statutes such as Section 504 and P.L. 94-142 became focal points for organizing among disabled people and provided a good opportunity for establishing policy-oriented coalitions of the new generation of grass-roots disability organizations.

The emphasis in this paper on the role of the state in providing resources and creating networks is consistent with the evolving literature on resource mobilization in social movements (Freeman, 1982; McCarthy & Zald, 1977). The importance of network linkages and resource availability, however, has sometimes been stressed to the exclusion of any emphasis on the role of ideas and symbolic categories in framing issues—e.g., in attempts to argue for structural over social-psychological modes of analysis. As Snow, Rochford, Worden, & Benford (1986) have recently pointed out, however, social-psychological and resource-mobilization models are not mutually exclusive. The disability rights movement is one in which the way an issue was framed had serious effects on both movement participation and the ability of the movement to influence public policies (as was also the case with the problem of drunk driving—Gusfield, 1981).

Ensuring access to public buildings or public services may be viewed as a social welfare benefit or as a civil right. The former connotes dependency by the disabled person and largess on the part of society. It suggests that we must approve of disabled people, their attitudes and behavior, in order to help them,

and that they must earn our approval by conforming to our expectations, however handicapping those expectations may be. Within this conception, helping disabled people is analogous to helping single mothers with dependent children—a qualified and rather grudging form of assistance. Further, providing access as a welfare benefit invites the rationing of accessibility, for welfare is typically given and withdrawn based on the limits of generosity of the giver rather than according to the needs of the recipient.

Alternatively, when access to societal institutions is defined as a right, it becomes virtually unconditional. Removing architectural barriers to public buildings becomes analogous to abolishing the poll tax, a necessary guarantee of equity in our society. Cost, inconvenience, or disapproval of the deprived group's behavior become far less relevant to whether their lack of access should be remedied.

Of course definitions and perceptions are not independent of social structure and political power—the efficacy of definitions typically depends on structural factors, not the least of which is the power held by their proponents. Nevertheless, as the tradition of scholarship dating back to Max Weber has demonstrated, ideas can influence social structures, just as social structures can generate ideas.

The Politics of Disability in the 1980s

While disability has been less visible as a public issue in the 1980s, the growth of grass-roots organizations has continued around the country. The establishment of independent living programs, access to mass transit systems, architectural accessibility, and other civil-rights-oriented issues have been passed, along with attempts to maintain a number of benefit programs in the face of federal cutbacks. One particularly visible issue has been public transportation, for the Reagan administration has substantially weakened federal requirements for accessibility, thus leading to many local debates over what services should be provided by financially besieged transit operators. While national organizations such as the Denver-based ADAPT have been active in this arena, much of the impetus for activism has been at the local level. However, conflict has continued between proponents of total access to transit systems and those supporting paratransit and other special services.

Nationally, organizations such as the Disability Rights Education and Defense Fund and ACCD have continued to lobby Congress and federal agencies. However, many observers of the disability rights movement have perceived a decline in its effectiveness and national influence. The Reagan administration has removed a number of advocacy-oriented individuals with ties to established movement organizations from administrative and advisory positions in federal agencies. Lowered expectations have dimmed the hopefulness of the late 1970s

about promoting vigorous enforcement of civil rights protections such as Section 504 and enacting new legislation prohibiting discrimination in private-sector employment. Optimism about further advances has been replaced by concerns about court decisions and administrative rulings that circumscribe the effectiveness of existing laws. A successful effort was made to prevent weakening P.L. 94-142, yet many local school districts have been accused of less than full compliance with the provisions of that statute. Clearly, the federal government has retreated from its activist role in promoting the rights of disabled persons, and the growth of organizations seeking to support and extend those rights.

While during the 1970s disability advocates were often in a collaborative relationship with many federal officials, the relationship between disability rights organizations and the federal government is now much more adversarial in nature. Similar tensions have been experienced by other advocates involved with issues ranging from environmental protection to occupational safety to human services. Thus, the crucial change has been in the political environment rather than in the disability rights movement itself.

On the positive side, although the disability rights movement may have lost some of its political efficacy, its relationships with other "progressive" movements may have been enhanced. Common opposition to Reagan administration policies may have helped to institutionalize the participation of disability rights activists in the broad coalition of Washington liberal-left advocacy groups. Similar partnerships have formed in a number of states and local communities, as social program budgets have experienced severe fiscal constraints in the wake of federal reductions.

However, quite a different alliance has been formed around one important issue. Right-to-life advocates within and outside the Reagan administration have joined disability rights organizations in seeking federal intervention in cases where medical treatment had been withheld from newborn infants with physical disabilities, i.e., the "Baby Doe" cases. Section 504 has been cited as the legal basis for intervention in these cases, since it prohibits discrimination on the basis of disability in all federally supported programs, including hospitals. On the other side of these cases, feminist groups, civil libertarians, and health care providers have opposed government intervention. The Supreme Court has ruled that the federal government may not intervene in such cases, but there is likely to be continuing public debate over the appropriateness of medical treatment for severely disabled newborns. Advances in medical technology are likely to generate other such debates involving the quality of life for disabled persons, the personal choice of parents and other family members, and the ability of health care professionals to make informed decisions about sustaining life.

The disability rights movement will have a great deal to say on ethical and policy issues involving abortion, care for disabled newborns, the right to treatment, and the right to refuse treatment (e.g., Asch, 1986). It remains unclear to what extent spokesmen for the disabled will be accepted as legitimate contributors in these debates by policy makers, as experts rather than as unfortunate and axe-grinding victims. Having reconstructed their own definition of self, disability rights activists must continue to influence the definitions of others, through reasoned debate and through political activity. The ability of movement leaders and grass-roots disabled advocates to be full participants will depend on both their organizing ability and their acumen as issue entrepreneurs.

Equally unclear, due to its current political unpopularity, is the future of further extensions of government-guaranteed rights in the United States. Diminished funding for programs that promote independence for disabled people, such as attendant care, independent living centers, and facility modification to remove architectural barriers, may inhibit the political participation of many people with disabilities and thus limit their ability to mobilize politically. Political conservatism within government and the general public may mean that the catalytic role of public officials in promoting the growth of the disability rights movement is over, at least for the present. Also unclear is the long-term impact of the policy gains of the 1970s. The large-scale entry of disabled Americans into schools, jobs, and public life may have taken on a momentum of its own, or it may merely have reached a plateau of tokenism.

Progress should continue, even in the absence of government support, if disability rights groups can raise the consciousness of the vast majority of disabled people who have not been involved politically and who may not share the political definition of disability promoted by the movement. However, redefinition of disability can no longer be expected to flow from court rulings and government policies. Community organizing will be essential—to broaden participation in the movement, to build acceptance of a positive image of people with disabilities, and to sustain and expand the organizational infrastructure created by the movement in the 1970s. Organization at the community level can create the resources necessary for the movement to be effective and continue the extension of conceptions of disability that promote social and political participation.

Clearly, the emergence of a social movement of disabled people is no guarantee of major institutional changes. If the movement continues to grow at the local level, however, its power may be expected to accumulate. The more that people with disabilities become integrated into mainstream social institutions, the more their presence may lead to further institutional changes. And to the extent that more political definitions of disability become widespread, the disability rights movement may be expected to continue to play an active role in American political and social life.

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The mode of analysis I have suggested is different from the rigid test for obscenity that we apply to the determination whether a particular book, film or performance can be banned. The regulation here is not directed to particular works or performance, but to their concentration, and the constitutional analysis should be adjusted accordingly. What JUSTICE STEVENS wrote for the plurality in *American Mini Theatres*, is applicable here as well: "[W]e learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached." 427 U. S., at 65. The prohibition of concentrated pornography here is analogous to the prohibition we sustained in *American Mini Theatres*. There we upheld ordinances that prohibited the concentration of sexually oriented businesses, each of which (we assumed) purveyed material that was not constitutionally proscribable. Here I would uphold an ordinance that regulates the concentration of sexually oriented material in a single business.

The basis of decision I have described seems to me the proper means, in Chief Justice Warren's words, "to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments." *Jacobellis* v. *Ohio*, 378 U. S. 184, 199 (1964) (Warren, C. J., dissenting). It entails no risk of suppressing even a single work of science, literature, or art—or, for that matter, even a single work of pornography. Indeed, I fully believe that in the long run it will expand rather than constrict the scope of permitted expression, because it will eliminate the incentive to use, as a means of preventing commercial activity patently objectionable to large segments of our society, methods that constrict unobjectionable activity as well.

For the reasons stated, I respectfully dissent.

JOHN H. WESTON, Beverly Hills, Calif. (G. RANDALL GARROU, CATHY E. CROSSON, WESTON & SARNO, RICHARD L. WILSON, FRANK P. HERNANDEZ, ARTHUR M. SCHWARTZ, BRADLEY J. REICH, and MICHAEL W. GROSS, on the briefs) for petitioners; ANALESLIE MUNCY, Dallas City Attorney (KENNETH C. DIPPEL, First Asst. City Atty., and THOMAS P. BRANDT, Asst. City Atty., on the briefs) for respondents.

No. 88-493

UNIVERSITY OF PENNSYLVANIA, PETITIONER *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Syllabus

No. 88-493. Argued November 7, 1989—Decided January 9, 1990

After petitioner university denied tenure to associate professor Rosalie Tung, she filed a charge with respondent Equal Employment Opportunity Commission (EEOC) alleging discrimination on the basis of race, sex, and national origin in violation of Title VII of the Civil Rights Act of 1964. In the course of its investigation, the EEOC issued a subpoena seeking, *inter alia*, Tung's tenure-review file and the tenure files of five male faculty members identified in the charge as having received more favorable treatment than Tung. Petitioner refused to produce a number of the tenure-file documents and applied to the EEOC for modification of the subpoena to exclude what it termed "confidential peer review information." The EEOC denied the application and successfully sought enforcement of the subpoena by the District Court. The Court of Appeals affirmed, rejecting petitioner's claim that policy considerations and First Amendment principles of academic freedom required the recognition of a qualified privilege or the adoption of a balancing approach that would require the EEOC to demonstrate some particularized need, beyond a showing of relevance, to obtain peer review materials.

Held: A university does not enjoy a special privilege requiring a judicial finding of particularized necessity of access, beyond a showing of mere relevance, before peer review materials pertinent to charges of discrimination in tenure decisions are disclosed to the EEOC.

(a) The claimed privilege cannot be grounded in the common law under Federal Rule of Evidence 501. This Court is reluctant to recognize petitioner's asserted privilege where it appears that Congress, in expressly extending Title VII's coverage to educational institutions in 1972 and in thereafter continuing to afford the EEOC a broad right of access to any evidence "relevant" to a charge under investigation, balanced the substantial costs of invidious discrimination in institutions of higher learning against the importance of academic autonomy, but did not see fit to create a privilege for peer review documents. In fact, Congress did provide a modicum of protection for an employer's interest in the confidentiality of its records by making it a crime for EEOC employees to publicize before the institution of court proceedings materials obtained during investigations. Petitioner has not offered persuasive justification for its claim that this Court should go further than Congress thought necessary to safeguard confidentiality. Disclosure of peer review materials will often be necessary in order for the EEOC to determine whether illegal discrimination has taken place. Moreover, the adoption of a requirement that the EEOC demonstrate a specific reason for disclosure, beyond a showing of relevance, would place a substantial litigation-producing obstacle in the EEOC's way and give universities a weapon to frustrate investigations. It would also lead to a wave of similar privilege claims by other employers, such as writers, publishers, musicians, and lawyers, who play significant roles in furthering speech and learning in society. Furthermore, petitioner's claim is not supported by this Court's precedents recognizing qualified privileges for Presidential and grand and petit jury communications and for deliberative intra-agency documents, since a privilege for peer review materials lacks a historical, constitutional, or statutory basis similar to that of those privileges.

(b) Nor can the claimed privilege be grounded in First Amendment "academic freedom." Petitioner's reliance on this Court's so-called academic freedom cases is somewhat misplaced, since, in invalidating various governmental actions, those cases dealt with attempts to control university speech that were *content based* and that constituted a *direct* infringement on the asserted right to determine on academic grounds who could teach. In contrast, petitioner here does not allege any content-based regulation but only that the "quality of instruction and scholarship [will] decline" as a result of the burden EEOC subpoenas place on the peer review process. The subpoena at issue does not provide criteria that petitioner *must* use in selecting teachers or prevent it from using any such criteria other than those proscribed by Title VII, and therefore respects *legitimate* academic decisionmaking. In any event, the First Amendment does not embrace petitioner's claim to the effect that the right of academic freedom derived from the cases relied on should be expanded to protect confidential peer review materials from disclosure. By comparison with cases in which the Court has recognized a First Amendment right, the complained-of infringement is extremely attenuated in that the burden of such disclosure is far removed from the asserted right, and, if petitioner's claim were accepted, many other generally applicable laws, such as tax laws, might be said to infringe the First Amendment to the extent they affected university hiring. In addition, the claimed injury to academic freedom is speculative, since confidentiality is not the norm in all peer review systems, and since some disclosure of peer evaluations would take place even if the "special necessity" test were adopted. Moreover, this Court will not assume that most evaluators will become less candid if the possibility of disclosure increases. This case is in many respects similar to *Branzburg* v. *Hayes*, 408 U. S. 665, where, in rejecting the contention that the First Amendment prohibited requiring a reporter to testify as to information obtained in confidence without a special showing that such testimony was necessary, the Court declared that the Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of generally applicable laws, *id.*, at 682, and indicated a reluctance to recognize a constitutional privilege of uncertain effect and scope, *id.*, at 693, 703.

850 F. 2d 969, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we are asked to decide whether a university enjoys a special privilege, grounded in either the common law or the First Amendment, against disclosure of peer review materials that are relevant to charges of racial or sexual discrimination in tenure decisions.

I

The University of Pennsylvania, petitioner here, is a private institution. It currently operates 12 schools, including the Wharton School of Business, which collectively enroll approximately 18,000 full-time students.

In 1985, the University denied tenure to Rosalie Tung, an associate professor on the Wharton faculty. Tung then filed a sworn charge of discrimination with respondent Equal Employment Opportunity Commission (EEOC or Commission). App. 23. As subsequently amended, the charge alleged that Tung was the victim of discrimination on the basis of race, sex, and national origin, in violation of § 703(a) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e-2(a), 78 Stat. 255, as amended, which makes it unlawful "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."

In her charge, Tung stated that the Department Chairman had sexually harassed her and that, in her belief, after she insisted that their relationship remain professional, he had submitted a negative letter to the University's Personnel Committee which possessed ultimate responsibility for tenure decisions. She also alleged that her qualifications were "equal to or better than" those of five named male faculty members who had received more favorable treatment. Tung noted that the majority of the members of her Department had recommended her for tenure, and stated that she had been given no reason for the decision against her, but had discovered of her own efforts that the Personnel Committee had attempted to justify its decision "on the ground that the Wharton School is not interested in China-related research." App. 29. This explanation, Tung's charge alleged, was a pretext for discrimination: "simply their way of saying they do not want a Chinese-American, Oriental, woman in their school." *Ibid.*

The Commission undertook an investigation into Tung's charge, and requested a variety of relevant information from petitioner. When the University refused to provide certain of that information, the Commission's Acting District Director issued a subpoena seeking, among other things, Tung's tenure-review file and the tenure files of the five male faculty members identified in the charge. *Id.*, at 21. Petitioner refused to produce a number of the tenure-file documents. It applied to the Commission for modification of the subpoena to exclude what it termed "confidential peer review information," specifically, (1) confidential letters written by Tung's evaluators; (2) the Department Chairman's letter of evaluation; (3) documents reflecting the internal deliberations of faculty committees considering applications for tenure, including the Department Evaluation Report summarizing the deliberations relating to Tung's application for tenure; and (4) comparable portions of the tenure-review files of the five males. The University urged the Commission to "adopt a balancing approach reflecting the constitutional and societal interest inherent in the peer review process" and to resort to "all feasible methods to minimize the intrusive effects of its investigations." Exhibit 2 to EEOC's Memorandum in Support of Application for Order to Show Cause.

The Commission denied the University's application. It concluded that the withheld documents were needed in order to determine the merit of Tung's charges. The Commission found: "There has not been enough data supplied in order for the Commission to determine whether there is reasonable cause to believe that the allegations of sex, race and national origin discrimination is true." App. to Pet. for Cert. A31. The Commission rejected petitioner's contention that a letter, which set forth the Personnel Committee's reasons for denying Tung tenure, was sufficient for disposition of the charge. "The Commission would fall short of its obligation" to investigate charges of discrimination, the EEOC's order stated, "if it stopped its investigation once [the employer] has . . . provided the reasons for its employment decisions, without verifying whether that reason is a pretext for discrimination." *Id.*, at A32. The Commission also rejected petitioner's proposed balancing test, explaining that "such an approach in the instant case . . . would impair the Commission's ability to fully investigate this charge of discrimination." *Id.*, at A33. The Commission indicated that enforcement proceedings might be necessary if a response was not forthcoming within 20 days. *Ibid.*

The University continued to withhold the tenure-review materials. The Commission then applied to the United States District Court for the Eastern District of Pennsylvania for enforcement of its subpoena. The court entered a brief enforcement order.[1] *Id.*, at A35.

The Court of Appeals for the Third Circuit affirmed the enforcement decision. 850 F. 2d 969 (1988).[2] Relying upon its earlier opinion in *EEOC* v. *Franklin and Marshall College*, 775 F. 2d 110 (1985), cert. denied, 476 U. S. 1163 (1986), the court rejected petitioner's claim that policy considerations and First Amendment principles of academic freedom required the recognition of a qualified privilege or the adoption of a balancing approach that would require the Commission to demonstrate some particularized need, beyond a showing of relevance, to obtain peer review materials. Because of what might be thought of as a conflict in approach with the Seventh Circuit's decision in *EEOC* v. *University of Notre Dame du Lac*, 715 F. 2d 331, 337 (1983), and because of the importance of the issue, we granted certiorari limited to the compelled-disclosure question. —— U. S. —— (1988).

II

As it had done before the Commission, the District Court, and the Court of Appeals, the University raises here essentially two claims. First, it urges us to recognize a qualified common-law privilege against disclosure of confidential peer review materials. Second, it asserts a First Amendment

[1] Three days before the stated 20-day period expired, petitioner brought suit against the EEOC in the United States District Court for the District of Columbia seeking declaratory and injunctive relief and an order quashing the subpoena. App. 4. The Pennsylvania District Court declined to follow its controlling court's announced "first-filed" rule, which counsels the stay or dismissal of an action that is duplicative of a previously filed suit in another federal court. See *Crosley Corp.* v. *Hazeltine Corp.*, 122 F. 2d 925, 929 (CA3 1941), cert. denied, 315 U. S. 813 (1942); *Compagnie des Bauxites de Guinea* v. *Insurance Co. of North America*, 651 F. 2d 877, 887, n. 10 (CA3 1981), cert. denied, 457 U. S. 1105 (1982). This declination, however, was upheld by the Third Circuit. See 850 F. 2d 969, 972 (1988). Since the applicability of the "first-filed" rule to the facts of this case is not a question on which we granted certiorari, we do not address it.

[2] The Court of Appeals did not rule on the question whether the Commission's subpoena permits petitioner to engage in any redaction of the disputed records before producing them, because the District Court had not fully considered that issue. The Third Circuit therefore ordered that the case be remanded for further consideration of possible redaction. See 850 F. 2d, at 982.

right of "academic freedom" against wholesale disclosure of the contested documents. With respect to each of the two claims, the remedy petitioner seeks is the same: a requirement of a judicial finding of particularized necessity of access, beyond a showing of mere relevance, before peer review materials are disclosed to the Commission.

A

Petitioner's common-law privilege claim is grounded in Federal Rule of Evidence 501. This provides in relevant part:

> "Except as otherwise required by the Constitution . . . or provided by Act of Congress or in rules prescribed by the Supreme Court . . . , the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The University asks us to invoke this provision to fashion a new privilege that it claims is necessary to protect the integrity of the peer review process, which in turn is central to the proper functioning of many colleges and universities. These institutions are special, observes petitioner, because they function as "centers of learning, innovation and discovery." Brief for Petitioner 24.

We do not create and apply an evidentiary privilege unless it "promotes sufficiently important interests to outweigh the need for probative evidence . . . ." *Trammel* v. *United States*, 445 U. S. 40, 51 (1980). Inasmuch as "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence,'" *id.*, at 50, quoting *United States* v. *Bryan*, 339 U. S. 323, 331 (1950), any such privilege must "be strictly construed." 445 U. S., at 50.

Moreover, although Rule 501 manifests a congressional desire "not to freeze the law of privilege" but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, *id.*, at 47, we are disinclined to exercise this authority expansively. We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. Cf. *Branzburg* v. *Hayes*, 408 U. S. 665, 706 (1972). The balancing of conflicting interests of this type is particularly a legislative function.

With all this in mind, we cannot accept the University's invitation to create a new privilege against the disclosure of peer review materials. We begin by noting that Congress, in extending Title VII to educational institutions and in providing for broad EEOC subpoena powers, did not see fit to create a privilege for peer review documents.

When Title VII was enacted originally in 1964, it exempted an "educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." § 702, 78 Stat. 255. Eight years later, Congress eliminated that specific exemption by enacting § 3 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103. This extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. The House Report focused specifically on discrimination in higher education, including the lack of access for women and minorities to higher ranking (*i. e.*, tenured) academic positions. See H. R. Rep. No. 92-238, pp. 19-20 (1971). Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members.[1] Petitioner therefore cannot seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption for educational institutions.

The effect of the elimination of this exemption was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions. This Court previously has observed that Title VII "sets forth 'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *EEOC* v. *Shell Oil Co.*, 466 U. S. 54, 62 (1984), quoting *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 359 (1977). The Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination. The Act obligates the Commission to investigate a charge of discrimination to determine whether there is "reasonable cause to believe that the charge is true." § 2000e-5(b). If it finds no such reasonable cause, the Commission is directed to dismiss the charge. If it does find reasonable cause, the Commission shall "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Ibid.* If attempts at voluntary resolution fail, the Commission may bring an action against the employer. § 2000e-5(f)(1).[2]

To enable the Commission to make informed decisions at each stage of the enforcement process, § 2000e-8(a) confers a broad right of access to relevant evidence:

> "[T]he Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated . . . that relates to unlawful employment practices covered by [the Act] and is relevant to the charge under investigation."

If an employer refuses to provide this information voluntarily, the Act authorizes the Commission to issue a subpoena and to seek an order enforcing it. § 2000e-9 (incorporating 29 U. S. C. § 161).

On their face, § 2000e-8(a) and § 2000e-9 do not carve out any special privilege relating to peer review materials, despite the fact that Congress undoubtedly was aware, when it extended Title VII's coverage, of the potential burden that access to such material might create. Moreover, we have noted previously that when a court is asked to enforce a Commission subpoena, its responsibility is to "satisfy itself that the charge is valid and that the material requested is 'relevant' to the charge . . . and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." It is not then to determine "whether the charge of discrimination is "well founded" or "verifiable." *EEOC* v. *Shell Oil Co.*, 466 U. S., at 72, n. 26.

The University concedes that the information sought by the Commission in this case passes the relevance test set forth in *Shell Oil*. Tr. of Oral Arg. 6. Petitioner argues, nevertheless, that Title VII affirmatively grants courts the discretion to require more than relevance in order to protect tenure-review documents. Although petitioner recognizes that Title VII gives the Commission broad "power to *seek* access to all evidence that may be 'relevant to the charge under investigation,'" Brief for Petitioner 38 (emphasis added), it

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[1] See, *e. g.*, 118 Cong. Rec. 311 (1972) (remarks of Sen. Ervin); *id.*, at 946 (remarks of Sen. Allen); *id.*, at 4919 (remarks of Sen. Ervin).

[2] Similarly, the charging party may bring an action after it obtains a "right-to-sue" letter from the Commission. § 2000e-5(f)(1).

contends that Title VII's subpoena enforcement provisions do not give the Commission an unqualified right to *acquire* such evidence. *Id.*, at 38–41. This interpretation simply cannot be reconciled with the plain language of the text of § 2000e–8(a), which states that the Commission "*shall . . . have* access" to "relevant" evidence (emphasis added). The provision can be read only as giving the Commission a right to obtain that evidence, not a mere license to seek it.

Although the text of the access provisions thus provides no privilege, Congress did address situations in which an employer may have an interest in the confidentiality of its records. The same § 2000e–8 which gives the Commission access to any evidence relevant to its investigation also makes it "unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding" under the Act. A violation of this provision subjects the employee to criminal penalties. *Ibid.*[3] To be sure, the protection of confidentiality that § 2000–8(e) provides is less than complete.[4] But this, if anything, weakens petitioner's argument. Congress apparently considered the issue of confidentiality, and it provided a modicum of protection. Petitioner urges us to go further than Congress thought necessary to safeguard that value, that is, to strike the balance differently from the one Congress adopted. Petitioner, however, does not offer any persuasive justification for that suggestion.

We readily agree with petitioner that universities and colleges play significant roles in American society. Nor need we question, at this point, petitioner's assertion that confidentiality is important to the proper functioning of the peer review process under which many academic institutions operate. The costs that ensue from disclosure, however, constitute only one side of the balance. As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great if not compelling governmental interest. Often, as even petitioner seems to admit, see Reply Brief for Petitioner 15, disclosure of peer review materials will be necessary in order for the Commission to determine whether illegal discrimination has taken place. Indeed, if there is a "smoking gun" to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files. The Court of Appeals for the Third Circuit expressed it this way:

> "Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memorand[a] which the [college] seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears. . . . [T]he peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision." *EEOC* v. *Franklin and Marshall College*, 775 F. 2d, at 116 (emphasis deleted).

[3] The prohibition on Commission disclosure does not apply, for example, to the charging party. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U. S. 590, 598–604 (1981).

Moreover, we agree with the EEOC that the adoption of a requirement that the Commission demonstrate a "specific reason for disclosure," see Brief for Petitioner 46, beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination. Cf. *Branzburg* v. *Hayes*, 408 U. S., at 705–706. A university faced with a disclosure request might well utilize the privilege in a way that frustrates the EEOC's mission. We are reluctant to "place a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible investigations by the EEOC." *EEOC* v. *Shell Oil Co.*, 466 U. S., at 81.

Acceptance of petitioner's claim would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society. What of writers, publishers, musicians, lawyers? It surely is not unreasonable to believe, for example, that confidential peer reviews play an important part in partnership determinations at some law firms. We perceive no limiting principle in petitioner's argument. Accordingly, we stand behind the breakwater Congress has established: unless specifically provided otherwise in the statute, the EEOC may obtain "relevant" evidence. Congress has made the choice. If it dislikes the result, it of course may revise the statute.

Finally, we see nothing in our precedents that supports petitioner's claim. In *United States* v. *Nixon*, 418 U. S. 683 (1974), upon which petitioner relies, we recognized a qualified privilege for Presidential communications. It is true that in fashioning this privilege we noted the importance of confidentiality in certain contexts:

> "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Id.*, at 705.

But the privilege we recognized in *Nixon* was grounded in the separation of powers between the Branches of the Federal Government. "[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings" *Id.*, at 705–706 (footnote omitted). As we discuss below, petitioner's claim of privilege lacks similar constitutional foundation.

In *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211 (1979), the Court recognized the privileged nature of grand jury proceedings. We noted there that the rule of secrecy dated back to the 17th century, was imported into our federal common law, and was eventually codified in Fed. Rule. Crim. Proc. 6(e) as "an integral part of our criminal justice system." *Id.*, at 218, n. 9. Similarly, in *Clark* v. *United States*, 289 U. S. 1, 13 (1933), the Court recognized a privilege for the votes and deliberations of a petit jury, noting that references to the privilege "bear with them the implications of an immemorial tradition." More recently, in *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132 (1975), we construed an exception to the Freedom of Information Act in which Congress had incorporated a well-established privilege for deliberative intra-agency documents. A privilege for peer review materials has no similar historical or statutory basis.

B

As noted above, petitioner characterizes its First Amendment claim as one of "academic freedom." Petitioner begins

its argument by focusing our attention upon language in prior cases acknowledging the crucial role universities play in the dissemination of ideas in our society and recognizing "academic freedom" as a "special concern of the First Amendment." *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967). In that case the Court said: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." See also *Adler* v. *Board of Education*, 342 U. S. 485, 511 (1952) (academic freedom is central to "the pursuit of truth which the First Amendment is designed to protect" (dissenting opinion of Douglas, J.)). Petitioner places special reliance on Justice Frankfurter's opinion, concurring in the result, in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 263 (1957), where the Justice recognized that one of "four essential freedoms" that a university possesses under the First Amendment is the right to "determine for itself on academic grounds *who may teach*" (emphasis added).

Petitioner contends that it exercises this right of determining "on academic grounds who may teach" through the process of awarding tenure. A tenure system, asserts petitioner, determines what the university will look like over time. "In making tenure decisions, therefore, a university is doing nothing less than shaping its own identity." Brief for Petitioner 19.

Petitioner next maintains that the peer review process is the most important element in the effective operation of a tenure system. A properly functioning tenure system requires the faculty to obtain candid and detailed written evaluations of the candidate's scholarship, both from the candidate's peers at the university and from scholars at other institutions. These evaluations, says petitioner, traditionally have been provided with express or implied assurances of confidentiality. It is confidentiality that ensures candor and enables an institution to make its tenure decisions on the basis of valid academic criteria.

Building from these premises, petitioner claims that requiring the disclosure of peer review evaluations on a finding of mere relevance will undermine the existing process of awarding tenure, and therefore will result in a significant infringement of petitioner's First Amendment right of academic freedom. As more and more peer evaluations are disclosed to the EEOC and become public, a "chilling effect" on candid evaluations and discussions of candidates will result. And as the quality of peer review evaluations declines, tenure committees will no longer be able to rely on them. "This will work to the detriment of universities, as less qualified persons achieve tenure causing the quality of instruction and scholarship to decline." Brief for Petitioner 35. Compelling disclosure of materials "also will result in divisiveness and tension, placing strain on faculty relations and impairing the free interchange of ideas that is a hallmark of academic freedom." *Ibid.* The prospect of these deleterious effects on American colleges and universities, concludes petitioner, compels recognition of a First Amendment privilege.

In our view, petitioner's reliance on the so-called academic freedom cases is somewhat misplaced. In those cases government was attempting to control or direct the *content* of the speech engaged in by the university or those affiliated with it. In *Sweezy*, for example, the Court invalidated the conviction of a person found in contempt for refusing to answer questions about the content of a lecture he had delivered at a state university. Similarly, in *Keyishian*, the Court invalidated a network of state laws that required public employees, including teachers at state universities, to make certifications with respect to their membership in the Communist Party. When, in those cases, the Court spoke of "academic freedom" and the right to determine on "academic grounds who may teach" the Court was speaking in reaction to content-based regulation. See *Sweezy* v. *New Hampshire*, 354 U. S., at 250 (plurality opinion discussing problems that result from imposition of a "strait jacket upon the intellectual leaders in our colleges and universities"); *Keyishian* v. *Board of Regents*, 385 U. S., at 603 (discussing dangers that are present when a "pall of orthodoxy" is cast "over the classroom").

Fortunately, we need not define today the precise contours of any academic-freedom right against governmental attempts to influence the content of academic speech through the selection of faculty or by other means,[4] because petitioner does not allege that the Commission's subpoenas are intended to or will in fact direct the content of university discourse toward or away from particular subjects or points of view. Instead, as noted above, petitioner claims that the "quality of instruction and scholarship [will] decline" as a result of the burden EEOC subpoenas place on the peer review process.

Also, the cases upon which petitioner places emphasis involved *direct* infringements on the asserted right to "determine for itself on academic grounds who may teach." In *Keyishian*, for example, government was attempting to *substitute* its teaching employment criteria for those already in place at the academic institutions, directly and completely usurping the discretion of each institution. In contrast, the EEOC subpoena at issue here effects no such usurpation. The Commission is not providing criteria that petitioner *must* use in selecting teachers. Nor is it preventing the University from using any criteria it may wish to use, except those—including race, sex, and national origin—that are proscribed under Title VII.[5] In keeping with Title VII's preservation of employers' remaining freedom of choice, see *Price Waterhouse* v. *Hopkins*, —— U. S. —— (1989) (plurality opinion), courts have stressed the importance of avoiding second-guessing of legitimate academic judgments. This Court itself has cautioned that "judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment." *Regents of University of Michigan* v. *Ewing*, 474 U. S. 214, 225 (1985). Nothing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking.

That the burden of which the University complains is neither content-based nor direct does not necessarily mean that petitioner has no valid First Amendment claim. Rather, it means only that petitioner's claim does not fit neatly within any right of academic freedom that could be derived from the cases on which petitioner relies. In essence, petitioner asks us to recognize an *expanded* right of academic freedom to protect confidential peer review materials from disclosure.

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[4] Obvious First Amendment problems would arise where government attempts to direct the content of speech at private universities. Such content-based regulation of private speech traditionally has carried with it a heavy burden of justification. See, *e. g.*, *Police Dept. of Chicago* v. *Mosely*, 408 U. S. 92, 95, 98–99 (1972). Where, as was the situation in the academic-freedom cases, government attempts to direct the content of speech at public educational institutions, complicated First Amendment issues are presented because government is simultaneously both speaker and regulator. Cf. *Meese* v. *Keene*, 465 U. S. 484, n. 18 (1987) (citing *Block* v. *Meese*, 253 U. S. App. D. C. 317, 327–328, 793 F. 2d 1303, 1313–1314 (1986)). See generally, M. Yudof, When Government Speaks (1983).

[5] Petitioner does not argue in this case that race, sex, and national origin constitute "academic grounds" for the purposes of its claimed First Amendment right to academic freedom. Cf. *Regents of the University of California* v. *Bakke*, 438 U. S. 265, 312–313 (1978) (opinion of Powell, J.).

Although we are sensitive to the effects that content-neutral government action may have on speech, see, *e. g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 647–648 (1981), and believe that burdens that are less than direct may sometimes pose First Amendment concerns, see, *e. g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958), we think the First Amendment cannot be extended to embrace petitioner's claim.

First, by comparison with the cases in which we have found a cognizable First Amendment claim, the infringement the University complains of is extremely attenuated. To repeat, it argues that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which in turn is the means by which petitioner seeks to exercise its asserted academic-freedom right of choosing who will teach. To verbalize the claim is to recognize how distant the burden is from the asserted right.

Indeed, if the University's attenuated claim were accepted, many other generally applicable laws might also be said to infringe the First Amendment. In effect, petitioner says no more than that disclosure of peer review materials makes it more difficult to acquire information regarding the "academic grounds" on which petitioner wishes to base its tenure decisions. But many laws make the exercise of First Amendment rights more difficult. For example, a university cannot claim a First Amendment violation simply because it may be subject to taxation or other government regulation, even though such regulation might deprive the university of revenue it needs to bid for professors who are contemplating working for other academic institutions or in industry. We doubt that the peer review process is any more essential in effectuating the right to determine "who may teach" than is the availability of money. Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 19 (1976) (discussing how money is sometimes necessary to effectuate First Amendment rights).

In addition to being remote and attenuated, the injury to academic freedom claimed by petitioner is also speculative. As the EEOC points out, confidentiality is not the norm in all peer review systems. See, *e. g.*, G. Bednash, The Relationship Between Access and Selectivity in Tenure Review Outcomes (1989) (unpublished Ph.D. Dissertation, University of Maryland). Moreover, some disclosure of peer evaluations would take place even if petitioner's "special necessity" test were adopted. Thus, the "chilling effect" petitioner fears is at most only incrementally worsened by the absence of a privilege. Finally, we are not so ready as petitioner seems to be to assume the worst about those in the academic community. Although it is possible that some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness. Not all academics will hesitate to stand up and be counted when they evaluate their peers.

The case we decide today in many respects is similar to *Branzburg* v. *Hayes*, *supra*. In *Branzburg*, the Court rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary. Petitioners there, like petitioner here, claimed that requiring disclosure of information collected in confidence would inhibit the free flow of information in contravention of First Amendment principles. In the course of rejecting the First Amendment argument, this Court noted that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." 408 U. S., at 682. We also indicated a reluctance to recognize a constitutional privilege where it was "unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." *Id.*, at 693. See also *Herbert* v. *Lando*, 441 U. S. 153, 174 (1979). We were unwilling then, as we are today, "to embark the judiciary on a long and difficult journey to . . . an uncertain destination." 408 U. S., at 703.[4]

Because we conclude that the EEOC subpoena process does not infringe any First Amendment right enjoyed by petitioner, the EEOC need not demonstrate any special justification to sustain the constitutionality of Title VII as applied to tenure peer review materials in general or to the subpoena involved in this case. Accordingly, we need not address the Commission's alternative argument that any infringement of petitioner's First Amendment rights is permissible because of the substantial relation between the Commission's request and the overriding and compelling state interest in eradicating invidious discrimination.[5]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

REX E. LEE, Washington, D.C. (CARTER G. PHILLIPS, MARK D. HOPSON, LOREEN M. MARCIL, JULI E. FARRIS, SIDLEY & AUSTIN, SHELLEY Z. GREEN, and NEIL J. HAMBURG, on the briefs) for petitioner; KENNETH W. STARR, Solicitor General (LAWRENCE G. WALLACE, Dpty. Sol. Gen., STEPHEN L. NIGHTINGALE, Asst. to the Sol. Gen., CHARLES A. SHANOR, Gen. Counsel, GWENDOLYN YOUNG REAMS, Assoc. Gen. Counsel, LORRAINE C. DAVIS, Asst. Gen. Counsel, and HARRY F. TEPKER JR., EEOC atty., on the briefs) for respondent.

No. 88-1319

COMMISSIONER OF INTERNAL REVENUE, PETITIONER *v.* INDIANAPOLIS POWER & LIGHT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Syllabus

No. 88-1319. Argued October 31, 1989—Decided January 9, 1990

Respondent Indianapolis Power and Light Co. (IPL), a regulated Indiana utility and an accrual-basis taxpayer, requires customers having suspect credit to make deposits with it to assure prompt payment of future electric bills. Prior to termination of service, customers who satisfy a credit test can obtain a refund of their deposits or can choose to have the amount applied against future bills. Although the deposits are at all times subject to the company's unfettered use and control, IPL does not treat them as income at the time of receipt but carries them on its books as current liabilities. Upon audit of IPL's returns for the tax years at issue, petitioner Commissioner of Internal Revenue asserted deficiencies, claiming that the deposits are advance payments for electricity and therefore are taxable to IPL in the year of receipt. The Tax Court ruled in favor of IPL on its petition for redetermination, holding that the deposits' principal purpose is to serve as security rather than as prepayment of income. The Court of Appeals affirmed.

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[4] In *Branzburg* we recognized that the bad-faith exercise of grand jury powers might raise First Amendment concerns. 408 U. S., at 707. The same is true of EEOC subpoena powers. See *EEOC* v. *Shell Oil Co.*, 466 U. S. 54, 72, n. 26 (1984). There is no allegation or indication of any such abuse by the Commission in this case.

[5] We also do not consider the question, not passed upon by the Court of Appeals, whether the District Court's enforcement of the Commission's subpoena will allow petitioner to redact information from the contested materials before disclosing them. See n. 2, *supra*.

concerning those representations do not go beyond the holding of the Court striking down the May 22, 1974 amendments and do not negate the fact that the Board nonetheless overran the authorized pool of otherwise available stock by only 14,265 shares.

Conclusion

Accordingly it is held that there was an overgrant in 1977 of options on 14,265 shares, which is set aside; and, the grant of options in excess of a total of 70,000 shares to any recipient is likewise set aside. The excesses are to be cancelled by Revlon and if there has been any exercise of such options the monies paid to Revlon on exercise thereof are to be refunded and the equivalent number of shares returned to Revlon.

In the event that any dispute arises as to application of these rulings that cannot be resolved by the parties, an appropriate application may be made to the Court for a hearing and entry of a further order at the foot of the judgment to be entered hereon.

The foregoing shall constitute the findings of fact and conclusions of law on the issue of liability. Fed.R.Civ.P. 52(a).

SO ORDERED.

under a qualified plan, a cancellation and regrant is not equivalent to a simple price reduction because the new options cannot be exercised prior to the expiration date of the cancelled options. (Technically, this is so because under a qualified plan, no option is exercisable while any option previously granted at a higher price is outstanding, and cancelled options are considered to be "outstanding" for these purposes.) Since the policy of the N.Y.S.E. was only to require the above-mentioned "undertaking" with respect to non-qualified plans, and since at the time of the cancellation and exchange here in question Revlon's plan was a qualified plan, plaintiff has not demonstrated that the cancellation and exchange violated any N.Y.S.E. policy or rule.

However, it should be noted that defendants reach too far in arguing that for these same reasons, Revlon was entitled after 1964 simply to disregard the representations it had made to its stockholders. The stockholders could not be expected to know that, so far as the N.Y.S.E. was concerned, the reasons for Revlon's having promised not to cancel or regrant options without shareholder approval had disappeared with the conversion of the plan in 1964 to a qualified plan.

Aaron FRICKE

v.

Richard B. LYNCH, in his official capacity as Principal of Cumberland High School.

Civ. A. No. 80-214.

United States District Court,
D. Rhode Island.

May 28, 1980.

Male homosexual high school senior sought preliminary injunction ordering school officials to allow him to attend senior prom with a male escort. The District Court, Pettine, Chief Judge, held that it was a denial of First Amendment rights of male homosexual high school student for school officials to preclude him from bringing a male escort to the senior prom since the student's action amounted to a political statement protected by the First Amendment and, although school officials sought to prevent attendance in order to eliminate possibility of violence, they failed to show that barring student was the least restrictive means of obtaining that goal.

Order accordingly.

1. Constitutional Law ⇐90(3)

Undifferentiated fear or apprehension of disturbance is not enough to overcome right of freedom of expression. U.S.C.A. Const. Amend. 1.

2. Constitutional Law ⇐90(3)

In order for the state, in person of school officials, to justify prohibition of particular expression of opinion, it must be able to show that its action was caused by something more than mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. U.S.C.A.Const. Amend. 1.

3. Constitutional Law ⇐90.1(1)
Schools ⇐172

Where there is no finding and no showing that exercise of forbidden right of expression of opinion would materially and substantially interfere with requirements of appropriate discipline in operation of school, the prohibition cannot be sustained. U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐90(3)

Fear, however justified, of violent reaction is not sufficient reason to restrain protected speech in advance. U.S.C.A.Const. Amend. 1.

5. Constitutional Law ⇐90(3)

Actual hostile reaction to exercise of freedom of expression is rarely an adequate basis for curtailing free speech. U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐90.1(1)
Schools ⇐169

Even a legitimate interest in school discipline does not outweigh a student's right to peacefully express his views in an appropriate time, place, and manner. U.S.C.A.Const. Amend. 1.

7. Schools ⇐169

Schools have an obligation to take reasonable measures to protect and foster free speech of students, and not stand helpless before unauthorized student violence. U.S.C.A.Const. Amend. 1.

8. Constitutional Law ⇐90.1(1)
Schools ⇐169

First Amendment requires that meaningful security measures be taken by schools to protect, rather than to stifle, free expression of students. U.S.C.A.Const. Amend. 1.

9. Constitutional Law ⇐90.1(1)
Schools ⇐169

It was a denial of the First Amendment right of male homosexual high school student for school officials to preclude him from bringing a male escort to the senior prom since the student's action amounted to a political statement protected by the First Amendment and, although school officials sought to prevent attendance in order to eliminate possibility of violence, they failed to show that barring student was the least restrictive means of obtaining that goal. U.S.C.A.Const. Amend. 1.

Lynette Labinger, Providence, R. I., John P. Ward, Boston, Mass., for plaintiff.

V. James Santaniello, Providence, R. I., for defendant.

OPINION

PETTINE, Chief Judge.

Most of the time, a young man's choice of a date for the senior prom is of no great interest to anyone other than the student, his companion, and, perhaps, a few of their classmates. But in Aaron Fricke's case, the school authorities actively disapprove of his choice, the other students are upset, the community is abuzz, and out-of-state newspapers consider the matter newsworthy.[1] All this fuss arises because Aaron Fricke's intended escort is another young man. Claiming that the school's refusal to allow him to bring a male escort violates his first and fourteenth amendment rights, Fricke seeks a preliminary injunction ordering the school officials to allow him to attend with a male escort.

Two days of testimony have revealed the following facts. The senior reception at Cumberland High School is a formal dinner-

1. See the New York Times of Wednesday, May 21, and the Boston Globe of Tuesday, May 20 and Wednesday, May 21.

dance sponsored and run by the senior class. It is held shortly before graduation but is not a part of the graduation ceremonies. This year the students have decided to hold the dance at the Pleasant Valley Country Club in Sutton, Massachusetts on Friday, May 30. All seniors except those on suspension are eligible to attend the dance; no one is required to go. All students who attend must bring an escort, although their dates need not be seniors or even Cumberland High School students. Each student is asked the name of his date at the time he buys the tickets.

The principal testified that school dances are chaperoned by him, two assistant principals, and one or two class advisers. They are sometimes joined by other teachers who volunteer to help chaperone; such teachers are not paid. Often these teachers will drop in for part of the dance. Additionally, police officers are on duty at the dance. Usually two officers attend; last year three plainclothes officers were at the junior prom.

The seeds of the present conflict were planted a year ago when Paul Guilbert, then a junior at Cumberland High School, sought permission to bring a male escort to the junior prom. The principal, Richard Lynch (the defendant here), denied the request, fearing that student reaction could lead to a disruption at the dance and possibly to physical harm to Guilbert. The request and its denial were widely publicized and led to widespread community and student reaction adverse to Paul. Some students taunted and spit at him, and once someone slapped him; in response, principal Lynch arranged an escort system, in which Lynch or an assistant principal accompanied Paul as he went from one class to the next. No other incidents or violence occurred. Paul did not attend the prom. At that time Aaron Fricke (plaintiff here) was a friend of Paul's and supported his position regarding the dance.

This year, during or after an assembly in April in which senior class events were discussed, Aaron Fricke, a senior at Cumberland High School, decided that he wanted to attend the senior reception with a male companion. Aaron considers himself a homosexual, and has never dated girls, although he does socialize with female friends. He has never taken a girl to a school dance. Until this April, he had not "come out of the closet" by publicly acknowledging his sexual orientation.

Aaron asked principal Lynch for permission to bring a male escort, which Lynch denied. A week later (during vacation), Aaron asked Paul Guilbert—who now lives in New York—to be his escort (if allowed), and Paul accepted. Aaron met again with Lynch, at which time they discussed Aaron's commitment to homosexuality; Aaron indicated that although it was possible he might someday be bisexual, at the present he is exclusively homosexual and could not conscientiously date girls. Lynch gave Aaron written reasons for his action;[2] his

2. Principal Lynch sent the following letter to Aaron's home and handed it to him in person:

Dear Aaron:

This is to confirm our conversation of Friday, April 11, 1980, during which I denied your request to attend the Senior Reception on May 30, 1980 at the Pleasant Valley Country Club in Sutton, Massachusetts, accompanied by a male escort.

I am denying your request for the following reasons:

1. The real and present threat of physical harm to you, your male escort and to others;
2. The adverse effect among your classmates, other students, the School and the Town of Cumberland, which is certain to follow approval of such a request for overt homosexual interaction (male or female) at a class function;
3. Since the dance is being held out of state and this is a function of the students of Cumberland High School, the School Department is powerless to insure protection in Sutton, Massachusetts. That protection would be required of property as well as persons and would expose all concerned to liability for harm which might occur;
4. It is long standing school policy that no unescorted student, male or female, is permitted to attend. To enforce this rule, a student must identify his or her escort before the committee will sell the ticket.

I suspect that other objections will be raised by your fellow students, the Cumberland School Department, Parents and other citizens, which will heighten the potential for harm.

prime concern was the fear that a disruption would occur and Aaron or, especially, Paul would be hurt. He indicated in court that he would allow Aaron to bring a male escort if there were no threat of violence.

After Aaron filed suit in this Court, an event reported by the Rhode Island and Boston papers, a student shoved and, the next day, punched Aaron. The unprovoked, surprise assault necessitated five stitches under Aaron's right eye. The assailant was suspended for nine days. After this, Aaron was given a special parking space closer to the school doors and has been provided with an escort (principal or assistant principal) between classes. No further incidents have occurred.

This necessarily brief account does not convey the obvious concern and good faith Lynch has displayed in his handling of the matter. Lynch sincerely believes that there is a significant possibility that some students will attempt to injure Aaron and Paul if they attend the dance. Moreover, Lynch's actions in school have displayed a concern for Aaron's safety while at school. Perhaps—one cannot be at all sure—a totally different approach by Lynch might have kept the matter from reaching its present proportions, but I am convinced that Lynch's actions have stemmed—in significant part—from a concern for disruption.

Aaron contends that the school's action violates his first amendment right of association, his first amendment right to free speech, and his fourteenth amendment right to equal protection of the laws. (The equal protection claim is a "hybrid" one—that he has been treated differently than others because of the content of his communication.)[3]

The starting point in my analysis of Aaron's first amendment free speech claim must be, of course, to determine whether the action he proposes to take has a "communicative content sufficient to bring it within the ambit of the first amendment." *Gay Students Organization v. Bonner*, 509 F.2d 652 (1st Cir. 1974) (hereinafter *Bonner*). As this Court has noted before, the "speech pure"/"speech plus" demarcation is problematic, both in logic and in practice. *Reilly v. Noel*, 384 F.Supp. 741 (D.R.I.1974); see cases cited therein. This normally difficult task is made somewhat easier here, however, by the precedent set in *Bonner, supra*. In that case, the University of New Hampshire prohibited the Gay Students' Organization (GSO) from holding dances and other social events. The first circuit explicitly rejected the idea that traditional first amendment rights of expression were not involved. 509 F.2d at 660. The Court found that not only did discussion and exchange of ideas take place at informal social functions, *id.* at 660–61, but also that:

> beyond the specific communications at such events is the basic "message" GSO seeks to convey—that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society.
>
> *Id.* at 661.

Here too the proposed activity has significant expressive content. Aaron testified

> Should you wish to appeal my decision, you may appeal to the Superintendent of Schools, Mr. Robert G. Condon. You will be entitled to a hearing before him or his designee. If you are not satisfied with his decision, you may appeal to the Cumberland School Committee. You are entitled to be represented by counsel, to examine and cross examine witnesses and to present witnesses on your own behalf. Further procedural details may be obtained from the Superintendent's office.
>
> If you have any further questions, please feel free to contact me. I am sending a copy of this letter to your parents in the event they wish to be heard.
>
> Sincerely,
> Richard B. Lynch
> Principal

3. The plaintiff has not advanced the plausible arguments that homosexuals constitute a suspect class, *see* L. Tribe, *American Constitutional Law* (1978) at 944–45 n. 17, or that one has a constitutional right to be a homosexual, *see, e. g., Acanfora v. Board of Education*, 359 F.Supp. 843 (D.Md.1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974). The first amendment aspect of the case makes it unnecessary for me to reach these issues, although they may very well be applicable to this kind of case.

that he wants to go because he feels he has a right to attend and participate just like all the other students and that it would be dishonest to his own sexual identity to take a girl to the dance. He went on to acknowledge that he feels his attendance would have a certain political element and would be a statement for equal rights and human rights. Admittedly, his explanation of his "message" was hesitant and not nearly as articulate as Judge Coffin's restatement of the GSO's message, cited above. Nevertheless, I believe Aaron's testimony that he is sincerely—although perhaps not irrevocably—committed to a homosexual orientation and that attending the dance with another young man would be a political statement. While mere communicative intent may not always transform conduct into speech, *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968), *Bonner* makes clear that this exact type of conduct as a vehicle for transmitting this very message can be considered protected speech.[4]

Accordingly, the school's action must be judged by the standards articulated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and applied in *Bonner*: (1) was the regulation within the constitutional power of the government; (2) did it further an important or substantial governmental interest; (3) was the governmental interest unrelated to the suppression of free expression; and (4) was the incidental restriction on alleged first amendment freedoms no greater than essential to the furtherance of that interest? *Bonner* at 662.

I need not dwell on the first two *O'Brien* requirements: the school unquestionably has an important interest in student safety and has the power to regulate students' conduct to ensure safety. As to the suppression of free expression, Lynch's testimony indicated that his personal views on homosexuality did not affect his decision, and that but for the threat of violence he would let the two young men go together. Thus the government's interest here is not in squelching a particular message because it objects to its content as such. On the other hand, the school's interest is in suppressing certain speech activity because of the reaction its message may engender. Surely this is still suppression of free expression.

It is also clear that the school's action fails to meet the last criterion set out in *O'Brien*, the requirement that the government employ the "least restrictive alternative" before curtailing speech. The plaintiff argues, and I agree, that the school can take appropriate security measures to control the risk of harm. Lynch testified that he did not know if adequate security could be provided, and that he would still need to sit down and make the necessary arrangements. In fact he has not made any effort to determine the need for and logistics of additional security. Although Lynch did not say that any additional security measures would be adequate, from the testimony I find that significant measures could be taken and would—in all probability—critically reduce the likelihood of any disturbance. As Lynch's own testimony indicates, police officers and teachers will be present at the dance, and have been quite successful in the past in controlling whatever problems arise, including unauthorized drinking. Despite the ever-present possibility of violence at sports events, adequate discipline has been maintained. From Lynch's testimony, I have every reason to believe that additional school or law enforcement personnel could be used to "shore up security" and would be effective. It should also be noted that Lynch testified that if he considered it impossible to provide adequate security he would move to

4. The defendant argues that Aaron has selected an inappropriate time and place for his speech activity. Admittedly, Aaron seeks to express a political message in a social setting. His message, however, will take a form uniquely consonant with the setting—he wishes to attend and participate like everyone else. Thus, while a purer form of speech—such as leafleting or speechmaking—might legitimately be barred at a dance, prohibiting Aaron's attendance does not fall within the rubric of a time, place, and manner restriction. This is especially so because the school's action is not entirely content-neutral. See note 5 and p. 385, *supra*.

cancel the dance. The Court appreciates that controlling high school students is no easy task. It is, of course, impossible to guarantee that no harm will occur, no matter what measures are taken. But only one student so far has attempted to harm Aaron, and no evidence was introduced of other threats. The measures taken already, especially the escort system, have been highly effective in preventing any further problems at school. Appropriate security measures coupled with a firm, clearly communicated attitude by the administration that any disturbance will not be tolerated appear to be a realistic, and less restrictive, alternative to prohibiting Aaron from attending the dance with the date of his choice.

[1–3] The analysis so far has been along traditional first amendment lines, making no real allowance for the fact that this case arises in a high school setting. The most difficult problem this controversy presents is how this setting should affect the result. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), makes clear that high school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506, 89 S.Ct. at 736. As the *Tinker* Court stated:

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. *Burnside v. Byars* [363 F.2d 744] . . . .

Tinker at 508–09, 89 S.Ct. at 737–738. Numerous other courts have recognized and enforced students' rights to free expression inside and outside the classroom. *E.g.*, *Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972); *Butts v. Dallas Independent School District*, 436 F.2d 728 (5th Cir. 1971); *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

Tinker did, however, indicate that there are limits on first amendment rights within the school:

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. *Burnside v. Byars, supra*, at 749. *But conduct by the student, in class or out of it, which for any reason —whether it stems from time, place or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (C.A. 5th Cir. 1966).

Tinker at 513, 89 S.Ct. at 740 (emphasis added).

It seems to me that here, not unlike in *Tinker*, the school administrators were acting on "an undifferentiated fear or apprehension of disturbance." True, Aaron was punched and then security measures were taken, but since that incident he has not been threatened with violence nor has he been attacked. There has been no disruption at the school; classes have not been cancelled, suspended, or interrupted. In short, while the defendants have perhaps shown more of a basis for fear of harm than in *Tinker*, they have failed to make a "showing" that Aaron's conduct would "materially and substantially interfere" with school discipline. *See Tinker* at 509, 89 S.Ct. at 737. However, even if the Court assumes that there is justifiable fear and that Aaron's peaceful speech leads, or may lead, to a violent reaction from others, the question remains: may the school prohibit the speech, or must it protect the speaker?

[4, 5] It is certainly clear that outside of the classroom the fear—however justified—of a violent reaction is not sufficient reason to restrain such speech in advance, and an actual hostile reaction is rarely an adequate basis for curtailing free speech. *Gregory v. City of Chicago*, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); *Collin v. Chicago Park District*, 460 F.2d 746 (7th Cir. 1972); *Williams v. Wallace*, 240 F.Supp. 100 (M.D.Ala.1965). Thus, the question here is whether the interest in school discipline and order, recognized in *Tinker*, requires a different approach.

[6, 7] After considerable thought and research, I have concluded that even a legitimate interest in school discipline does not outweigh a student's right to peacefully express his views in an appropriate time, place, and manner.[5] To rule otherwise would completely subvert free speech in the schools by granting other students a "heckler's veto," allowing them to decide—through prohibited and violent methods—what speech will be heard. The first amendment does not tolerate mob rule by unruly school children. This conclusion is bolstered by the fact that any disturbance here, however great, would not interfere with the main business of school—education. No classes or school work would be affected; at the very worst an optional social event, conducted by the students for their own enjoyment, would be marred. In such a context, the school does have an obligation to take reasonable measures to protect and foster free speech, not to stand helpless before unauthorized student violence.

5. The second reason relied upon by the *Bonner* court in finding the GSO social events to be speech-related was the interpretation placed upon those events by the community. There the university prohibited the gay social events because the community considered them "shocking and offensive," "a spectacle, an abomination," an "affront" to townspeople, "grandstanding," inflammatory, "undermin[ing] the university within the state," and distasteful. The first circuit concluded that "[w]e do not see how these statements can be interpreted to avoid the conclusion that the regulation imposed was based in large measure, if not exclusively, on the content of the GSO's expression." *Bonner* at 661. I quite agree that these statements of community outrage indicate that the *content*, i. e. the homosexual-ness, of the GSO's activities led to the strong reaction and the prohibition, not the fact that they were dances. With all due respect, however, I am puzzled by how this reaction proves the *expressive* nature of these activities. Community outrage per se does not transform conduct into speech, or even indicate that it is speech; communities have reacted with outrage similar to that of the citizens of New Hampshire to such non-expressive activities as Hester Prynne's adultery, the dumping of chemicals into Love Canal, and the Son of Sam murders. It is hard in *Bonner* to separate the community's opposition to the GSO's acts from its opposition to its message (if the acts had a message); surely they opposed both. Same-sex dancing may have an expressive element, but it is also action, and potentially objectionable as such.

Insofar as *Bonner* directs me to consider community reaction in assessing expressive content, I conclude that the community disapproves of the content of Aaron's message and that the vehemence of their opposition to his intended escort is based in part on this disapproval of what he is trying to communicate. The school here professes to be unconcerned with the content of the plaintiff's message, but their concern with townspeople's reaction is, indirectly, content-related.

This holding is supported by other cases that have considered the problem, although they were not actually confronted with a reasonable expectation of a disturbance. In *Butts v. Dallas Independent School District*, 436 F.2d 728, 732 (5th Cir. 1971), the fifth circuit protected the wearing of black armbands saying:

> we do not agree that the precedential value of the *Tinker* decision is nullified whenever a school system is confronted with disruptive activities or the possibility of them. Rather we believe that the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative.

Judge Goldberg's well reasoned and eloquent opinion in *Shanley v. Northeast Independent School District*, 462 F.2d 960, 973–74 (5th Cir. 1972), upholding the right of high school students to write and distribute a newspaper off school grounds, asserted:

> However, we must emphasize in the context of this case that even reasonably forecast disruption is not per se justification for prior restraint or subsequent punishment of expression afforded to students by the First Amendment. If the content of a student's expression could give rise to a disturbance from those who hold opposing views, then it is certainly within the power of the school administration to regulate the time, place, and manner of distribution with even greater latitude of discretion. And the administration should, of course, take all reasonable steps to control disturbances, however generated. We are simply taking note here of the fact that disturbances themselves can be wholly without reasonable or rational basis, and that those students who would reasonably exercise their freedom of expression should not be restrained or punishable at the threshold of their attempts at expression merely because a small, perhaps vocal or violent, group of students with differing views might or does create a disturbance. (Citations omitted.)

[8] The present case is so difficult because the Court is keenly sensitive to the testimony regarding the concerns of a possible disturbance, and of physical harm to Aaron or Paul. However, I am convinced that meaningful security measures are possible, and the first amendment requires that such steps be taken to protect—rather than to stifle—free expression. Some may feel that Aaron's attendance at the reception and the message he will thereby convey is trivial compared to other social debates, but to engage in this kind of a weighing in process is to make the content-based evaluation forbidden by the first amendment.

As to the other concern raised by *Tinker*, some people might say that Aaron Fricke's conduct would infringe the rights of the other students, and is thus unprotected by *Tinker*. This view is misguided, however. Aaron's conduct is quiet and peaceful; it demands no response from others and—in a crowd of some five hundred people—can be easily ignored. Any disturbance that might interfere with the rights of others would be caused by those students who resort to violence, not by Aaron and his companion, who do not want a fight.

[9] Because the free speech claim is dispositive, I find it unnecessary to reach the plaintiff's right of association argument or to deal at length with his equal protection claim.[6] I find that the plaintiff has estab-

6. This case can also be profitably analyzed under the Equal Protection Clause of the fourteenth amendment. In preventing Aaron Fricke from attending the senior reception, the school has afforded disparate treatment to a certain class of students—those wishing to attend the reception with companions of the same sex. Ordinarily, a government classification need only bear a rational relationship to a legitimate public purpose; only where the classification encompasses a suspect class or burdens a fundamental right is the government held to a stricter standard of justification. Counsel have conceded that homosexuals are not a suspect class sufficient to trigger a higher standard of scrutiny. As noted above, however, there is a significant first amendment component to Aaron's desire to attend the reception with another male. Where, as here, government classification impinges on a first

lished a probability of success on the merits and has shown irreparable harm; accordingly his request for a preliminary injunction is hereby granted.

As a final note, I would add that the social problems presented by homosexuality are emotionally charged; community norms are in flux, and the psychiatric profession itself is divided in its attitude towards homosexuality. This Court's role, of course, is not to mandate social norms or impose its own view of acceptable behavior. It is instead, to interpret and apply the Constitution as best it can. The Constitution is not self-explanatory, and answers to knotty problems are inevitably inexact. All that an individual judge can do is to apply the legal precedents as accurately and as honestly as he can, uninfluenced by personal predilections or the fear of community reaction, hoping each time to disprove the legal maxim that "hard cases make bad law."

Harold JARVIS, et ux

v.

Raymond E. JOHNSON et al.

v.

Lois E. GILLETTE.

Civ. A. Nos. 79-2, 79-99 Erie.

United States District Court,
W. D. Pennsylvania.

May 28, 1980.

On day after verdict in favor of plaintiff, plaintiff filed motion to amend judgment to add damages for delay pursuant to Pennsylvania rule permitting award of delay damages. The District Court, Knox, J., held that Pennsylvania rule permitting award of delay damages was procedural rather than substantive and thus not applicable in federal court.

Motion denied.

Federal Civil Procedure ⇐51

Pennsylvania rule which was adopted by Pennsylvania Supreme Court and which was therefore procedural rather than substantive was not applicable in federal court, as federal courts have their own rules and devices to ease congestion. Const.Pa. Art. 5, § 10(c); Pa.R.C.P. Nos. 238, 238(f), 42 Pa.C.S.A.

John Gent, Erie, Pa., for plaintiffs.

John Beatty, Erie, Pa., for defendants.

Donald Bebenek, Pittsburgh, Pa., Charles D. Marlett, Erie, Pa., for third party defendant.

MEMORANDUM

KNOX, District Judge.

We have a case here where the jury has found verdicts in favor of the plaintiffs in the amount of $72,750, $67,750 being entered in favor of plaintiff Harold L. Jarvis. The court reduced the verdict in his favor by $15,000 pursuant to the Pennsylvania no fault law, leaving a net award of $52,750 which, added to the $5,000 awarded his wife, gives a total amount involved of $57,750. Plaintiff, on April 1, 1980, the day after the verdict on March 31, 1980, filed a motion to amend judgment to add damages for delay from October 16, 1979.

Plaintiff's motion to amend was filed pursuant to Rule 238 Pa.R.C.P.

Subdivision (f) of Rule 238 is the portion applicable here and reads as follows:

amendment right, the government is held to a higher level of scrutiny. *Chicago Police Department v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Reilly v. Noel*, 384 F.Supp. 741 (D.R.I.1974).

I find that principal Lynch's reason for prohibiting Aaron's attendance at the reception—the potential for disruption—is not sufficiently compelling to justify a classification that would abridge first amendment rights.

For "Frick v Lynch"

Dennis, Donna J. and Ruth E. Harlow, "Gay Youth and the Right to Education." Yale Law & Policy Review 4 (1986): 448-478.

Jacqueline LANTZ, by her Next Friend, Lucille LANTZ, Plaintiff,

v.

Gordon M. AMBACH, individually and as Commissioner of the New York State Department of Education; and Martin C. Barell, Chancellor of the New York State Board of Regents, R. Carlos Carballada, Vice Chancellor of the Board of Regents, Willard A. Genrich, Chancellor Emeritus of the Board of Regents, Jorge L. Batista, Shirley C. Brown, Kenneth B. Clark, Laura Bradley Chodos, Thomas H. Frey, Norma Gluck, Emlyn I. Griffith, Mimi Lieber, Floyd S. Linton, Louise P. Matteoni, James W. McCabe, J. Edward Meyer, Salvatore J. Sclafani, individually and as members of the New York State Board of Regents; and the Board of Education of Yonkers, New York; and the New York State Public High School Athletic Association, Defendants.

No. 85 Civ. 7735 (LLS).

United States District Court,
S.D. New York.

Oct. 30, 1985.

Female student in junior year at high school, who wanted to play football at school without girls' football team, brought action seeking declaratory judgment that public high school regulation which prohibited mixed sex competition in football and other specified sports violated federal law which proscribes sex discrimination in education programs or activities receiving federal financial assistance and equal protection clause, and injunction requiring state officials to delete regulation and permit her to try out for junior varsity football squad. The District Court, Stanton, J., held that: (1) regulation's operation was too broad and had to give weight to facts in particular cases, and (2) to extent that challenged regulation deprived female student of opportunity to try out for junior varsity football squad, it operated to abridge her right to equal protection, and state officials would be enjoined from complying with or enforcing regulation.

Regulation enforcement enjoined.

1. Civil Rights ⇐9.5

For sex discrimination to violate Title IX of the Education Amendments, which proscribes sex discrimination in education programs or activities receiving federal financial assistance, the sex discrimination must occur in specific program which receives federal financial assistance. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

2. Civil Rights ⇐9.5

Title IX of the Education Amendments regulations, which requires opportunity for female students to try out for male teams, or vice versa, where there is no team for students' own sex, does not apply to contact sports such as football. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

3. Civil Rights ⇐9.5

Title IX of the Education Amendments, which proscribes sex discrimination in education programs or activities receiving federal financial assistance, is neutral as to mixed sex competition in football. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

4. Civil Rights ⇐13.2(3)

Request for injunction or judgment declaring that public high school regulation which prohibits mixed sex competition in football and other specified sports violated Title IX of the Education Amendments, which proscribes sex discrimination in education programs or activities receiving federal financial assistance, would be denied, as the Title did not apply to football. Education Amendments of 1972, § 901 et seq., 20 U.S.C.A. § 1681 et seq.

5. Schools ⇐164

Governmental objective of public high school regulation which prohibits mixed sex competition in football and other sports is

to protect health and safety of female students.

6. Schools ⇐164

Governmental objective of protecting health and safety of female high school students is important.

7. Constitutional Law ⇐224(2)

Public high school regulation which prohibits mixed sex competition in football and other specified sports has no reasonable relation to achievement of governmental objective of protecting health and safety of female students, for purposes of equal protection, where particular girl is as fit or more to be on squad than weakest of squad's male members, as in such a case, effect of the regulation is to exclude qualified members of one gender because they are presumed to suffer from inherent handicap or to be innately inferior. U.S.C.A. Const.Amend. 14.

8. Constitutional Law ⇐224(2)

Operation of public high school regulation which prohibits mixed sex competition in football and other specified sports is too broad to be valid under equal protection clause, and must give way to facts in particular cases. U.S.C.A. Const.Amend. 14.

9. Civil Rights ⇐13.2(3)

Constitutional Law ⇐224(2)

To extent that public high school regulation which prohibits mixed sex competition in football and other specified sports deprived 16-year-old healthy female student in her junior year at high school of opportunity to try out for junior varsity football squad, regulation operated to abridge student's right under U.S.C.A. Const.Amend. 14, § 1, and state officials would be enjoined from complying with the regulation or enforcing it.

New York Civil Liberties Union, White Plains, N.Y., for plaintiff; Virginia Knaplund, of counsel.

Robert Abrams, Atty. Gen. of the State of N.Y., New York City, for defendants Gordon Ambach, Com'r of the N.Y. State Dept. of Educ. and N.Y. State Bd. of Regents; Stanley A. Camhi, Randolph Volkell, Asst. Attys. Gen., of counsel.

Anderson, Banks, Moore, Curran & Hollis, Yonkers, N.Y., for The Bd. of Educ. of Yonkers, N.Y.; Maurice F. Curran, Lawrence W. Thomas, of counsel.

McGivern, Shaw & O'Connor, Scotia, N.Y., for the N.Y. State Public High School Athletic Ass'n, Inc.; Ronald R. Shaw, of counsel.

STANTON, District Judge.

Plaintiff Jacqueline Lantz, a 16-year-old healthy female student in her junior year at Lincoln High School, Yonkers, New York wants to play football. Lincoln High School has no girls' football team, so she attempted to try out for the junior varsity football squad. Her attempts were blocked by a regulation promulgated by the defendant Commissioner of the New York State Department of Education under the authority of the defendant members of the New York State Board of Regents, and applied by defendants The Board of Education of Yonkers, New York and The New York State Public High School Athletic Association. The regulation, 8 N.Y.C.R.R. § 135.4(c)(7)(ii)(c)(2) states:

> "There shall be no mixed competition in the following sports: basketball, boxing, football, ice hockey, rugby and wrestling."

Suing under the Civil Rights Act, 42 U.S.C. § 1983, plaintiff claims the regulation violates Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and her right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. She seeks a declaratory judgment that the regulation as written violates that statute and that clause of the Fourteenth Amendment, and an injunction requiring the defendants to delete the regulation and permit her to try out for the junior varsity squad, and an award of attorney's fees. Under Fed.R.Civ.P. 65(a)(2) the trial of the action on the merits has been advanced and

consolidated with the hearing of the application for a preliminary injunction.

[1–4] It is not clear that Title IX applies to this case. To violate Title IX the sex discrimination must occur in the specific program which receives federal financial assistance. *See Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 1220–22, 79 L.Ed.2d 516 (1984). Plaintiff merely alleges on information and belief that the Lincoln High School Athletic Department receives funds under Title IX (Complaint ¶ 26), and no proof supports that allegation. If Title IX does apply, it helps neither side. Its regulations, which require opportunity for female students to try out for male teams (or vice versa) where there is no team for their own sex, do not apply to contact sports such as football. 34 C.F.R. 106.41(b). Title IX is simply neutral as to mixed competition in football. *See Force v. Pierce City R–VI School District*, 570 F.Supp. 1020, 1024–25 (W.D.Mo.1983). Accordingly, the request for an injunction or a judgment declaring that the regulation violates Title IX is denied.

[5, 6] The Supreme Court has stated that discrimination among applicants on the basis of their gender is subject to scrutiny under the Equal Protection clause of the Fourteenth Amendment, and will be upheld only where there is "exceedingly persuasive justification" showing at least that the classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 723–25, 102 S.Ct. 3331, 3335–36, 73 L.Ed.2d 1090 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S.Ct. 1195, 1199, 67 L.Ed.2d 428 (1981), and *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980)). Here the governmental objective is to protect the health and safety of female students, and there is no quarrel with the importance of that objective. To demonstrate that the regulation is substantially related to that objective, the Commissioner and the Board of Regents have offered data establishing that "as a general rule, senior high school students (age 15 through 18) are more physically developed, stronger, more agile, faster and have greater muscular endurance than their female counterparts" (Atty Genl's brief at 6–18), medical opposition to girls' participation on boys' teams in such contact sports as football (which Dr. Falls described as a "collision" sport) because of the risk of injury in such participation, and the testimony of Dr. Willie to the effect, among other points, that the present regulation enhances safety by permitting simple and uniform administration across the state.

[7, 8] But these data, however refined, inevitably reflect averages and generalities. The Commissioner and the Regents say (Atty Genl's brief at 19), "It makes no difference that there might be a few girls who wish to play football who are more physically fit than some of the boys on the team." Yet it does make a difference, because the regulation excludes all girls. No girl—and simply because she is a girl—has the chance to show that she is as fit, or more, to be on the squad as the weakest of its male members. Where such cases exist, the regulation has no reasonable relation to the achievement of the governmental objective. In such a case, the effect of the regulation is to exclude qualified members of one gender "because they are presumed to suffer from an inherent handicap or to be innately inferior." *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 725, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982). Thus the regulation's operation is too broad, and must give way to the facts in particular cases.

[9] Applying the language of *Force v. Pierce City R–VI School District*, 570 F.Supp. 1020, 1031 (W.D.Mo.1983), to this case, Jacqueline Lantz "obviously has no legal entitlement to a starting position" on the Lincoln High School Junior Varsity football squad, "since the extent to which she plays must be governed solely by her abilities, as judged by those who coach her. But she seeks no such entitlement here.

"Instead she seeks simply a chance, like her counterparts, to display those abilities. She asks, in short, only the right to try."

To the extent that the challenged regulation deprives her of the opportunity to try out for the junior varsity football squad, it operates to abridge her right under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the defendants will be enjoined from complying with it or enforcing it.

The foregoing comprises the Court's findings of fact and conclusions of law, and the reasons for the issuance of the injunction. It appears that every court which has considered questions like the one facing the court in this case has reached the same result. *See, e.g., Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F.Supp. 1117 (E.D.Wis.1978); *Clinton v. Nagy*, 411 F.Supp. 1396 (N.D.Ohio 1974); *Hoover v. Meiklejohn*, 430 F.Supp. 164 (D.Colo.1977); *Force v. Pierce City R–VI School District*, 570 F.Supp. 1020 (W.D.Mo.1983); *Reed v. Nebraska School Activities Ass'n*, 341 F.Supp. 258 (D.Neb.1972); *Morris v. Michigan State Bd. of Education*, 472 F.2d 1207 (6th Cir.1973); *Haas v. South Bend Community School Corp.*, 259 Ind. 515, 289 N.E.2d 495 (1972); *Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n*, 18 Pa.Cmwlth. 45, 334 A.2d 839 (1975) (applying Penn.Equal Rights Amendment); *Darrin v. Gould*, 85 Wash.2d 859, 540 P.2d 882 (1975) (en banc); *Attorney General v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 378 Mass. 342, 393 N.E.2d 284 (1979) (applying Mass.Equal Rights Amendment).

It is, accordingly

ORDERED that the trial of this action on the merits shall be and is hereby consolidated with the hearing on plaintiff's motion for a preliminary injunction, pursuant to Fed.R.Civ.P. 65(a)(2); and it is further

ORDERED that defendant Gordon M. Ambach as Commissioner of the New York State Department of Education and defendants Martin C. Barell, Chancellor of the New York State Board of Regents, R. Carlos Carballada, Vice Chancellor of the Board of Regents, Willard A. Genrich, Chancellor Emeritus of the Board of Regents, Jorge L. Batista, Shirley C. Brown, Kenneth B. Clark, Laura Bradley Chodos, Thomas H. Frey, Norma Gluck, Emlyn I. Griffith, Mimi Lieber, Floyd S. Linton, Louise P. Matteoni, James W. McCabe, J. Edward Meyer, and Salvatore J. Sclafani, as members of the New York State Board of Regents and each of them shall be and are hereby permanently restrained and enjoined from refusing to allow Jacqueline Lantz to compete for membership on the Lincoln High School Junior Varsity football squad on the same basis that males are allowed to compete, during the time that her enrollment makes her eligible to compete for Junior Varsity membership; and it is further

ORDERED that the defendant Board of Education, its agents and employees arrange for a prompt determination whether plaintiff Jacqueline Lantz is eligible for junior varsity football pursuant to the same standards that are applied to male candidates and, if she is found eligible, direct that she be permitted to try out for the squad; and it is further

ORDERED that the New York State Public High School Athletic Association shall be and is hereby permanently restrained and enjoined from imposing any sanctions against any plaintiff or any defendant because of their compliance herewith, and from taking any other action which interferes with the ability of Jacqueline Lantz to compete for a place on or play for the Lincoln High School Junior Varsity football squad during the time that her enrollment makes her eligible to compete for Junior Varsity membership; and it is further

ORDERED that plaintiff's claim for an award of costs, including prevailing attorney's fees, shall be and is hereby severed and shall be heard and disposed of at a future time to be set by order of the court upon plaintiff's application therefor, and that the judgment and injunctive orders set forth in the preceding paragraphs hereof shall be and are hereby designated as final

for purposes of appeal, and shall be entered as such, all pursuant to Fed.R.Civ.P. 54(b), it being the court's determination that there is no just reason to delay the entry and finality of the same.

To permit an immediate appeal this order and judgment are stayed until Midnight, October 29, 1985.

So ordered.

UNITED STATES of America,

v.

Jonas KLIMAVICIUS.

Civ. No. 84-0183 P.

United States District Court,
D. Maine.

Oct. 30, 1985.

In a denaturalization proceeding, the Government moved to compel deposition testimony of defendant and for sanctions for defendant's refusal to answer questions at a deposition. The District Court, Gene Carter, J., held that defendant failed to establish threat of foreign prosecution real and substantial enough to justify his invocation of Fifth Amendment privilege against self-incrimination.

Motion to compel discovery granted; motion for sanctions denied.

Witnesses ⇐297(14)

Defendant in denaturalization proceeding failed to establish there was a threat of foreign prosecution real and substantial enough to justify his invocation of Fifth Amendment privilege against self-incrimination with regard to deposition questions and request for production of documents. U.S.C.A. Const.Amend. 5.

Ronnie L. Edelman, Alan Held, Trial Attys., Washington, D.C., F. Mark Terison, Asst. U.S. Atty., Portland, Me., for plaintiff.

Ivars Berzins, Babylon, N.Y., Daniel Bates, Daniel G. Lilley, Portland, Me., for defendant.

MEMORANDUM OF DECISION AND ORDER GRANTING GOVERNMENT'S MOTION TO COMPEL DISCOVERY AND DENYING GOVERNMENT'S MOTION FOR SANCTIONS

GENE CARTER, District Judge.

In this denaturalization proceeding Plaintiff seeks to compel the deposition testimony of the Defendant and seeks sanctions for Defendant's refusal to answer questions at a deposition held on March 6, 1985. In its six-count Complaint, Plaintiff alleges that Defendant illegally obtained entry into and citizenship in the United States by concealing that he had aided the Nazis in persecuting civilian populations during World War II.

Defendant refused to answer any questions at his deposition other than those requesting his name and address. In response to other questions, Defendant responded, "Fifth Amendment," indicating that he did not wish to answer because his responses might tend to incriminate him. Defendant also refused to produce certain documents and handwriting and signature exemplars on Fifth Amendment grounds.[1] Plaintiff asserts in its motion herein that the Fifth Amendment privilege is unavailable to Defendant.

A major portion of Defendant's argument supporting his claim of Fifth Amendment privilege is that he has a reasonable fear of criminal prosecution in the U.S.S.R.,

1. The Court determined in a prior order that the Defendant could not support a Fifth Amendment claim as to the handwriting and signature exemplars. *United States v. Klimavicius*, 613 F.Supp. 1222 (D.Me.1985) (Order).

JUSTICE AND GENDER

Sex Discrimination and the Law

Deborah L. Rhode

HARVARD UNIVERSITY PRESS
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Chapter 11

Association and Assimilation

In 1896, in *Plessy v. Ferguson*, the United States Supreme Court upheld a Louisiana law providing "separate but equal" railway cars for white and black passengers. In response to claims that such segregation "stamps the colored race with a badge of inferiority," the Court stated: "If this be so, it is not by reason of anything found in the Louisiana act, but solely because the colored race chooses to put that construction on it." While the *Plessy* reasoning no longer enjoys a respectable following in contexts involving race, its legacy for gender issues is more complex. Not all women resent all forms of separatism, and American society remains deeply divided over which forms count as invidious.[1]

A substantial constituency even denies that gender separatism involves gender discrimination. In 1982, three Justices of the Supreme Court insisted that Mississippi University's exclusion of male students from one of its nursing schools was "simply not a [case of] sex discrimination," and advocates of all-male clubs have frequently made analogous claims. To these defenders of separatism, the preeminent issue is not equal protection but association, and the values of individual freedom and cultural diversity that underlie it. So too, although many feminists view equality as the central question, they differ sharply on whether single-sex institutions promote or subvert it.[2]

In part, the dispute rests on competing Utopian premises. As the concluding chapter suggests, there is no consensus within society in general or the feminist community in particular over the role that gender differences and gender segregation should play in an ideal world. Under one vision of an egalitarian social order, sex becomes like eye color, a biological characteristic that does not significantly shape public opportunities, personal aspirations, or associational networks. Other theorists, more ambivalent about the importance of gender identity in the ideal society, might preserve institutions that are sexually separate but truly equal.[3]

Even those sharing a similar Utopian vision often differ on the role of gender-based affiliations in bringing us closer to that ideal. A threshold disagreement centers on what priority to attach to the entire issue. Those most affected by single-sex clubs and schools are generally not those who are most economically or socially disadvantaged. Only a small percentage of American educational institutions are segregated by sex, and the number of all-male clubs and schools has been gradually declining. Why then should separatism become a central legal concern? Moreover, some feminists question women's insistence on getting in, as opposed to doing in, sex-segregated clubs. From their perspective, an association that bans women is not an association that women should want to join, particularly if it means endorsing principles that could undermine all-female affiliations.[4]

Other observers have questioned women's focus on an issue that risks trivializing their antidiscrimination campaign. If, for instance, prominent business leaders and government officials view organizations like the Bohemian Club as an opportunity to "dress like a woman and make wee wee on trees," they should be left in peace. Or if substantial numbers of students want to attend all-female schools, feminists should not be on the front lines fighting to deny them that choice.[5]

For many women, however, the issues surrounding gender-segregated secular institutions are not so readily dismissed. As a practical matter, single-sex clubs constitute a substantial presence on the social landscape. Membership in the Elks, Moose, Lions, and Eagles totals well over five million, and smaller, more elite institutions provide forums for significant political and commercial interchanges. As a symbolic matter, the exclusion of women, like that of racial or religious minorities, carries a stigma that affects individuals' social status and self-perception. And as a theoretical matter, separatism poses questions that have shaped feminist legal struggles for the last century: questions about public and private, sameness and difference, formal versus substantive equality. In what contexts should the sexes' distinctive social experiences find expression? Under what circumstances is special treatment for women's affiliations necessary to secure equal treatment for women? How much public structuring of personal choices are we prepared to tolerate?[6]

These questions call for a richer understanding of the dual role of sex-segregated institutions in American culture. They have provided channels for expressing individual autonomy and fostering collective goals; they have also been vehicles for denying individual opportunity and perpetu-

ating collective disadvantage. Their presence has served both to empower women and to exclude them from circles in which power is exercised. Such institutions have affirmed women's traditional values of care and connection, while reinforcing social hierarchies that work on opposite principles.

This complex legacy points up limitations in conventional constitutional doctrine, which seeks neutral principles, abstract categories, and sharp dichotomies. Judicial grapplings with gender-segregated clubs and schools over the last quarter-century reveal the inadequacy of efforts to differentiate public from private discrimination, or to distinguish associations that foster invidious stereotypes from those that promote a healthy pluralism. A more satisfactory framework must acknowledge the blurred character of our categories and the double-edged implications of our choices. Private institutions have public consequences, and legitimizing separatism in one setting often entrenches it in others. As with other issues, public-private dichotomies provide inadequate foundations for legal analysis.

If our approach toward separatism is to become more convincing, it must first become consciously contextual. It must begin not with abstract contested assumptions about the value of gender segregation in an ideal world, but rather with a clearer understanding of its mixed functions in this one. We may not be sure about the role gender ought to play in the good society, but we can share a sense of the role gender ought not to play. Here again, legal analysis must focus less on sex-based differences and more on sex-based disadvantages. From this perspective, we must distinguish between separatist institutions that on balance challenge or perpetuate such disadvantages. Any adequate analysis must become more attentive in theory to what is evident in fact. Associations of disempowered groups carry different social meanings than do associations of empowered groups, and associations of the disempowered vary in their capacity to alter that status. Under some circumstances, this approach will require preferential treatment for all-women's institutions. Only by seeking a frame of reference that focuses more concretely on the relation between gender separatism and gender disadvantages can we begin to deal adequately with associational issues.

Private Clubs and Public Values

Historical Perspectives

According to conventional wisdom, the United States has always been a nation of joiners. In no other country, Tocqueville asserted, "has the principle of association been more successfully used or applied to a greater multitude of objects." Later accounts suggest that society's increasing secularization, urbanization, and geographic mobility have heightened the

desire for organized affiliations. With the erosion of kinship, community, and religious ties, other social networks are generally thought to have grown more prominent.[7]

What sketchy empirical research is available suggests that these accounts require certain qualifications. Correlations between urbanization, secularization, and association are by no means clear. Nor is it apparent how distinctive Americans are in their desire for affiliation. Most adults do not report active participation in nonreligious associations. These qualifications should not, however, obscure the importance of such organizations to large segments of the population or to the culture in general. For the last two centuries, a broad array of civic, social, political, and professional groups has provided opportunities for personal growth and public influence. Associations ranging from the Guild of Former Pipe Organ Plumbers to societies for Females who Have Deviated from the Paths of Virtue have organized around common concerns. Larger, more diverse groups have variously served to disperse power or to consolidate privilege; to conserve traditional values or to promote social change; to safeguard minority rights or to obstruct minority influence.[8]

Much of that work has proceeded through all-male or all-female affiliations. Although there are no reliable figures on the number of such organizations, historical research leaves little doubt about the sex-segregated landscape of American associations. Throughout the eighteenth and nineteenth centuries, men generally dominated the public sphere, while women occupied the domestic sphere, and their organizational affiliations reflected similar patterns. Early all-male associations served as forums for political debate, professional interchange, and social advancement; female groups tended to center on family, charitable, and religious activities. Most of the nation's influential political and legal theorists of this period apparently shared Thomas Jefferson's conviction that, in order to prevent "depravity of morals and ambiguity of issues, women should not mix promiscuously in gatherings of men." Organizations that permitted females to be present did not necessarily invite their active participation. Women could be seen but not heard in many early abolitionist and religious societies; in some instances, they were not even to be seen. In one of the most celebrated examples, female participants in the 1840 London Anti-Slavery Conference found themselves seated in the balcony, cordoned off by curtains from the formal floor proceedings.[9]

Such experiences fostered feminist sentiments. By the mid-nineteenth century the boundaries of the sexes' separate spheres came under greater challenge. As more women sought political, educational, and employment opportunities, their desire for formal organizations increased. Some of these organizations were committed to altering gender roles, but an even larger array formed to assert traditional female values in a broader polit-

ical setting. Maternal, cultural, temperance, and social-reform associations provided channels for personal interchange and public influence. By 1914, the General Federation of Women's Clubs claimed over a million members.[10]

Typically these groups formed along class and race as well as gender lines. Barred from joining white women's organizations, black women formed their own local groups and their own national federation (the National Association of Colored Women). Although the organizations of minority and nonminority women filled many of the same needs and sought many of the same objectives, their agendas were not identical. Black women's groups were much more concerned with issues of racial discrimination and somewhat less interested in issues of gender discrimination than were their white counterparts. A relatively larger number of minority organizations appear to have been successful at bridging class barriers and focusing on issues of greatest importance to poor women.[11]

Although many all-female organizations never explicitly confronted the question of male membership, those that faced the issue were generally opposed. With some prominent exceptions, such as the National Association of Women's Suffrage, most groups proceeded on the assumption that female members could best gain self-confidence and organizational skills apart from the overpowering or "constraining presence of their more experienced brothers." In a few celebrated instances, these groups invited men to participate in club functions on the same terms women had enjoyed in male gatherings: guests could adorn but not participate in the proceedings.[12]

The growing popularity of women's associations met resistance from various quarters. Many commentators worried that women's organizational commitments, together with their increased access to educational and employment opportunities, would lure participants from their appointed sphere. The inevitable effect of female associations would be "homes . . . ruined [and] children neglected." Women's clubs were blamed for everything from the rise in feminist agitation to the decline of homemade pies.[13]

Such attributions were not wholly without substance, although the causal connections were more complicated than critics generally assumed. Like their educational counterparts, early all-female associations served both to challenge and to conserve traditional roles. By providing highly circumscribed channels for women's energies, some organizations may have deflected demands for more significant public involvement. Too often, women settled for the semblance rather than the substance of power. Moreover, club membership policies often reinforced class, race, ethnic, and religious prejudices that worked against coalitions on women's issues. Yet participation in collective activities also helped lay the foundations for a broader feminist consciousness. The confidence and competence that some members gained in organizational settings encouraged involvement in other public pursuits. Even the most traditional female associations often invited feminist speakers, debated feminist issues, or inadvertently became enlisted in feminist causes. For example, social-purity societies that began with the mission of rescuing women from sin sometimes found themselves denouncing the male sexual and employment practices that rendered sin a necessary vocation. The barriers that women's organizations experienced in pursuit of traditional women's interests often helped persuade members to define such interests more broadly. To preserve the sanctity of the home, organizations such as the Women's Christian Temperance Union came to support measures that ultimately expanded women's influence outside it.[14]

The dual role of single-sex institutions in challenging and in conserving traditional gender patterns persisted throughout the twentieth century. Particularly for full-time homemakers, such clubs often provided the most accessible channel for personal growth and public influence. And, like their nineteenth-century predecessors, some traditionalist organizations evolved in the 1960s and 1970s into forums for more active feminism. But, unlike all-male clubs, few all-female associations provided important career advantages. Organizations that formed in response to men's affiliations, such as the Jaycettes, Rotary-Anns, ladies' auxiliaries, or women's professional associations, failed to attain similar social status, and most of the prominent women's organizations, such as NOW and the League of Women Voters, admitted men.

Legal Challenges

Given this historical backdrop, it is not surprising that almost all legal challenges to gender-segregated clubs have been directed at all-male institutions. Such challenges have met with only partial success. Judicial and legislative decisionmaking has sought to establish a firm boundary between public and private associations, and sex-discrimination plaintiffs have managed only to chip away at the margins, not to challenge underlying premises.

Traditionally, the state-action requirement of the Fourteenth Amendment has insulated private clubs from constitutional scrutiny. Over the last century the Supreme Court has declined to extend equal protection requirements to a segregated association absent a showing either: that it performs a "public function" by offering goods or services historically provided by governments; or that the government is significantly involved with the association through regulation or enforcement of discriminatory practices. Conferral of a liquor license or state charter has not been thought a sufficient entanglement to meet the state-action requirement.

And although the availability of tax deductions and exemptions has been an adequate nexus of government involvement in cases involving race, it has proved inadequate in cases involving gender. This double standard is also reflected in Internal Revenue Code provisions and Supreme Court precedents that have made race—but not sex—discrimination a basis for denying tax deductions and exemptions to organizations.[15]

A comparable distinction is evident in many public-accommodations statutes. Acting under the commerce power, Congress drafted Title II of the 1964 Civil Rights Act to ban discrimination in public accommodations on the grounds of race, religion, or national origin, but not sex. Political leaders willing "to end the White Cafe [were] not prepared to close down the Men's Grill." State legislatures have been somewhat more receptive. During the two decades following the Civil Rights Act, about half the states passed public-accommodations laws that included prohibitions on gender discrimination. Yet these statutes, by express provision or judicial interpretation, have generally extended only to "public" institutions. Their effect on sex-segregated clubs initially was quite limited. In the 1980s, however, lobbying and litigation efforts began to expand conventional understandings of the term "public."[16]

Those efforts have received cautious approval from the Supreme Court, although the scope of its holdings has remained unclear. First in *Roberts v. United States Jaycees* (1984), and then in *Rotary International v. Rotary Club of Duarte* (1987) and *New York State Club Association v. City of New York* (1988), the Court held that state or local antidiscrimination laws could ban gender restrictions in club membership policies without infringing First Amendment rights of association. In so holding, the Court noted that associational interests have received constitutional protection in two contexts. One line of decisions has shielded certain intimate human relationships against state intrusion in order to preserve fundamental personal liberties. A second line of precedents has recognized rights to associate in order to engage in other constitutionally protected activities—speech, assembly, and religious expression. In analyzing the first interest, the Court concluded that neither Jaycee nor Rotary clubs could claim the kind of intimate attachments that warranted constitutional protection. Factors influencing that determination included the substantial size of some club chapters, the inclusiveness of admission processes apart from gender, and the participation of nonmembers and female associate members in many organizational functions. Although a "not insubstantial" part of club activities involved protected expression, admitting women as full members would not, in the majority's view, require altering or abandoning that expression.[17]

The Court reached a similar conclusion in the *New York State Club* case. At issue was a facial challenge to an antidiscrimination law applicable to nonreligious associations that had over four hundred members, provided regular meal service, and regularly received payment directly or indirectly from nonmembers "for the furtherance of trade or business." Since the legislation had not yet been enforced, the Court was unwilling to assume that the admission of women would impair associational or advocacy interests. However, the Justices left open the possibility that individual clubs subsequently could show such impairment under principles set forth in *Rotary* and *Jaycees*.[18]

If hard cases make bad law, easy cases sometimes do no better, and the private-clubs decisions are good examples. The organizational practices at issue in *Jaycees* and *Rotary* were not typical of most sex-segregated clubs, and the Court's opinions were careful to limit their holdings to those practices. The *New York Club* decision also offered no guidance on the application of constitutional principles to large but selective clubs. What is disturbing about this sequence of cases is not the results but the rationales, and the Court's continued adherence to a public-private framework that does not adequately capture the competing values at issue.

A threshold difficulty lies with the distinction between intimate and nonintimate associations. Under the analysis endorsed in *Jaycees, Rotary International,* and various lower court decisions, the ultimate question is whether an organization seems more an extension of home or market. That leaves many groups occupying an awkward middle ground, and neither of the principal criteria the Supreme Court identified, size and selectivity, yields satisfactory distinctions.[19]

For example, what level of protection should apply to the organizations that are large but more exclusive than the Minnesota Jaycees, which reportedly had rejected no male applicant in recent memory? Many selective groups have substantial memberships; some 2,000 individuals belong to the Bohemian Club, and restrictive luncheon and country clubs frequently number in the hundreds. It is not self-evident that gender prejudice is more deserving of protection in such elitist organizations than in their more democratic counterparts. So too, the relation between size and intimacy is more complicated than conventional doctrines have acknowledged. Some exclusive organizations, although not intimate in scale, can provide forums for developing intimate relationships.

Moreover, missing from the major associational privacy cases is any acknowledgment of the values that separatism might serve, whatever an association's size or exclusivity. The dynamics of mixed and single-sex organizations differ, and separatism in some contexts may present opportunities for self-expression and collective exploration that would be inhibited by gender integration. Many feminist associations have proceeded on that assumption. Indeed, much of the literature on single-sex affiliations suggests that subordinate groups can be empowered by the exclusion

of dominant groups. The ability to choose associates or to determine who should share private information and social activities is an aspect of personal liberty warranting at least some constitutional recognition independent of size and selectivity. By granting individuals the right to structure their social relationships without state intrusion, the law can create spheres of solidarity that promote both private and public values. Such associations preserve opportunities for self-expression and mutual commitment, as well as constraints on governmental power.[20]

Equally disquieting has been the courts' treatment of expressive interests. In the *Jaycees* litigation, for example, the organization's counsel asserted that women would have different attitudes about various issues on which the group had taken a public position, particularly its campaign supporting President Reagan's economic policies. Without referring to that example, the majority dismissed such claims as resting on "sexual stereotyping" and "unsupported generalizations about the relative interests and perspectives of men and women." The problem with that analysis was not simply its willingness to overlook a wealth of gender-gap studies supporting the Jaycees' argument. A more fundamental difficulty was the implication that exclusion from an all-male institution could be permissible if the club had supported its generalizations and produced evidence suggesting that female members might challenge its prevailing values. If the price of women's admission is a promise of assimilation, that alternative is deeply problematic.[21]

The claims about "women's point of view" at issue in cases like *Jaycees* are analogous to arguments that have divided American feminism for decades. Suffragists in the nineteenth and early twentieth centuries alternated between asserting that women were fundamentally the same as men and therefore entitled to the same rights of citizenship, and contending that women were fundamentally different and that their distinctive perspectives warranted equal representation. Comparable disputes resurfaced in the 1970s and 1980s fueled in part by research of feminist theorists such as Carol Gilligan and Nancy Chodorow, discussed in the chapter that follows. The implications of much of this work run counter to the position that civil liberties and women's rights organizations generally took as *amici curiae* in *Jaycees*. Claims about gender-linked attributes and attitudes that arise from males' and females' different social experience are not easily reconciled with the rhetoric of many *amici* briefs, which rejected all "stereotypical assumptions" that "women as a group will express differing . . . views merely because of their sex."[22]

Yet the case for full female participation in all-male associations like the Jaycees or Rotary need not depend on denying either sex-linked differences or the value of single-sex associations. Instead, it entails a more contextual assessment of the significance of those differences and

values. If men and women as groups tend to differ in their approach to certain moral or political issues, it does not necessarily follow that the particular men and women likely to join a given organization would differ. Nor does it follow that the organization should be entitled to use gender as a crude proxy for personal ideology. In a wide variety of other contexts, courts have declined to permit the use of sex-linked generalizations, however accurate, because the social costs are too high. The same result should hold for institutions where gender segregation has perpetuated gender disadvantages. Organizations could of course consider ideology in selecting their membership; they simply could not rely on sex-based generalizations to justify categorical exclusions. Given the availability of more accurate screening devices, sexual integration need not impair an association's expressive activities. Rather, it might enrich assessment of issues on which the sexes have a common interest.[23]

A framework more attentive to gender disadvantages than gender difference would focus more directly on the social costs that flow from single-sex affiliations. These costs are more extensive than conventional public-private distinctions and state-action doctrine have acknowledged. Although the *Jaycees, Rotary,* and *New York Clubs* holdings were an advance over earlier decisions, their reach remained quite limited. They permitted states to bar gender discrimination by certain organizations, but fell short of creating a constitutional remedy for such discrimination or of clarifying the organizations subject to regulation. These limitations in the Court's approach reflect more fundamental limitations in its public-private dichotomy. Such an approach obscures how women's exclusion from spheres conventionally classified as private contributes to their exclusion from spheres uniformly understood as public.

The perpetuation of all-male associations has worked to women's disadvantage on several levels. The most direct harms involve lost opportunities for social status, informal interchanges, and personal contacts. Although defenders of men's clubs have often presented them as refuges from commercial activity, the research available undercuts that characterization. Surveys of male executives as well as reports from business and professional women consistently emphasize the significance of men's associations. Such clubs have provided forums for exchanging information and developing relationships that generate business or career opportunities. In a society where men reportedly obtain almost one-third of their jobs through personal contacts, and probably a higher percentage of prestigious positions, the commercial role of social affiliations should not be undervalued. Nor should their political significance be overlooked. Elite all-male associations have often been the site for private discussions that later emerged as public policy.[24]

Women's exclusion from "private" associations also works in less direct

ways to perpetuate their subordinate public status. When employers schedule business functions at discriminatory clubs, many female employees face an uncongenial choice: attendance will compromise personal principles, while boycotts will risk compromising collegial relationships. Moreover, as the Supreme Court has long recognized in the context of racial discrimination, the denial of equal access inevitably constitutes a "deprivation of personal dignity." Sex discrimination carries similar symbolic freight. The nineteenth-century practice of organizational bundling, of cordoning off women from the centers of activity, has had numerous twentieth-century analogues. Relegating females to separate dining rooms, separate entrances, or separate organizations is an affront to their integrity and sense of self-worth. That affront is no less substantial because women "choose to put that construction on it." Rather, these symbols of inferiority, once perceived and internalized as such, can become self-perpetuating.[25]

In responding to such arguments, defenders of all-male institutions frequently maintain that women do not experience separatism as degrading but enjoy having their own clubs or dining facilities. These rejoinders, which resemble the explanations often given for excluding racial or religious minorities, obscure a fundamental distinction. Separatism imposed by empowered groups has a different symbolic and practical significance than separatism chosen by subordinate groups. Given this nation's historic traditions and cultural understandings, the exclusion of males from women's liberation groups or garden clubs no more conveys inferiority than does the exclusion of whites from black associations or Protestants from Jewish social organizations. Nor does such exclusivity perpetuate political, social, or economic disadvantages.[26]

By contrast, the forms of institutional separatism chosen by dominant groups tend to reinforce their privileged position and the stereotypes underlying it. The explanations that private-club members commonly advance for excluding women leave little doubt about the lingering strength of such stereotypes. It is variously claimed that a female presence would alter associational demeanor and decor, that women "wouldn't fit in," or that men would feel embarrassed using crude language, telling off-color jokes, or encountering "last night's date at lunch." According to one club manager, "if a man has a business deal to discuss, he doesn't want to sit next to a woman fussing about how much mayonnaise is on her chicken salad." To like-minded members of other clubs, sexual integration threatens to transform their organization's atmosphere into that of a "henhouse . . . [with] all that cackling" or of "Macy's basement at a post-Christmas sales." And as a fall-back position, some separatists invoke the perennial excuse: Washingon Metropolitan Club officials have

regretfully reported that, "much [as] we love the girls, we just don't have the lavatory facilities to take care of them."[27]

The rationale for male separatism thus appears less compelling in practice than in principle. The concerns that club members typically advance mesh poorly with the apocalyptic rhetoric that their legal advocates generally employ. It is difficult to perceive the alteration of club decor as a "chilling spectacle" or a prelude to totalitarian oversight. Moreover, when sexist stereotypes dictate associational policy, they tend to become self-reinforcing. No women are present to counteract the assumption that males' luncheon conversation centers on mergers, while females' fixates on mayonnaise. Men who are uncomfortable associating with women in such social settings are unlikely to become less so if discomfort remains a justification for exclusivity.[28]

Such discomfort is not readily confined. Those who have trouble treating women as equals at clubhouse lunches will not escape such difficulties in corporate suites or smoke-filled rooms. A substantial array of social science research indicates that individuals who seem "dissimilar" are often disliked and avoided in work-related contexts. As long as women do not "fit" in the private worlds where friendships form and power congregates, they will never fully "fit" in the public sectors with which the state is justifiably concerned.[29]

The boundary between public and private is fluid in still another sense that traditional state-action doctrine declines to acknowledge. Most "private" clubs depend heavily on public support, largely in the form of state and federal tax subsidies. Clubs gain tax exemptions by claiming to be private organizations in which "substantially all" activities are for pleasure, recreation, and other nonprofit purposes, while members (or their employers) deduct dues and fees as "ordinary and necessary business expenses." This privileged status points up the difficulties of seeking to label organizations as either commercial or noncommercial, public or private. Such rigid distinctions are further compromised by other forms of governmental support that state-action doctrine has discounted, such as federal grants, state liquor licenses, or municipal services.[30]

Alternative Frameworks

An alternative approach for sex-segregated associations must begin with a greater sensitivity to context, to the varying cultural consequences of particular institutional structures. If we distinguish between organizations that can reinforce and those that can challenge gender disadvantages, men's and women's groups will frequently stand on different footings. The point is not that values of choice and intimacy have less social importance for men than women, but rather that the social costs are

different. In a male-dominated society, the price of male cohesiveness is substantial. At this juncture, we cannot maximize both intimacy for men and equality for women. Nor can we underestimate the hard choices that our regulatory policies will entail. What we can do is make our choices with greater sensitivity to the full range of values underlying them. Our analysis can depend not only on the benefits available in single-sex associations but also on the likelihood that experiences of comparable value are available in mixed environments with fewer social costs.

Such an alternative approach requires a reconceptualization of public and private. In this context, a familiar feminist maxim holds particular force; the personal is the political and warrants legal recognition as such. That recognition of course only begins analysis. The difficult task lies in drawing distinctions that adequately reflect the dual role of sex-segregated institutions in enhancing and in confining human relationships. We need not only a better set of rules, but also a better understanding of their capacity to express our social aspirations.

To this end, our statutory and constitutional analysis should focus not simply on an organization's intimate or expressive character, but also on the totality of its public subsidies and public consequences. Rather than looking to any single nexus of state involvement, courts and legislatures should consider the cumulative significance of the organization's governmental and commercial entanglements. Public grants, licenses, and tax benefits can serve as legitimate bases for regulation. For example, any association that receives a substantial percentage of its revenues through tax exemptions and business deductions could be considered "public" and hence subject to prohibitions against gender discrimination. Alternatively, the state could withdraw favorable tax treatment or liquor licenses from sex-segregated organizations. Employers who subsidize membership fees and business functions at such clubs could be denied governmental contracts or be held liable for discrimination under existing statutory prohibitions. Since employers provide an estimated one and a half billion dollars in annual support to private clubs and 40 to 50 percent of the revenues of certain selective men's associations, the cumulative effect of these strategies would be significant. Recent municipal ordinances that follow some of these approaches have already had major effects on club policies.[31]

Focusing on governmental support and commercial entanglements would avoid some of the idiosyncrasies of conventional balancing approaches. Associational liberty and equal opportunity are not commensurable values that can be calibrated and offset in a neutral, principled fashion. Without a more focused framework, we are left with the kind of inconsistent decisionmaking that has viewed the Bohemian and Kiwanis clubs as private, and the Jaycees and Princeton eating clubs as public. Moreover, an approach that ties public sanctions to public entanglements

accommodates competing concerns; clubs willing to forego tax advantages, employer contributions, or state licenses could retain their separatist status. This strategy would leave scope for associational choices but would not purport to be neutral as to their content. Since women's organizations on the whole tend to be less commercially oriented and thus less dependent on employer support or business expense deductions than men's organizations, such strategies would target those groups with the greatest social costs.[32]

That is not to underestimate the price of such a regulatory approach. Subjecting associational policies to state oversight increases the risk of harassing litigation and narrows the range of private choice. In some contexts, penalizing separatism by dominant groups may undermine its legitimacy for subordinate groups. We have, however, managed to prohibit racial discrimination by private clubs and schools and sex discrimination by private employers without the disabling social consequences that critics have often envisioned. Private organizations that serve public functions do not provide the only opportunities for male bonding in this society.

Of course, the more categorical any regulatory strategy, the more over- and underinclusive it will prove. Of particular concern are all-female organizations that might be inhibited by the withdrawal of preferential tax treatment. Yet a law that explicitly differentiates between men's and women's associations, while theoretically defensible, may prove politically unpalatable. The problem is not, as advocates of all-male clubs have frequently argued, that such distinctions would be unprincipled. An approach that disadvantaged men's organizations but not women's would be asymmetrical with respect to sex but not with respect to social influence. And from the point of view of reducing gender inequality, it is influence that matters.

From a more prudential perspective, however, it is risky to argue for a policy that expressly grants rights to women's but not men's affiliations. In some contexts, such as single-sex colleges or athletics, it makes sense to assume those risks. As the following discussion suggests, the small and declining number of all-male educational institutions, together with the remedial justifications for all-female learning environments, offers a defensible case for preferential treatment. So too, some sports warrant special solicitude for all women's but not all men's teams. For most forms of association, however, it is better to rely on strategies that differentiate men's and women's affiliations in practice rather than in principle. That is in part the justification for an approach that focuses on commercial entanglements and public subsidies.

Even if such a strategy encouraged more women's groups to adopt formal positions of gender neutrality, many would find that their com-

position did not actually change. Nor is it apparent that change is undesirable. As women become more fully integrated into male organizations, the need for some all-female associations may diminish. To the extent that groups like the Jaycettes or local women's networks have functioned less as communities by consent than communities by imitation or exclusion, their passing is an acceptable by-product of a more egalitarian society. Their demise would also have compensating benefits. Male involvement in female-dominated organizations can erode gender stereotypes and enlarge understandings of women's concerns. At the very least, an increase in sex-neutral admission policies would help undercut one of the most convenient current rationalizations for male separatism: that women are happy with their own institutions.

A more basic problem lies in the inevitable underinclusiveness of any legal assault on sex-segregated associations. The law is too blunt an instrument to reach the most influential separatist networks. Golfing groups and luncheon cliques that form along gender lines may play a more substantial role in limiting women's opportunities than any of the organized entities susceptible to legal intervention. Moreover, even in formal organizations, access does not insure admission. Nor does admission guarantee acceptance. Getting women into the right clubs is far easier than getting them to the right tables. But access is a necessary first step. Although we cannot eliminate social segregation by legal fiat, we can at least minimize its crudest form and the social legitimacy that perpetuates it.[33]

Education

Single-sex education presents comparable issues and comparable complexities. Women's schools, like women's organizations, evolved against a backdrop of separatism that they helped both to challenge and to perpetuate. The history of female education reflects the same ambivalence about gender differences that has divided the women's movement throughout the nineteenth and twentieth centuries.

Historical Perspectives

Although equal education was one of the earliest feminist demands, it enjoyed little public support during most of this nation's early history. Arguments for joint or equivalent instruction of the sexes, such as those advanced by British feminists Mary Astell and Mary Wollstonecraft in the late seventeenth and eighteenth centuries, had relatively little influence in the United States until after the Civil War. Throughout the Colonial and post-Revolution periods, female education was rudimentary. It rarely

progressed beyond instruction at home or in primary schools, generally in intermittent periods when boys were absent. Proposals for more systematic education often provoked extended tributes to "Mother's knee," which, as a site of female learning, allegedly rivaled the most distinguished universities in America and Europe. As John Trumbull suggested at the end of the eighteenth century:

> Why should girls be learn'd and wise?
> Books only serve to spoil their eyes.
> The studious eye but faintly twinkles
> And reading paves the way to wrinkles.[34]

In the late eighteenth and early nineteenth centuries, a small number of private women's schools began offering more advanced courses in academic disciplines and feminine accomplishment, and support grew for public elementary education of both sexes. By the latter part of the nineteenth century, amost all public primary schools were coeducational and a rising number of all-female secondary schools were offering a standard academic curriculum. Access to these institutions was highly restricted by class and race. Until the passage of compulsory-school-attendance laws and prohibitions on child labor in the late nineteenth and early twentieth centuries, education remained a luxury many poor families could not afford. Racial and ethnic prejudice, coupled with disparities in school finance systems, created barriers for minority and lower-class students at all educational levels.[35]

Nonetheless, the growing availability of elementary and secondary instruction in the mid-nineteenth century represented a significant advance. The increased demand for teachers, and the willingness of female employees to accept salary levels well below those of men, heightened the need for college-educated women. School administrations that had once excluded female applicants began to conclude that their "gentle," "unaspiring," and "compliant" natures, as well as heightened moral sensibilities, rendered them particularly suitable for working with children. The growing women's rights movement, the availability of better secondary institutions, and the declining enrollments of male students during the Civil War and Reconstruction era also helped expand opportunities for female college applicants. In 1837, some two hundred years after the founding of the first American college, Oberlin admitted the first women undergraduates, and Mount Holyoke Seminary began what eventually became an all-female baccalaureate program. Three decades later, approximately 3,000 female students were enrolled in four-year institutions. Slightly over two-thirds were in the nation's thirty-odd women's colleges,

and the remainder were dispersed across forty private coeducational colleges and eight state universities.[36]

Progress for minorities was far slower. In 1862, Oberlin granted the first college degree to a black woman in the United States; a quarter-century later, blacks numbered only about 30 of the nation's 250 female graduates. De facto and de jure segregation, coupled with financial constraints, severely limited the numbers of minority students and confined most to predominately minority institutions. However, expanded opportunities for white women laid foundations for an eventual increase in options for women of color.[37]

This expansion in female education was not without resistance. Many constituencies doubted that women had the physical or mental capacity for serious study. Opponents compiled an array of "scientific" data: women's brains were too light, their foreheads too small, their powers of reasoning too inadequate for rigorous academic programs. Female students who ignored such limitations did so at their peril. Highly influential works by Dr. Edward Clarke and his disciples warned that women who diverted their scarce biological reserves to cognitive rather than reproductive organs risked "life-long suffering," perhaps permanent sterility. Equal education for women could only result in defeminizing, deforming, and eventually depleting America's superior breeding stock. Even those who escaped physical risk would remain psychologically vulnerable. "Bookishness" was a "bad sign" in female adolescents; a rigorous academic program might tempt them from the "duties of [their] station."[38]

On closer examination, most of the empirical foundations for such claims looked rather tenuous. Dr. Clarke's work was based on six dubious cases, and more systematic research about women's physical and academic performance in higher education suggested that their alleged infirmities were more a product of "corsets and cant [than] calculus or Kant." Statistical surveys did, however, indicate that college-educated women were less likely to marry and had lower reproductive rates. Although a few observers consoled themselves by noting that such celibacy was occurring among the selfish, career-oriented women least likely to make good mothers, not all members of the educated classes contemplated their decline with equanimity. Concerns about the relation beween education and domesticity continued to color public debates, not only about equal opportunities for collegiate instruction, but also about the content and context of women's entire academic experience.[39]

The extent to which education should reflect or challenge traditional roles provoked controversy throughout the nineteenth and early twentieth centuries. To some advocates of expanded female instruction, such as Catherine Beecher and Emma Willard, the primary objective should be "the preparation of woman for her distinctive profession as housekeeper,

mother, nurse, and chief educator of infancy and childhood." Critics of the more rigorous nineteenth-century academies lamented the attention to algebra and astronomy among students whose primary mission was to "sew, darn, wash, [and] starch."[40]

In responding to such claims, defenders of intellectual rigor often took an ambiguous or ambivalent course. Some emphasized that the point of instructing women in traditional disciplines was both to "enlarge their spheres of thought" and to render them "more interesting companions to men." Chemistry might be significant in it own right, but its principles were also applicable in the kitchen. Early leaders of the Seven Sisters schools vacillated between denials that domesticity was women's "sole destiny" and reassurances that higher education would not divert her from traditional "womanly ways to serve," or make her "any the less woman." The tension was particularly apparent in Southern and church-affiliated institutions, which were sometimes chartered with the explicit intent of preparing women for conventional female roles.[41]

This ambivalence about educational objectives affected curricular debates throughout the nineteenth and early twentieth centuries. Even some of the more progressive coeducational colleges, including Oberlin, initially established a separate "ladies' course" or placed other restrictions on female students' opportunities. Although these constraints tended to lapse once the "ladies" had proven their ability to handle standard academic fare, many institutions continued to offer majors in subjects such as home economics, which were designed to bridge the gap between women's traditional roles and the university's traditional disciplines. As a result, the academic as well as extracurricular programs at coeducational schools frequently reflected patterns of de facto sexual segregation. Particularly in the more elite colleges, however, the trend was toward increasingly androgynous curricula. Even the revived cult of domesticity in the 1950s failed to reverse that progression. Despite repeated calls for a feminized program of study, with greater emphasis on haute cuisine and less on modern philosophy, few four-year colleges altered their traditional approach.[42]

This disdain for "female-oriented" courses came at a cost. One result was to obscure or devalue women's experience. In their attempt to establish academic credibility, leading women's schools tended to imitate rather than innovate. A prevailing assumption, as Bryn Mawr President M. Carey Thomas expressed it, was that a "men's curriculum" was essential for women if they were to "hold their own" in professional life after leaving the university. In Thomas' view, the role of women's colleges was to encourage such professional aspirations, a view reflected in her celebrated claim, "our failures only marry." Although a few institutions such as Sarah Lawrence and Bennington attempted to gear their programs to

women's interests, most curricula appeared intent on providing an education "at least as bad as that given men."[43]

With certain brief exceptions, such as Vassar's flirtation with "Euthenics" (dominated by unreflective courses on marriage and motherhood), the elite women's colleges evidenced almost no interest in women's studies until the 1970s. The focus was on encouraging individual achievement, not identifying collective problems. Even in the less prestigious all-female institutions, where relatively few graduates pursued academic or professional careers, little effort was directed toward rethinking conventional curricula, challenging traditional paradigms, or preparing students for "living with people as well as paper." Administrators who targeted special courses for women tended to confine offerings to narrow "feminine" areas such as home economics. On the whole, such instruction reaffirmed rather than challenged gender roles.[44]

Ironically enough, many early presidents of women's colleges were openly hostile to the women's rights movement, as well as to the "mannish tastes and manners" or "bumptious" professionalism that it might foster. Some institutions refused even to permit suffragist speakers on campus, let alone extend academic credit for studying their ideology, and many student bodies were equally unreceptive until late in the suffrage campaign. Even those administrators more sympathetic to the feminist movement were unwilling to consider it worthy of serious intellectual interest. Nor did faculty members feel free to devote significant scholarly attention to those areas until the 1970s. Although many of these academics had experienced gender discrimination in their own careers, few focused research on the causes and consequences of such social practices.[45]

Since most of the leaders (and many of the followers) in women's education during the late nineteenth and early twentieth centuries resisted efforts to "feminize" curricula, the rationale for single-sex institutions had to rest on different footing. Initially the main justification was male exclusivity. Most women's schools were founded at a time when administrators of prominent collegiate and secondary programs were adamantly opposed to coeducation. The reasons varied, and consistency was not among their strengths. It was claimed, for example, that romance would be both bred and destroyed by institutionalized intermingling of the sexes. Proximity would invite promiscuity or else androgyny. Some believed carnal appetites would prove uncontrollable; campuses would become "matrimonial bureaus . . . dotted with couples billing and cooing." Other critics assumed that such appetites would wither away once daily interchange made males "unmanly," females "unwomanly," and marriage less "glamourous." Many commentators, drawing on the same arguments that had been launched against any higher education for women, maintained that coeducation ignored "natural" differences in the sexes' mental ca-

pacities and social roles. Joint instruction would compromise traditional academic standards and coarsen feminine sensibilities. Related concerns involved the decline in athletic achievement, alumni contributions, and academic inquiry that would reportedly follow from female intrusion; women could scarcely be expected to hold their own on the football field or in rigorous analysis of "delicate" subjects.[46]

Early supporters of coeducational programs met opponents on their own terrain. Males and females received instruction together in the family, proponents submitted, and what could be more "natural" than the family? Not all tendencies toward androgyny were disadvantageous; society would benefit when men became more "orderly [and] gentle," and women became "stronger and more earnest" through joint education. It was sexual segregation, not integration, that was most likely to corrupt manners and morals. To some observers, the connection between female academies and feminist agitation was painfully apparent. Presumably the kind of "mutual understanding" that grew from joint instruction of the sexes would prove a desirable preventative for "extremis[m] in the suffrage cause." Such contact might also curb the "morbid tendencies," anticapitalist sentiments, and inadequate fertility rates that Calvin Coolidge accused the Seven Sister colleges of encouraging.[47]

For those unmoved by considerations of sex, there were considerations of money. However attractive in theory, separate but equal turned out to be quite expensive in practice. Most private women's schools could not match the resources of their male counterparts. Nor were taxpayers and legislators prepared to establish truly equivalent men's and women's facilities. Coeducation was cheaper and could minimize financial difficulties at formerly all-male institutions during periods of sagging enrollment. For minority communities, the costs of separate institutions were generally prohibitive. Only two black women's colleges, Spelman in Atlanta and Bennett in Greensboro, were able to secure a substantial funding base.[48]

At the turn of the century, the force of these economic as well as ideological considerations was clearly evident. Between 1870 and 1910, the proportion of colleges that was coeducational grew from less than one-third to more than one-half. By 1957, the ratio was almost three-quarters. Student agitation fueled further interest in coeducation during the 1960s and early 1970s. Administrators' initial responses varied, but many were less than enthusiastic. Harvard's President Nathan Pusey made his sentiments abundantly clear in a comment about the relation between conscription and the university's graduate programs; the draft, he predicted, would leave Harvard with the "blind, the lame, and the women." In 1971, the director of Harvard Admissions added that it would be "unfortunate to reduce the number of men . . . in order to accommodate more women students," since that would mean "less diversity in the class

and, as a result, fewer interesting people." But ultimately, even Harvard College succumbed. By the mid-1980s, single-sex schools accounted for only 2.3 percent of all college women and a much smaller percentage of men, and the trend in secondary schools was similar.[49]

Legal Challenges

Such trends developed largely without legal intervention. Gender separatism in public education did not attract significant attention until the 1970s, when debates over Title IX of the Civil Rights Act and the Equal Educational Opportunities Act raised the issue. At that point, qualified tolerance for sex discrimination became explicit national policy. In relevant part, these statutes prohibited such discrimination in federally funded educational programs, but created an exception for student admissions. Prior to a restrictive Supreme Court interpretation in the early 1980s, this legislation had significant effects, particularly in affirmative-action and athletic programs. On matters of student admissions, however, congressional sponsors claimed that they lacked sufficient factual information to pass judgment and declined to treat sex like race, color, or national origin as a prohibited ground for selection. Given the substantial academic research on the subject, these legislators' professed ignorance seems largely self-imposed. From the tenor of debate, it is by no means clear that such data would have influenced deliberations. Some legislators, whose wives or constituents reportedly received "a very fine education from A to Z" at women's schools, did not appear entirely open-minded on the subject. In any event, promises of further, more systematic congressional attention to the issue have not been kept.[50]

Most American courts have retained a similar distance from the subject. For three centuries, the exclusion of women from public and private education passed without judicial objection. Until the 1980s, the Supreme Court issued no full opinions on point; ironically, its first decision prohibited discrimination against male rather than female students. Prior to that decision, the Court declined certiorari or granted summary affirmances in several cases that merited more serious scrutiny. The first of these cases arose in 1960 and involved challenges to Texas A & M's exclusion of women. A parallel claim a decade later concerned the exclusion of men from Winthrop State College in South Carolina. In both instances, the lower courts upheld gender segregation despite evidence that the institutions offered courses unavailable at other schools and were more convenient for the plaintiffs. In neither case were the judges disturbed by the gender stereotypes reflected in the academic programs at issue. While Texas A & M required military training, Winthrop offered courses in stenography, typewriting, drawing, dressmaking, millinery arts, cooking, housekeeping, and other areas "suitable" for women. According

to the courts' reasoning, however, such curricular differences justified rather than indicted sex-based admissions. Although the decisions in both cases purported to preserve individual choice, they displayed no recognition of the way in which gender stereotypes constrained that choice.[51]

A comparable lack of sensitivity characterized a 1977 federal court of appeals holding in *Vorchheimer v. School District of Philadelphia*, affirmed without opinion by an equally divided Supreme Court. At issue was Susan Vorchheimer's right to attend Central High School, a public all-male college preparatory institution, rather than Girl's High, an all-female preparatory school. Despite Central's conceded superiority in mathematics and science programs, the court found that the schools offered "similar" courses, "comparable" facilities, and hence "comparable" education. From whose perspective and by what criteria remained more problematic than the court acknowledged. Certainly the institutions did not appear comparable to the plaintiff, who excelled in mathematics and science. Nor did they appear equivalent to the Philadelphia court that, in subsequent litigation under the state Equal Rights Amendment, identified numerous inequalities in library, instructional, and computer facilities as well as scholarship resources. What the federal panel also overlooked was empirical research suggesting that coeducational secondary schools promote less stereotypical attitudes toward the opposite sex than gender-segregated institutions and provide better learning environments than do all-male schools. Such findings are not conclusive, but they suggest the need for a more comprehensive inquiry than is apparent in *Vorchheimer* or other leading decisions.[52]

In this respect, the Supreme Court's decisions have not proven exceptions. The Court chose, for its first full opinion on sex-segregated education, a case that was ill-suited to the occasion. *Mississippi University for Women [MUW] v. Hogan* involved Joe Hogan's claim to admission at the nation's only all-female nursing school. In the view of many women's rights organizations, the Court's acceptance of the case for review was improvident; as their *amicus* brief noted, any holding limited to nursing schools would affect just one institution and the record was "exceedingly sparse" on the broader issue of single-sex schools. Undeterred by such observations, a divided Court upheld Hogan's claim. Although Justice O'Connor's majority opinion confined itself to MUW's school of nursing, the decision's logic was not so limited. Given the uncertain scope and symbolic significance of its holding, the majority's cursory evaluation of the merits of single-sex education remains troubling.[53]

Contemporary justifications for sex-segregated schools usually take two forms. One rationale is remedial and applies only to all-female institutions. This line of analysis suggests that gender segregation, like gender prefer-

ence in affirmative-action programs, serves a short-term objective of overcoming women's historic disadvantages in educational and vocational pursuits. A second and broader rationale, applicable to both male and female schools, involves pluralism; single-sex education promotes values of cultural diversity and personal association that have traditionally enjoyed First Amendment protection.

The *Hogan* majority chose to address only the first of these claims. In rejecting Mississippi's compensatory defense, Justice O'Connor reasoned that female students had not lacked opportunities for training or advancement in nursing. Nor had Mississippi demonstrated that gender-based admission was substantially related to any remedial objective. In 1980, women constituted about 97 percent of the nursing profession, and it has been discrimination against males, not females, that has helped to depress nurses' wages and status. According to the trial testimony of two witnesses, men do not dominate the nursing classroom and would not affect female students' performance. By continuing to exclude male applicants, the university's policies perpetuated archaic gender stereotypes about nursing as a women's profession. In the majority's view, such policies could not help but "penalize the very class the state purports to benefit."[54]

Particularly since this was the Court's first full opinion on single-sex schools, its analysis left much to be desired. As MUW's brief and Justice Powell's dissent pointed out, a substantial body of research suggests that certain all-female learning environments serve compensatory objectives. Compared with coeducational institutions, women's colleges reportedly have fostered greater verbal assertiveness, higher career aspirations, more intellectual self-esteem, expanded leadership opportunities, enhanced faculty-student contact, greater access to female role models, and more opportunities for women faculty and administrators. Presumably the state might have an interest in promoting some of these characteristics even for those in female-dominated professions. Why the Court declined even to mention this research and instead relied on two witnesses' more speculative opinions is not self-evident. It may be, as one brief suggested, that the university failed to introduce such research at trial. Alternatively, certain data regarding undergraduate programs may not be relevant for nursing schools because their students are older, the percentage of male enrollees is unusually small, and opportunities for female faculty and access to female role models are already present. In any case, the majority's analysis begs for qualifications missing from the opinion.[55]

Equally problematic was the dissenting opinion's unqualified embrace of the university's compensatory claim. In extolling the virtues of single-sex education, Justice Powell, joined by Justices Burger and Rehnquist, set forth a selective and superficial account of the available research. His

dissent relied uncritically on studies such as those by Elizabeth Tidball, which found that all-female colleges had produced a higher percentage than had coeducational colleges of those listed in *Who's Who of American Women* between 1910 and 1950. In explaining this disparity, Tidball argued that women's level of achievement was attributable to the greater number of female role models in women's colleges. Yet as *amici* briefs noted, the methodology of Tidball's study poses substantial problems.[56]

As a threshold matter, to view *Who's Who* listings as an adequate measure of achievement is to accept what many feminists have criticized as an impoverished understanding of individual worth, an understanding that has historically devalued women's contributions. But even accepting *arguendo* such definitions of success, one cannot infer a causal relation from a correlation without controlling for a host of variables that Tidball's research failed to acknowledge. From her data, it is impossible to separate the effects of single-sex schools from the higher socioeconomic status and career orientation of their students. Had Ivy League institutions been open to women during the period of Tidball's study, the percentage of achievers from coeducational schools might have been substantially different; subsequent research replicating Tidball's methodology suggests as much. So too, other empirical work on which the dissent and its authorities relied are, in the words of a recent Women's Coalition Report, "outdated and generally insufficient to support a coherent argument." For example, it is unclear how attributes such as greater verbal assertiveness and intellectual self-esteem in single-sex environments affect women's capacity to function in mixed environments.[57]

The pluralist defense of single-sex schools raises similar difficulties. It is true, as Justice Powell noted in *Hogan,* that generations of distinguished Americans have found "distinct advantages" in sex-segregated education. However, a comparable claim was often made about racially segregated schools and clubs, and it rested on comparable stereotypes. Moreover, nothing in the standard pluralist argument distinguishes all-female from all-male schools as an antidote for "needless conformity." According to the president of one of the few remaining all-male colleges, educational separatism fosters much the same expressive interests as those advanced in association cases; it promotes a "directness, a relaxed informal exchange." If women gained admission to the late-evening beer sessions where male students sat around "talking about Thomas Wolfe, Bismarck, or girls, or whatever . . . what they talked about would be different." Yet it might also be better. Experience at other institutions does not suggest that coeducation banishes Bismarck from the intellectual landscape. Nor does it prevent students from continuing to congregate in other single-sex settings. It may, however, help to erode what some students and faculty

of all-male colleges have acknowledged as part of their distinctive atmosphere: the tendency to regard women as "sex objects" rather than as potential equals.[58]

Thus, the enhancement of some students' choices can only come at the cost of restricting others, and history leaves little doubt about which sex has paid the greater price for segregation. Nor does limiting the pluralist defense to women's institutions entirely solve these difficulties. Contrary to the dissent's suggestion in *Hogan,* perpetuating such institutions does not unequivocally "expan[d] women's choices." To affirm the "honored traditions" of Mississippi University for Women, which focused on typewriting, teaching, nursing, and needlework, is to reinforce expectations that have constrained, not enlarged, female options. Lumping all women's schools into the same abstract category ignores the diversity in experiences that such institutions have fostered.[59]

The complexity in cases like *Hogan* is that no single constituency speaks for women's interests. Separatist education, like other separatist associations, offers the vices and virtues of a ghetto: it provides support, solidarity, and self-esteem for subordinate groups, but often at the price of perpetuating attitudes that perpetuate subordination. For some constituencies, such as the MUW alumnae association that filed an *amicus* brief supporting its alma mater, the direct personal benefits of gender segregation are worth the price. For organizations such as the National Organization for Women, which took the contrary position in *Hogan,* the costs of gender stereotyping are prohibitive.

In the face of such competing concerns and conflicting data, American courts have steered a muddled course, and the prospects for improvement do not appear substantial. Separate but equal as educational policy remains a perplexing misnomer. In some respects separate is better, in other respects worse, but never is it likely to be equal. Nor has the judiciary done an impressive job of sorting out the differences. Given the backdrop of inequality against which such issues arise, we might expect that doubts would be resolved in favor of all-female but not all-male schools. In that sense, the converse pattern emerging from *Vorchheimer* and *Hogan* carries an ironic symbolic message.

Alternative Frameworks

Men's schools, like men's clubs, have often been "witting or unwitting devices for preserving tacit assumptions of male superiority." The effect of women's secondary and undergraduate institutions has been more mixed and justifies a different degree of legal tolerance. At least in the short run, the most desirable result may be a return to the general pattern of noninvolvement that traditionally characterized the law's role in single-

sex education. All-male secular schools are already verging on extinction, and all-female institutions seem destined to avoid that fate only as long as they provide advantages lacking in coeducational settings. Given the difficulties that courts have experienced in assessing those advantages, judicial restraint seems a generally prudent strategy. Only in contexts like *Vorchheimer* or *Hogan,* where the disparities in resources or the harms of stereotypes are so apparent and the adverse impact of integration is so minimal or uncertain, is legal intervention justifiable. At this historical moment, undermining all-female institutions through tax policies, funding cutoffs, or constitutional mandates is a dubious use of legal resources.[60]

In the long run, however, separatist education requires rethinking. Perpetuating segregated institutions is often a poor substitute for improving integrated ones. In all-female settings, it is more difficult to challenge the cultural attitudes that reinforce subordination; by definition, many of those most in need of such challenge are absent. One goal of contemporary women's schools should be to create a society in which their compensatory function is no longer required. To the extent that all-female institutions have been especially supportive for female students by providing role models, leadership opportunities, and positive teaching environments, those characteristics should become more dominant in coeducational settings as well.

To make existing educational structures truly coeducational we must focus not just on admissions policies but also on institutional priorities. Although women by no means speak with one voice on such issues, there are certain concerns that large constituencies share. A school genuinely hospitable to these concerns would have different relations with its internal and surrounding communities than those typical of existing institutions. Its working environment would have a less hierarchical and sex-segregated structure than the prevailing norm, in which female and minority support staffs dominate the lower reaches and white male tenured professors and senior administrators occupy the upper tier. Its student body would include a broader cross-section of American society, including more minorities and greater representation of older and part-time women enrollees with interrupted career patterns and competing family responsibilities. Its curricula, classroom climate, financial aid, and affirmative-action policies would be more responsive to the experiences of subordinate groups and to the need for challenging as well as transmitting dominant intellectual paradigms. And its wage-scales, working hours, leave policies, and childcare commitments would reflect greater sensitivity to the needs of working parents. The objective, as Virginia Woolf emphasized, is not for women simply to "join the [academic] procession." It is rather for both women and men to rethink the direction of that procession and the terms on which they are prepared to enter.[61]

Athletics

Gender discrimination in athletics presents similar concerns, and similar questions about priorities. Given the critical problems facing American women—poverty, sexual violence, reproductive liberty, occupational inequality, childcare—should getting girls into Little League baseball be a pressing feminist objective? Will equal access for women risk accepting a male model of athletic achievement, one preoccupied with competition, aggression, and profitability?

To those concerned with equity in sports, the answers involve both practical and symbolic considerations. Athletic activity promotes physical and psychological health; it reduces cardiovascular risks, provides coping mechanisms for stress and anxiety, and fosters personal skills and collegial relationships. In contemporary American society, athletic achievement also confers prestige, respect, and self-esteem, as well as educational and employment opportunities. Moreover, gender disparities in sports have been both a cause and a consequence of broader cultural stereotypes involving masculinity and femininity. Substantial progress toward gender equality will require challenging those stereotypes wherever they persist, and athletics is no exception.

Traditionally, athletic prowess has been far more valued in men than in women. Until the last century, the feminine ideal was inconsistent with strenuous physical competition. Standards of dress, complexion, figure, and behavior discouraged female sports. Any male-female interaction on the playing field involved largely noncompetitive or relatively sedate pastimes that could be pursued without acquiring an indelicate sweat. Most of these activities—riding, archery, or croquet—served mainly to provide respectable social encounters for the upper classes. During the late nineteenth and early twentieth centuries, those norms gradually changed, partly in response to efforts by physicians, educators, and women's rights advocates. After some all-female colleges introduced exercise regimens and team sports to balance their intellectual programs, other educational institutions gradually followed suit. The rising popularity of bicycles, the less restrictive trends in women's fashions, and the changing standards of female beauty all encouraged greater athletic activity.[62]

Women's increasing involvement in sport, like their involvement in education, provoked objections along two major lines. Women were allegedly unsuited for sport, and sport would make women unsuitable as women. The female physique and disposition would not bear the strain of competition. Some of the concerns were well expressed by a principal of an English women's college at the close of the nineteenth century. Her institution had become a "hotbed of hockey," and she could not help but register some misgivings when watching her first match. "The children

will hurt themselves if they all run after one ball," she predicted. "Get some more balls at once."[63]

If women persisted in their "Amazonian ambitions," their efforts could drain "vital forces" necessary for reproduction (a threat that strenuous domestic work somehow failed to present). Sporting activities would both disfigure and divert women from their rightful roles; they would develop large feet, coarse hands, and "bicepts like a Blacksmith." As G. K. Chesterton put it, "let women play violent and confusing games if you think it will do them any good to be violent and confused."[64]

Partly in response to these objections, women's physical education developed along less competitive lines than men's. Female involvement in formerly male sports such as basketball was often defended as a way to enable participants to develop "poise and grace and become better ladies." In the late 1920s, the leaders of physical education for women in the United States formally rejected what they perceived as an increasingly competitive and market-oriented model of men's sports. Their alternative was a program based on educational values, widespread participation, and positive social interaction rather than competitive achievement.[65]

By the late 1960s, limitations in this model were provoking widespread dissatisfaction. No athletic scholarships were available to women, interscholastic programs were relatively rare, and many physical education departments stressed activities that required few skills (ring tossing or rhythmic hoola-hooping) or promoted vicarious roles (cheerleading and pep-club activities). Women who excelled in sports not traditionally associated with women risked being stigmatized as socially and/or sexually "deviant."[66]

Partly in response to these concerns, Congress passed Title IX of the Civil Rights Act (1972), which prohibited sex discrimination in educational programs receiving federal funds. Although the legislative history concerning its application to athletics is murky, congressional sponsors clearly did not envision full equality. As then-Senator Birch Bayh put it, "we are not requiring that intercollegiate football be desegregated."[67]

What exactly Congress was requiring, and what should be the standards for assessing equal athletic opportunity, have remained open to dispute. In 1975, the Office of Health, Education, and Welfare promulgated regulations clarifying that Title IX would permit separate teams for men and women in contact sports or in any activity where selection is based on "competitive skill." If a noncontact sport is available only to members of one sex, and athletic opportunities for the other sex have "previously been limited," members of the excluded sex must be allowed to try out for the team offered. Subsequent HEW regulations made clear that funding need not be equal for men's and women's programs. Nor does it need to be proportional to the number of male and female athletes at a partic-

ular institution, except in providing scholarships. Instead, the regulations somewhat ambiguously require "equivalent treatment" in order to provide "equal accommodation of the interests and abilities" of each sex.[68]

The decade following Title IX's enactment witnessed dramatic progress. The number of female athletes in interscholastic collegiate competition increased fourfold, even greater advances occurred at the secondary level, and litigation or legislation resulted in female access to many formerly all-male teams or programs, including Little League baseball. But major inequalities also persisted. The Civil Rights Commission's 1980 report noted that in colleges with major sports programs, budgets for female athletics were less than half those for males. Subsequent surveys of secondary as well as collegiate institutions revealed that fewer sports were open to women and that they experienced discrimination in coaching, facilities, equipment, practice schedules, competitive opportunities, and related areas. The merger of male and female sports programs that Title IX encouraged had an ironic effect on decisionmaking structures. Women lost key administrative and coaching positions, together with control over budget and personnel decisions.[69]

Beginning in the early 1970s, these discriminatory patterns prompted litigation under state and federal constitutional provisions as well as Title IX. Results have been mixed. Much of the difficulty has again stemmed from courts' focus on gender difference rather than on the disadvantages that have resulted from it. Early judicial decisionmaking provided striking examples of the very stereotypes that litigants sought to challenge. A case in point involved a 1971 Connecticut state court decision that girls could be excluded from a high school's only cross-country running team. In the court's view, "The present generation of our younger male population has not become so decadent that boys will experience a thrill in defeating girls in a running contest . . . With boys vying with girls in cross country running and indoor track, the challenge to win and the glory of achievement, at least for many boys would lose incentive and become nullified. Athletic competition builds character in our boys. We do not need that kind of character in our girls." In other cases involving equal-protection challenges, courts have assumed that "innate physical differences" justify excluding males from female teams or females from male teams, despite the lack of comparable opportunities for the excluded athletes. Thus one judge explained, the Constitution "does not create a fictitious equality where there are real differences."[70]

As in other contexts, courts have taken as innate and essential differences that are in part cultural and contingent. Physiological characteristics are heavily influenced by social norms governing diet, appearance, dress, behavior, and athletic opportunities. How much of males' advantage in most sports results from nature and how much from nurture remains

unclear. It is, however, obvious that the differences in men's and women's capabilities are relatively small in comparison to the differences in opportunities now open to them. Since the most effective way to challenge assumptions of inherent female inferiority is to provide successful counterexamples, our athletic policies must become less preoccupied with gender differences and more concerned with gender disadvantages.

To address these disadvantages, courts and commentators have identified two basic approaches. The first is to unify all athletic programs and allocate opportunities for participation without regard to sex. Advocates of this approach generally begin from the premise that separate can never be equal, and that gender as a selection principle will inevitably prove under- and overinclusive. Under current circumstances, the difficulty with this strategy is that female athletes would be unable to qualify in large numbers for most teams. Until adequate remedial programs and competitive opportunities at all skill levels are available, gender neutrality in form will not yield gender equality in fact.[71]

A preferable approach is to permit separate teams but make them truly equal in terms of expenditures, practice schedules, equipment, coaching, and so forth. One way to insure greater equity would be to adopt an Olympic scoring method; separate teams would compete against those of their own sex, but scores would be combined to determine interscholastic rankings. Under such a system, economies of scale could result from having male and female teams share the same schedule and staff. If there is insufficient interest to justify a team for both males and females, HEW regulations specify a reasonable approach; members of the excluded sex must be allowed to try out for the team offered if athletic opportunities have previously been limited for that sex. Such a strategy has the advantage of being neutral in form but responsive to differences in fact. Those whose previous opportunities have been limited are overwhelmingly female. Allowing women to compete for places on men's teams would help redress sex-based disadvantages; allowing men to compete for places on women's teams would amplify those disadvantages.

One difficulty with this approach involves the exceptional female athlete who would prefer to forego competition with her own sex in order to work with males closer to her skill level. Although some courts and commentators have justified accommodating her preference, such an approach risks maximizing individual opportunity at the expense of broader social goals. Without the example, inspiration, and assistance that an outstanding teammate can provide, all-female programs are less likely to break the stereotypes of second-class status.[72]

However this particular issue is resolved, a more fundamental point deserves emphasis. The objective of maximizing women's participation in sports is not only to equalize opportunities but also to transform them.

As women increasingly become respected competitors and national leaders in athletics, they will have a greater chance to challenge its premises and priorities. These individuals will be in a position to develop alternative models that are less commercial, less combative, and less dangerous. As more women become participants rather than spectators, they must take the opportunity to rethink as well as master athletic demands.[73]

Different but Equal

Analogous claims could be made about female entrance into other institutions. If we are to make significant progress toward a more humane and egalitarian social order, our focus must be not simply on access to, but alteration of, existing structures. One danger is that women's gradual absorption into prevailing social networks will result in assimilation, not alteration. In attempting to become full "members of the club," women may lose the perspective or inclination to question its underlying premises. Once inside, female members may have less interest in challenging the closed networks of privilege that membership reflects and reinforces. How to avert that form of acculturation is one of the most critical issues confronting feminism. For women to attain equality without relinquishing difference, to ascend the hierarchy without losing commitment to change it, remain central objectives.

As we make progress toward these goals, our sense of separatism may change. At this juncture, it is impossible to assess what role single-sex institutions might play in a truly egalitarian society. It is hard enough to sort out their competing values in the current social order. For the present at least, separate is not equal. But neither can women entirely forego separatism without greater control over the terms of integration.

Conclusion: Principles and Priorities

After a period of enormous growth, American feminism in the 1980s showed signs of strain. In many respects, the difficulties paralleled those of an earlier era. The decades following enfranchisement witnessed considerable division and disaffection concerning women's issues. After gaining the ballot, suffragists were unable to unite around another cause, and most of the postsuffrage generation avoided feminist activity. The trend in the 1920s was toward increasing individualism, and those who remained interested in women's common problems could not agree about potential solutions. Deep theoretical and political disputes centered on whether women would gain more by stressing their differences or their commonalities with men.[1]

Comparable problems have emerged a half-century later. Although unsuccessful in their campaign for a constitutional amendment, women's rights advocates have secured legal prohibitions against most overt forms of gender discrimination. These victories have removed some of the impetus for feminist efforts, as has the country's generally conservative tilt. Whatever the movement's difficulties, they have been greatly exaggerated by the media, which makes news by declaring feminism dead, dying, or permanently disabled. Public figures have tended to avoid the feminist label, and others have often prefaced support for women's issues with the disclaimer: "I'm not a feminist but..."[2]

Yet at the same time feminism's political progress has slowed, its theoretical efforts have been flourishing. Women's studies programs have been growing in scope and strength, and gender has become an increasingly significant category of analysis across a wide array of disciplines. Contem-