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## The Man, The State and You: The Role of the State in Regulating Gender Hierarchies

Meredith Render

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# THE MAN, THE STATE AND YOU:

## THE ROLE OF THE STATE IN REGULATING GENDER HIERARCHIES

MEREDITH RENDER\*

Abstract.....	73
Introduction: Women are Still Treated Differently at Work, But the Assimilation Model Has Helped Us to Stop Caring .....	74
I. Conceptualizing Equality in a Hierarchical Schema.....	82
A. The Current Gender Schematic: Cherry-Picking and Trickle-Down .....	84
B. If to Schema is Human, then Whether to Schema is not the Question .....	98
C. Discrimination as Tyranny: Gender and the Liberty Axis .....	104
II. The Role of the State in Inhibiting Private Hierarchical Preferences .....	110
A. Should the State Play a Role in the Regulation of Private Tyrannies? .....	112
B. Governance Versus Regulation: Welcome Back to the Machine .....	115
C. Working it out Together (While Carrying a Big Stick): The Value of the Civil Rights Model .....	124
Conclusion .....	127

### ABSTRACT

*This paper begins with the thesis that an andocentric-assimilation model of women's liberation both has affected workplace outcomes*

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\* Practicing attorney, Washington D.C.; J.D. *Georgetown University Law Center*. The author wishes to thank Robin West, Vicki Jackson, William Isasi, Heather Wilson, Tamra Moore, and Malcolm Slee for lending their perspective and insight as well as their support to this project, without which this article would not have been possible.

*for women and has desensitized us to those outcomes. The paper then applies that thesis to understandings of “equality” within a hierarchical framework, arguing that the equality-liberty dichotomy is false in the context of gender discrimination in the workplace. Instead the paper argues that disparate treatment is a liberty concern. In seeking to have our professional fates married to the fates of our male colleagues—which is what workplace equality doctrines aim to do—women are seeking to be only as free as our male colleagues are to find work and to find meaning in our work, to procreate or not, to coast along or to stand out, and, if we choose, to stand alone. Further, this paper offers the perspective that as feminist advocates we should resist the inclination to make our peace with the ordering of the gendered paradigms as they stand and to negotiate compromises from these vantage points. Within this theoretical framework, this paper explores the implications of the “regulation” versus “governance” debate in the context of gender discrimination. The article suggests that renaming and reframing aside, the approach embodied by the governance paradigm as it is applied to gender discriminatory contexts is neither new nor a deal for those already occupying a subordinate bargaining position, but it is instead a framework by which to privilege existing power structures and efficiency-based values over other values and interests. Moreover, this paper defends the civil rights model of rules-based state-enforced mandatory anti-discrimination measures, such as Title VII, as an admittedly non-panacean yet nonetheless indispensable means by which private gender hierarchies are inhibited. Finally, this paper contends that in looking to the law to inhibit this particular privately-enforced tyranny, women are correctly interpreting the obligation of the state within our constitutional scheme to disrupt private tyrannies when those tyrannies reach the point of functioning as class-based power monopolies, limiting the fundamental freedoms of those outside the monopolist class.*

\* \* \*

INTRODUCTION: WOMEN ARE STILL TREATED DIFFERENTLY AT WORK,  
BUT THE ASSIMILATION MODEL HAS HELPED US TO STOP CARING

A friend of mine, a BigLaw escapee, described to me how she suddenly decided to leave her BigLaw firm job in the midst of a recruiting lunch. The story unfolds as follows: she, a second year litigation associate, was lunching with her mentee, a first-year male litigation associate, and a female law school recruit. During the first

part of the lunch, my friend listened as her mentee truthfully detailed for the benefit of the recruit the interesting brief-writing he had done during the course of his first year at the firm, as well as the engaging issues he had researched, and the points of law he had summarized. At the end of this pitch, the female recruit turned politely to my friend, the senior attorney at the table, the mentor, the female litigator, and asked, “And has your practice been similar?” In truth, my friend, like ninety percent of the women in her class, had spent the last two years—in the same litigation department, mind you—occupied primarily with administrative work rather than legal research or analysis.<sup>1</sup> As she sat there, in the proverbial hot seat for the firm, she suddenly could not imagine why she was engaged in the project of recruiting a highly qualified woman candidate to her firm. “No,” she replied, gesturing towards her male mentee, “but in a few years they may let me work for him.”

With this indiscretion my friend betrayed the firm’s open secret concerning women litigators and the “bad” work. Apparently, it was widely known among both men and women associates at her firm that women associates were assigned administrative work while similarly situated male associates were assigned more analytically substantive work. As inhabitants of the professional world, do we find this anecdote surprising?<sup>2</sup> When shopping this story around to other

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1. Cf. J. Stratton Shartel, *More Female Litigators Relegated to Non-Trial Work, Survey Finds*, 9 NO. 2 INSIDE LITIG. 12, 12 (1995) (reporting the results of a survey of 500 litigation attorneys).

Male litigators in private practice tend to spend more time at trial than their female colleagues, while women litigators spend more of their time on non-trial responsibilities such as settlement negotiation and document preparation, according to a recent survey of attorneys conducted by Inside Litigation.

The results paint a disheartening picture of an environment in which men spend more of their time in the courtroom, reaping the rewards of trial experience, favorable verdicts, and high visibility, while women are assigned secondary roles, making advancement more difficult.

*Id.*

2. It should not be surprising. In fact, in researching this project what is most surprising is how remarkably well documented and discussed an experience this is, and has been for literally decades. A disparate treatment researcher could hardly swing a dead cat without hitting an array of examples of assignment or promotion gender-based disparities at a law firm. Consider, for example, a similar law firm “case study” described by Susan Sturm several years ago:

A group of women have questioned recent decisions denying women promotion to partnership, the firm’s general failure to retain and promote women despite comparable entry credentials, and a series of individual incidents that triggered complaints of sexual harassment and gender bias. In part because the firm aggressively recruits women at the entry level and fails to track patterns in work assignment and promotion, the firm’s management has been largely unaware of any problem until these complaints arose. The complaints involved a range of issues: differences in patterns of work assignment and training opportunities among men and women; tolerance of

BigLaw lawyers, it has rarely been received with surprise or disbelief. Instead, the tale has often been met with various pragmatic accounts for the disparity, frequently along the lines of: “Women leave firms. The good work is scarce, and is reserved for those who are more likely to stay.” This explanation, although certainly incomplete, lays bare an internalized bottom line that prioritizes efficiency in information costs over equal opportunity. It is efficient, rational, inaccurate, and discriminatory, but is it surprising?

What is surprising, although perhaps it should not be, is that people—meaning here, primarily lawyers—are consistently underwhelmed when presented with the topic of this decidedly less sexy subset of workplace gender discrimination: disparate treatment. Disparate treatment, it seems, while widely acknowledged, is no longer a problem of stirring concern. Courteous inquiries concerning this project have frequently fronted a look which communicates, “Now? Surely we have finished with that by now—would you perhaps be better occupied by considering the future of *Roe*?”

The most striking aspect of this two-pronged incredulity is the latter point, the surely-we-are-finished-with-that-by-now point.<sup>3</sup> Of course we

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a sexualized work environment by partners who are otherwise significant “rainmakers”; routine comments by male lawyers, particularly in the predominantly male departments, on the appearance, sexuality, and competence of women; harsh assessments of women’s capacities and work styles based on gender stereotypes; avoidance of work-related contact with women by members of particular departments; and hyper-scrutiny of women’s performance by some, and the invisibility of women’s contributions to others.

Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 470 (2001). And another strikingly similar example:

Consider, for example, a litigation law firm that promotes almost exclusively from within its own ranks. The hiring partners at the firm have no problem hiring women and regularly hire entering classes that are fifty percent women. The partners simply refuse to hire women who they perceive to be aggressive, loud, and competitive. The partners just do not like women with these personality traits, preferring women who are a bit more “girly,” giggly, and deferential. They regularly hire women from top law schools who fit this mold. Despite the law firm’s frequent hiring of female associates, very few women are invited to join the partnership ranks. In order to become an equity partner in the firm, a candidate must have a reputation as a tough and aggressive litigator and be able to bring business into the firm. By the time associates reach the firm’s six year up-or-out deadline, significantly fewer female associates than male associates have these attributes. Without any discrimination taking place at the time of the partnership decision, far fewer women than men are promoted to partner at the firm.

Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 227 (2004).

3. And least of all among lawyers, whose own experience in the contemporary legal workplace, coupled with their exposure to what one hopes was at least a passing acquaintanceship with anti-discrimination law during their legal education, should

are not. For three decades—more than a generation—men and women have worked side by side in legally-mandated gender-integrated workplaces, and yet women collectively inhabit a markedly subordinate sphere in the workforce.<sup>4</sup> In fact, so pronounced a predictor is gender in determining workplace outcomes for identically qualified people that it is difficult to imagine that such inequity would be tolerated if the predictive criterion were any other immutable quality.<sup>5</sup> Yet we are no longer roused at the mention of

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result in an heightened awareness that women working in the legal profession get up in the morning and go to a different workplace.

[W]omen comprise about one-half of the ABA-accredited law school graduating class but account for only 16.81% of the partners in law firms nationwide. More than half—70.9%—of women lawyers work in private practice law firms. These figures suggest that, relative to total headcounts, women attorneys are under-represented among those in partnership. Although graduating from law school and being hired as entry-level attorneys in adequate numbers during the past decade, women are not remaining with their law firm employers as career lawyers who aspire to and achieve partnership status.

Paula Patton, *Women Lawyers, Their Status, Influence and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 173, 173 (2005). Consider, too, for example, Deborah Rhode's observations:

In law, as in life, women are underrepresented at the top and overrepresented at the bottom. Women now account for a majority of law school applicants and almost 30% of the profession, but only about 15% of federal judges and law firm partners, 10% of law school deans and general counsels, and 5% of managing partners of large firms. Women in legal practice make about \$20,000 a year less than men, and surveys of law firms and corporate counsel salaries have consistently found a significant gender gap even among those with similar positions and experience. Moreover, male and female attorneys with similar qualifications do not obtain similar positions. Studies involving thousands of lawyers have found that men are at least twice as likely as similarly qualified women to obtain partnership.

Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 HOFSTRA L. REV. 1001, 1002-03 (2002) (citations omitted). Moreover, lest we think academia is deemed above the fray:

The national statistics for women in legal education are bleak: approximately 26% of tenured law professors and 17% of law school deans are female. A woman applying for a tenure-track job may have worse odds of being hired than a man. Not only do the statistics reveal that women receive tenure at lower rates than men, but they also demonstrate that women are paid less than similarly qualified men of the same status and with the same experience. Finally, women are hired in teaching jobs off the conventional tenure track, in positions such as lecturers and instructors, at higher frequencies than men.

Mary Elizabeth Basile, *False Starts: Harvard Law School's Efforts Toward Integrating Women into the Faculty, 1928-1981*, 28 HARV. J. L. & GENDER 143, 143-44 (2005) (citations omitted).

4. See 42 U.S.C. §§ 2000e-2000e-15 (2004) (prohibiting the exclusion of women from the workforce based solely on their gender over the last forty years). Of course, women worked outside the home, particularly in non-white collar professions, long before Title VII required that they must be permitted the privilege of doing so. See Deborah A. Ballam, *Affirmative Action: Purveyor of Preferential Treatment or Guarantor of Equal Opportunity? A Call for a "Revisionsing" of Affirmative Action*, 18 BERKELEY J. EMP. & LAB L. 1, 6 (1997) (noting that Title VII's framers intended for women to slowly but surely gain equal opportunity in the workforce after its passage).

5. Identically qualified here includes accounting for the presence of children at

that glass ceiling we first heard about twenty years ago.<sup>6</sup> In truth, we have seen the surveys, the studies, the statistics and we know the score: as women in the workplace our choices are fewer, our power less, and our pay inferior as compared to our similarly situated male colleagues.<sup>7</sup> Rarely do we set workplace policy, and even when we do, the resulting policy is as likely to reflect a “female accommodation” model of gender integration—itsself an unsatisfactory rendering of gender equality—than when a man is in the decision-making chair.<sup>8</sup> When women do make it to the “top,” they most often do so by way of

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home. See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004) (suggesting that an employer can treat mothers and fathers in a similarly discriminatory manner).

6. See Christina Del Valle, *Glass Ceiling? What Glass Ceiling?*, BUS.WK., Oct. 24, 1994, available at <http://www.businessweek.com/archives/1994/b33958.arc.htm> (stating that only three of ninety-three invited companies showed up to a hearing held by the Glass Ceiling Commission); see also Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males*, 26 WASHBURN L.J. 23, 76 n.286 (1996) (providing that “the term ‘glass ceiling’ was first used” by Carol Hymowitz and Timothy D. Schellhardt of the Wall Street Journal in *The Glass Ceiling: Why Women Can’t Seem to Break the Invisible Barrier that Blocks Them from the Top Jobs*, WALL ST. J., Mar. 24, 1986, at D1, D4-5).

7. See INST. FOR WOMEN’S POLICY RESEARCH, THE GENDER WAGE RATIO: WOMEN’S AND MEN’S EARNINGS (2005) [hereinafter GENDER WAGE RATIO], <http://www.iwpr.org/pdf/C350.pdf> (stating that women’s annual earnings are still below men’s); see also DANIEL H. WEINBERG, U.S. CENSUS BUREAU, U.S. DEPT. OF COM., *Evidence from Census 2000 About Earnings by Detailed Occupation for Men and Women* (2004) (observing the ratio of women’s earnings to men’s earning by percentile in 1999); Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27, 35-36 (2005) (explaining that “[t]he compensation gap between men and women is not unique to the legal profession either”).

Studies of full-time workers conducted by the U.S. Department of Labor show a persistent, albeit narrowing, gap in men and women’s earnings. In 1979, when comparable earnings data were first available, women earned about 63 percent as much as men did. In 2000, median weekly earnings for female full-time wage and salary workers was \$491, or 76 percent of the \$644 median for their male counterparts. A survey of the members of the American Association for the Advancement of Science (life sciences professionals) revealed that men earn almost one-third more than women, \$94,000 versus \$72,000. The difference is greatest among academic administrators. The report finds “evidence that women are paid less for similar work even when type of employer is held constant.” Gender gaps in compensation are a fact of life for professionals on Wall Street as well. In one study, women earned 60.5 percent of what their male counterparts earned in 1997. Finally, a Catalyst study of over one thousand men and women senior executives found that while only 16 percent of the men surveyed earned less than \$200,000 in 2001, 38 percent of the women reported earning less than \$200,000.

*Id.* (citations omitted); see also AM. ASS’N OF UNIV. WOMEN, GAPS IN LEARNING, GAPS IN EARNINGS: A GUIDE TO STATE AND NAT’L DATA (2004), available at <http://www.aauw.org/research/statedata> (providing that a “typical college-educated woman working full time earns \$44,200 a year compared to \$61,800 for college-educated male workers—a difference of \$17,600!”).

8. See Joan C. Williams, *Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 390 (2004) (explaining that employers often construe their flexible work arrangements as a “great deal” to women when it may be an expression of gender bias rather than a solution).

the assimilation model.<sup>9</sup> They serve as powerful symbols of the ultimate achievability of assimilation.<sup>10</sup> They remind the rest of us to stop our whining and learn to “fit in.”<sup>11</sup> Consequently, this is not a paper about whether or why women are discriminated against in the workforce, inasmuch as it is a paper about the ways in which we have made our peace with it, and in so doing, the ways in which we have settled for temporary membership in a permanent underclass.

Further, as to the former point, the timing concern, now is an admittedly unfashionable time to be concerned with the disparate treatment of women in the workplace.<sup>12</sup> It is a subtle topic when contrasted against our present political climate of near-constant crisis, when the future of Title VII itself is precariously moored within its ebbing Commerce Clause host, and the promise of an American Age of Reason seems to be inexplicitly eluding our collective jurisprudential grasp. From a feminist standpoint, in light of the times, the problems of workplace gender equality do little to command attention, worried as we are about protecting what we perceive to be more fundamental civil liberties.<sup>13</sup> Conventional in-the-trenches wisdom tells us that now is not the time for pressing forward with equality-based doctrines.<sup>14</sup> Instead, under duress as we are, we should compartmentalize our egalitarian goals from our more primal liberty concerns, as though discrimination—and at work, of all places—fails to implicate first-order autonomy and independence. Meanwhile, elsewhere in this same cultural climate, ivory tower voices have become increasingly critical of the concept of the civil rights top-down regulatory model as a tool for shoe horning social inequities into egalitarian reforms.<sup>15</sup> Concurrently, stalwart principles of

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9. Or its corollary exploitation model, whereby the successful woman capitalizes on traditionally misogynistic ideals of femininity. For a discussion of the assimilation model of female liberation, see Meredith Render, *Misogyny, Androgyny, and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World*, 29 HARV. J.L. & GENDER 99 (2006).

10. *Id.*

11. *Id.*

12. Del Valle, *supra* note 6.

13. See, e.g., Rob Stein, *Pharmacists' Rights at Front of New Debate: Because of Beliefs, Some Refuse to Fill Birth Control Prescriptions*, WASH. POST, Mar. 28, 2005, at A01 (discussing the current debate over whether a pharmacist's right to not dispense birth control due to personal or religious beliefs conflicts with a woman's right to contraception).

14. See Del Valle, *supra* note 6 (suggesting that few employers even acknowledge the problem of the glass ceiling).

15. See, e.g., Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 4 (1996) (voicing skepticism of the conventional picture of the judiciary's counter-majoritarian righter of egalitarian wrongs); MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 5 (2004) (arguing that constitutional interpretation reflects the social and political climate of the times because judges live



anti-discrimination law in the gender context have been losing rather than gaining currency in both the courts and the academy.<sup>16</sup> Thus, at this particular cultural moment does it seem reasonable to wonder “why now?”

In response to this question, this paper offers an alternative framework to the equality-liberty dichotomy, suggesting, or more accurately recollecting, that disparate treatment *is* a liberty concern. This paper recalls that in seeking to have our professional fates married to the fates of our male colleagues—which is what workplace equality doctrines aim to do—women are seeking to be only as free as our male colleagues are to find work and to find meaning in our work, to procreate or not, to coast along or to stand out, and, if we choose, to stand alone.<sup>17</sup> The paper contends that this liberty interest

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within those cultural times).

16. For example, a Ninth Circuit panel recently held that an employer policy requiring women, and only women, to wear make-up did not constitute gender discrimination under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), because the policy imposed grooming requirements on both men and women, and thus did not impose an “unequal burden on women.” *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1086-87 (9th Cir. 2004), *reh’g en banc granted*, 409 F.3d 1061 (9th Cir. 2005). The court cited as binding precedent a 1974 Ninth Circuit decision which predates *Price Waterhouse* by more than a decade, and which held that employers may impose sex differentiated grooming requirements on employees. *Id.* at 1080 (citing *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896-97 (9th Cir. 1974)). The court reasoned that its 1974 decision was not inconsistent with *Price Waterhouse’s* admonishment against employer policies that require conformity with gender stereotypes:

Although *Price Waterhouse* held that Title VII bans discrimination against an employee on the basis of that employee’s failure to dress and behave according to the stereotype corresponding with her gender, it did not address the specific question of whether an employer can impose sex-differentiated appearance and grooming standards on its male and female employees. Nor have our subsequent cases invalidated the “unequal burdens” test as a means of assessing whether sex-differentiated appearance standards discriminate on the basis of sex.

*Id.* at 1082. In light of this holding, the problem with *Price Waterhouse’s* recommendation that Ann Hopkins dress more femininely was not that it required her to conform to a sex-differentiated standard of dress, but was, instead, that there was no evidence on record that male employees were likewise urged to dress in a masculine way, should they aspire to ascend through the *Price Waterhouse* ranks. *But see Price Waterhouse*, 490 U.S. at 235. Separate (or in this case, only slightly more subtly dubbed, sex-differentiated) but equal lives and breathes in the Ninth Circuit, at least for the moment (rehearing en banc has been granted).

17. We have concentrated much on what it costs women to bear children when they do not want to, but we have considered too little what it costs women not to bear children when they do want to. See SYLVIA ANN HEWLETT, *CREATING A LIFE* 86 (2002) (providing that forty-nine percent of women over forty who earn more than one-hundred thousand dollars a year do not have children). That compares with nineteen percent of men in the same category. *Id.* And lest you assume that these women chose the life they’re living, only fourteen percent said they had not wanted children. *Id.* Choosing between engaging work (or for many women, economic self-sufficiency of any sort) and children is a Hobson’s choice that men in this culture do not face. It is a gendered dilemma that is not dissimilar to the pre-*Roe* choice between abstinence (to the extent this was possible, given the realities of rape, incest

continues to be threatened by the proliferating and private hegemony of the andocentric paradigm within our hierarchical society. Further, this paper offers the perspective that as egalitarian advocates we ought not to ignore the role that androcentricism plays in mapping the professional lives of women, simply because we fear we lack the political tools or will at present to adequately address it. We should resist the inclination to make our peace with the ordering of the gendered paradigms as they stand and to negotiate compromises from these vantage points, because in so doing we concede the point not that we presently inhabit a subordinate position, but that we *are* subordinate.<sup>18</sup>

Moreover, this article explores the gender implications of the recently revived regulation versus laissez-faire debate, or as it has been recast of late, the New Deal top-down paradigm versus the “Renew Deal” governance paradigm.<sup>19</sup> The article suggests that renaming and reframing aside, the approach embodied by the governance paradigm as it is applied to discriminatory contexts is neither new nor is it a deal for those already occupying a subordinate bargaining position. It is instead a familiar framework by which to privilege existing power structures and efficiency-based values over equality. The article contends that moving away from a regulatory model functions to abandon the understanding of “equality” at work as a function of first order liberty, which, in the view of the author, is a mistake for those who carry with them a history of subordination. Further, this paper defends the civil rights model of rules-based state-enforced mandatory anti-discrimination measures, such as Title VII, as an admittedly non-panacean yet nonetheless indispensable means by which private gendered hierarchies are inhibited. Finally, this paper

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and so forth) or the risks of bearing a child—a choice which men also did not face.

18. The concept of gendered paradigms expressed here includes gendered expressions and presentation as well as sex.

19. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345-47 (2004) (identifying the emergence of a “new governance paradigm”). This paradigm is synthesized

from a myriad of recent scholarly theories including the following: “reflexive law,” “soft law,” “collaborative governance,” “democratic experimentalism,” “responsive regulation,” “outsourcing regulation,” “reconstitutive law,” “post-regulatory law,” “revitalizing regulation,” “regulatory pluralism,” “decentering regulation,” “meta-regulation,” “contractarian law,” “communicative governance,” “negotiated governance,” “destabilization rights,” “cooperative implementation,” “interactive compliance,” “public laboratories,” “deepened democracy and empowered participatory governance,” “pragmatic lawyering,” “nonrival partnership,” and “a daring legal system.”

*Id.* (citations omitted). Professor Lobel supports the newness claim, attributing the political pendulum shift of the past five years to a “new reality” to which legal thought and practice must “transform themselves to adjust.” *Id.* at 357.

contends that in looking to the law to inhibit this particular private tyranny, women are correctly interpreting the obligation of the state within our constitutional scheme to disrupt private tyrannies when those tyrannies reach the point of functioning as class-based power monopolies, limiting the fundamental freedoms of those outside the monopolist class.

This set of arguments is presented in the following format: Part II explores ways in which equality can be conceptualized within a hierarchical scheme, first by identifying the current dominate gendered hierarchy of androcentricism and assimilation, and considering the ways in which this hierarchy has affected our understanding of the issue of disparate treatment at work. Next, the paper considers the places at which gender “equality” interests intersect with the liberty axis and suggests that gender discrimination at work is a liberty concern. Part III of the paper discusses the role the state in the regulation of private hierarchies, considers the relative merits and drawbacks of the so-called governance model of employment law, and ultimately offers an unqualified defense of the civil rights model of inhibiting gender discrimination in the workplace.

#### I. CONCEPTUALIZING EQUALITY IN A HIERARCHICAL SCHEMA

The use of a hypothetical may assist in humanizing or at least solidifying a consideration of what the introduction has threatened will be an unfortunate series of *-isms* and other abstractions. Adopting the introductory scenario and folding it into a hypothetical, it may look something like this: a class of ten spanking new associates enters a litigation firm, each associate clutching to his or her breast an excellent transcript and fond memories of an appellate clerkship. Of this class, seven are women and three are men.<sup>20</sup> Of the thirty associates already at the firm, three are women—a disparity of attrition rather than of hiring. Still, undaunted by this ratio, the seven new female hires march confidently into their litigation practices, where upon six of them are immediately assigned work on a client that requires primarily administrative and oversight work from associates. None of the three men are assigned to this client, and during the following year, the men easily lap the women several times over in terms of gaining trial and discovery exposure, brief writing and other marketable litigation experience. The disparity here concerns assignments, and the hypothetical will assume to isolate that

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20. For the sake of simplicity the hypothetical will assume that none of the new hires, male or female, have children.

particular, and evidently not uncommon, phenomena.<sup>21</sup> Moreover, this disparity in experience begins to feed upon itself, as assignments that require particular experience become increasingly beyond the reach of the female associates. Predictably, by the end of the class's second year at the firm, two of the original three women associates have left, as have five of the seven now second-year female associates. But not to worry, law school recruit, the new incoming class is comprised of seventy percent women, so things should even out.

And worry, we do not. Every year, legions of bright, qualified women march into this and countless similar employment situations, undaunted by the odds that women statistically face in those contexts.<sup>22</sup> Certainly part of the reason this happens is less the result of a lack of foresight and more the result of a lack of nondiscriminatory alternatives.<sup>23</sup> However, something more happens to keep us marching: every now and again at reliable intervals, a woman makes it within the system.<sup>24</sup> Moreover, when a woman makes it, she often makes it big, and it is this beacon of attainability, the uber-successful woman within the existing structure—the managing partner, the supreme court justice, the CEO, the secretary of state—which leads us to believe that the structure itself is not flawed and that the origin of any failures, statistical or otherwise, lies within ourselves.

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21. Cf. SUSAN NOSSEL & ELIZABETH WESTFALL, *PRESUMED EQUAL: WHAT AMERICA'S TOP LAWYERS REALLY THINK ABOUT THEIR FIRMS* xii (1998). The survey synthesized responses from twelve-hundred women attorneys practicing at law firms that employ fifty women attorneys or more. The survey has been described as demonstrating that

[c]learly, assignment quality matters. And some of the women who completed the survey said they were shunted into less significant roles when male partners were unable to overcome feelings about which duties were "appropriate" for women. In the end, these women felt that their lack of exposure to more challenging work hurt their chances at partnership and limited hands-on experience gained through client contact.

Institute of Management and Administration, Inc., *What You Can Learn from Women Lawyers' Views of Their Firms*, COMPENSATION AND BENEFITS FOR LAW OFFICES (Apr. 1998).

22. See U.S. EQUAL EMP. OPPORTUNITY COMM'N, *DIVERSITY IN LAW FIRMS* (2003) [hereinafter EEOC], available at <http://www.eeoc.gov/stats/reports/diversitylaw/#status>.

The average number of women and White male associates in the sample firms are nearly identical (37.68 for women and 37.60 for White men). However, the mean number of White male partners far exceeds the mean number of women partners at 12.71 percent. The mean odds ratio for this comparison is 5.330; clearly not even odds for the two groups.

*Id.*

23. See Reichman & Sterling, *supra* note 7, at 35-36 (noting the widespread income disparities in all professions).

24. See Suzanne Hoppough, *Most Powerful Women in Media*, FORBES, July 28, 2005, [http://www.forbes.com/lists/2005/07/28/lists-powerfulwomen-media05powo\\_m\\_cz\\_sh\\_0728media.html](http://www.forbes.com/lists/2005/07/28/lists-powerfulwomen-media05powo_m_cz_sh_0728media.html) (highlighting several successful businesswomen such as Janet Robinson, Marjorie Scardino, and Oprah Winfrey).

When the media applauds the superstar, or the woman who has survived the odds, it doesn't take into account the millions who continue to live in poverty. A generation later, the idea of women's full participation in American life brought subtle advances, though it is generally no more than mere tokenism which has assuaged the consciences of the powerful.<sup>25</sup>

In fact, the existence of a minority of highly visible, highly successful women does much more than assuage the consciences of the powerful, it assuages the concerns of relevant class, it reassures women generally that they too could one day be well-placed within the hierarchy, and creates a cottage industry of book pushers explaining to women how to beat the odds.<sup>26</sup> The presence of one or two highly placed women partners, for example, reassures the bright-eyed women recruits in our hypothetical that they are reasonably likely to succeed at BigLaw, in a way that simple statistical realities fail to vanquish.<sup>27</sup> Seeing some women succeed, and succeed so dramatically, we are inspired, we are challenged, and we are ready to follow in their footsteps. We are blinded by the brilliance of possibility.

*A. The Current Gender Schematic:  
Cherry-Picking and Trickle-Down*

The facts, nevertheless, counsel circumspection.<sup>28</sup> Consider, for example, the following: "There are six female CEOs of Fortune 500 companies, an elite handful who have beaten the odds. But it is not certain they will propel many other women to the top. Among the [twenty-four] best-paid executives working for those six CEOs, only three are women."<sup>29</sup>

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25. Barbara L. Bernier, *Assimilation or Liberation: Post-Modern American Women—Speech and Property Law*, 9 ROGER WILLIAMS U. L. REV. 521, 530-31 (2004) (asserting further that "[t]he women's movement suffers from the same problem of the civil right's movement—that is, expecting that assimilation is equivalent to liberation as the answer to full citizenship status in America.").

26. For a random and unendorsed selection of sports-themed go-girl literature, see RONNA LICHTENBERG, *PITCH LIKE A GIRL: HOW A WOMAN CAN BE HERSELF AND STILL SUCCEED* (Rodale 2005) (1993); GAIL EVANS, *PLAY LIKE A MAN, WIN LIKE A WOMAN* (2000); PAT HEIM & SUSAN K. GOLANT, *HARDBALL FOR WOMEN: WINNING AT THE GAME OF BUSINESS* (1993). Alternatively there are the sugar-and-spice-and-everything-nice themed selections. See, e.g., KATE WHITE, *WHY GOOD GIRLS DON'T GET AHEAD BUT GUTSY GIRLS DO* (1996); LOIS P. FRANKEL, *NICE GIRLS DON'T GET THE CORNER OFFICE: 101 UNCONSCIOUS MISTAKES WOMEN MAKE THAT SABOTAGE THEIR CAREERS* (2004) [hereinafter FRANKEL, *CORNER OFFICE*]; LOIS P. FRANKEL, *NICE GIRLS DON'T GET RICH* (2005).

27. EEOC, *supra* note 22.

28. See Patton, *supra* note 3, at 173; Rhode, *supra* note 3, at 1002-03; Basile, *supra* note 3, at 143-44; GENDER WAGE RATIO, *supra* note 7; WEINBERG, *supra* note 7; Reichman & Sterling, *supra* note 7, at 35; AM. ASS'N OF UNIV. WOMEN, *supra* note 7.

29. See Del Jones, *Few Women Hold Top Executive Jobs, Even When CEOs are*

Under the circumstances, “an elite handful has beaten the odds” seems an apt description of these special women who have been selected for advancement within a system skewed against them. In a real sense, these odds-beating uber-successful women have received the treble scepters of respect, economic autonomy and power in the workplace, and their well-placed presence in the workforce demonstrates that women—as a category—are not excluded from the power structure. If bias exists, it is not directed against women as a class in such a way as to preclude the advancement of *all* women, just most women. Thus, if bias accounts for disparate gendered outcomes at work, it is a bias that is calibrated to detect and prefer certain women over others—or, as is posited here, it is a bias that prefers some gendered qualities over others.

The persistence of a handful of elite successes while the overwhelming majority of women remain less likely to succeed than their male counterparts raises several questions, the first of which is why “these particular women?”<sup>30</sup> On some level, women who reach the top at work have gamed the system. They have brought to the table a degree of desirability that eludes the majority of women.<sup>31</sup> Are the women who succeed the smartest women? Are they the most hardworking? Are they the most competent? Are we dealing here with perhaps a genuine American meritocracy?<sup>32</sup>

Maybe. It is possible that in the course of the last thirty years women’s physical integration into professional settings previously reserved exclusively for men has had the effect of breaking down the preexisting hierarchical ordering of gender and, importantly, gendered expressions as they relate to issues of workplace competence. It may be the case that gender-indifferent market forces

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*Female*, USA TODAY, Jan. 27, 2003, available at [http://www.usatoday.com/money/jobcenter/2003-01-26-womenceos\\_x.htm](http://www.usatoday.com/money/jobcenter/2003-01-26-womenceos_x.htm) (explaining that the few companies that are run by women do not necessarily promote other women more frequently); see also Tristin K Green, *Discrimination in the Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 96 (2003) (stating that “[a]lthough white men made up 43% of the workforce, they held 95% to 97% of the senior manager, vice-president and higher positions in [Fortune 500 service firms]”).

30. Actually, the first is probably, “Why so few women?” However the question of why discrimination persists in the workplace is complex and well exceeds the scope of this article. For an account of the persistence of workplace gendered disparities, see Sturm, *supra* note 2, at 59-60.

31. See FRANKEL, CORNER OFFICE, *supra* note 26, at xiv.

32. Perhaps we are, and no considerations presented here forecloses the possibility that the most successful women are among the smartest, most hardworking, most competent of their peers. Indeed, they very likely are. See *Event Celebrates the Accomplishments of Michigan Women; Michigan Women’s Hall of Fame Honors [Ten] New Members*, U.S. NEWSWIRE, Oct. 17, 2005, available at <http://releases.usnewswire.com/getrelease.asp?d=55/55> (listing the ten women inductees and their accomplishments).

alone are at play in the hiring and promoting of women, and it just turns out that ninety-eight percent of women in the workforce are not competent to hold positions of significant responsibility. Or, alternatively, any number of other bias-free explanations may account for the disparity, including: women chose not to take competitive jobs; women make other lifestyle choices; men are less comfortable working with women because of the chilling effect of anti-discrimination laws; and so forth.<sup>33</sup>

This paper, however, proposes an alternative explanation predicated largely on the theory that the model of female liberation that evolved in response to “first generation” gender discriminations failed to address the misogynist notions about women underlying the initial distributions of power between men and women.<sup>34</sup> This theory, which I have described in greater detail elsewhere, holds that rather than reordering hierarchical gender preferences which held women to be inferior to men, the andocentric-assimilation model of female liberation allowed women to immigrate from their subordinate status insofar as they were (and are) willing and able to approximate existing and idealized andocentric norms.<sup>35</sup> The theory further holds that as a result of this particular evolution of gender deconstruction, deeply misogynist notions about feminized women—that is, women who express or are perceived to embody a gender identity which is farther away on the gendered continuum from andocentric ideal—persist, and have in fact been aggravated by the assimilation model.<sup>36</sup> However, the theory holds, post-assimilation, these gendered ideas are, ironically, far less identifiable in part because they fail to apply to all “women.”<sup>37</sup>

The example of our BigLaw hypothetical proves instructive on this point. The firm hires a lot of women—many more women than men. The firm is aggressively trying to increase the ratio of female associates to male associates, and as an institution it remains sincerely baffled by its gender-skewed attrition. Nonetheless, when the women arrive at BigLaw, they are treated differently than their male counterparts, and this treatment must be predicated on some perceived difference. If

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33. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, § 6 (Magazine), at 42 (announcing that many high-powered women choose to leave work when they become mothers because they find it less intense and more fulfilling).

34. Sturm, *supra* note 2, at 466 (stating that “[f]irst generation discrimination revolved around deliberate exclusion or subordination based on race or gender”). “This form of unequal treatment violated clear and uncontroversial norms of fairness and formal equality.” *Id.*

35. Render, *supra* note 9.

36. *Id.*

37. *Id.*

we accept for the moment that the otherness associated with most women remains tied to pre-assimilation notions about women as a category, we can assume that their difference is defined, at least in part, in contrast to competency, intelligence and efficacy.<sup>38</sup> Thus, however competent or intelligent the women litigators may be in spite of their otherness, the fact of their otherness nonetheless renders them more difficult to identify with, to talk to, and to trust than their male colleagues. Their otherness also presents dangers and difficulties in the establishment of nonsexual workplace intimacies, bonding and camaraderie. Gradually, most of them are isolated from the good work and the powerful partners. All but a very few are relegated to the back of the proverbial bus.

From this vantage point, it is not so great a leap to imagine that those few women who pass more easily among the partnership brotherhood are in some way either self-identified or coded as “less different” than the majority of the female associates that hemorrhage out of BigLaw every year. On some level, the women who succeed within this model are perceived to embody what it takes to make it at BigLaw. These few women somehow avoid, or at least mitigate, the stigma of otherness. In this light, it seems possible that those women who manage to beat the odds do so because they express or are perceived to express a gender identity that is more closely aligned with the andocentric ideal embraced by BigLaw. It is possible that women who have succeeded within an andro-idealized workplace (as compared to other similarly qualified women) have done so, at least in part, by complementing rather than challenging andocentric norms regarding competency and worth.

For example, in describing the qualities that facilitated the success of a woman who is chairman of a 630 lawyer firm, Lawrence Fish, chief executive of Citizens Financial Group observed, “She took a corner office, she got a big desk, and she didn’t dress in pastels.”<sup>39</sup> In other words, in the view of this particular male CEO, the woman he describes succeeded by escaping the otherness stigma of being a woman and its attendant presumption of incompetence and inferiority by eschewing a stereotypically feminized presentation and embodying—at least better than a pastel-clad woman would have—the existing andro-idealized vision of a successful, competent law firm leader.<sup>40</sup> Or put more simply: she met with his existing expectations.

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38. *Id.*

39. Kimberly Blanton, *Case Study: How Goodwin Procter Won Many of Testa’s Law Partners*, BOSTON GLOBE, Feb. 6, 2005, at C1.

40. Issues of gendered identities, expressions and presentations being laden as they are with assumed or implicit judgment and personalized normative and emotional responses, it is important to be clear: this article does not assert that



In this sense, the possibility that a greater ability or willingness to assimilate into existing organizational gendered expectations is predictive of relative success within those structures is far from a radical critique: those who would succeed within existing structures are well-advised to “fit in” to those structures.<sup>41</sup>

Of course, fitting into existing social structures and greater institutional expectations is not an experience unique to women. It is largely what everyone does at work, it is part of what I do as I present these ideas and part of what the reader will do in evaluating them. It is likewise important to emphasize that women who present less challenge to existing andro-ideals are not engaged in something nefarious or gender treasonous. This exploration of the implications of the success of the assimilation model of female liberation is not premised on an implicit “sell-out” indictment of women who have succeeded in a discriminatory climate. The fact that some succeed within a model that may be inherently discriminatory does not mean that women who do succeed do so to the detriment of women who do not. Nor does this paper suppose that women who succeed are consciously or unconsciously betraying a mythologically truer version

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successful women are more androgynous in their self-presentation, gender-expression or gendered identity than their less successful counterparts. This article posits only that the degree to which existing structure privileges movements away from the subordinate paradigm should not be ignored, but should instead be considered as part of an ongoing dialectic regarding women’s relative subordination.

41. Render, *supra* note 9. Moreover, not every workplace situation rewards female androgyny over femininity, but those which prize femininity in women tend to do so because value is placed in those contexts on women employees’ attractiveness to patrons or others. For example, in *Jespersen v. Harrah’s Operating Co.*, Jespersen, a female casino bartender, objected to her employer’s requirement that she wear make-up, a requirement which clearly signaled her employer’s preference for a traditionally feminine presentation among its women bartenders. 280 F. Supp. 2d 1189, 1190 (D. Nev. 2002), *aff’d*, 392 F.3d 1076 (9th Cir. 2004), *reh’g en banc granted*, 409 F.3d 1061 (9th Cir. 2005). Jespersen sensibly asserted that the forced-make-up requirement was objectionable because “[i]t is exploitive and perpetuates women’s roles as sex objects. [She] believe[d] the Defendant’s policy negatively impact[ed] women by portraying them in this stereotypical manner. She argue[d] that Defendant should not treat women like ‘Barbie’ dolls.” *Id.* at 1193. In finding for the casino, the trial court did not disagree with Jespersen that the requirement was exploitive or objectionable, holding: “Plaintiff is entitled to disagree with and object to the means by which Defendant promotes itself and its employees. Yet even if we agree that Defendant’s policy may not be a step forward in freeing women from societal stereotypes, it does not convert Defendant’s conduct into unlawful discrimination.” *Id.* at 1194 (citing *Alam v. Reno Hilton Corp.*, 819 F.Supp. 905, 913-14 (D. Nev. 1993) for the principle that making decisions for hiring casino dealers based on a preference for “Barbie doll” images is not discriminatory). Another possible motivation for preferring feminine women to androgynous women in the workplace concerns the desire in an employer to minimize the presence of “competent” women by preferring “giggling” women, as this ordering leaves unchallenged internalized hierarchy that women occupy a subordinate sphere of competency relative to the employer. However, this ordering of femininity in contrast to competency, coupled with a preference for femininity, rarely bodes well for the initially preferred women. See Yuracko, *supra* note 2, at 227.

of themselves, their gendered identities or expressions, or of womanhood generally. Instead, it is the supposition of this paper that women's "true" gendered identities may express along a spectrum, which is neither limited nor necessarily informed by their sex.<sup>42</sup> It is also probable that some number of women who succeed are contra-model exceptions—that they have succeeded despite presenting challenges to andocentric norms, and in so doing they have bested a system biased against them without particularly complimenting existing norms.

Whatever account one embraces regarding women on top, the persistence of an andocentric-assimilation model in the workplace is significant insofar as it continues to exclude *most* women from the dominate power paradigm, and insofar as it fosters preexisting misogynistic norms which lie at the heart of women's continued subordination, while simultaneously obscuring that subordination.<sup>43</sup>

Moreover, it is this obscuring function that is the central focus of the discussion here. Many if not most scholars writing about gender discrimination in the workplace today have identified that the problem has evolved beyond "first generation" discrimination predicated on formal biases relating to sex.<sup>44</sup> Susan Sturm initially and persuasively outlined the descriptive framework of "second generation discrimination":

Second generation claims frequently involve patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. This exclusion is difficult to trace directly to intentional, discrete actions of particular actors . . . . [Second generation discrimination] is particularly intractable, because the participants in the conduct may perceive the same conduct quite differently. Moreover, behavior that appears gender neutral, when considered in isolation, may actually produce gender bias when connected to broader exclusionary patterns.<sup>45</sup>

Similarly, Orly Lobel describes the gender discriminatory problems of the "new workplace" as "not the result of a distinct decision to discriminate but rather of complex practices, including corporate culture, informal norms, networking, training, mentoring and evaluation."<sup>46</sup> Thus, the picture of gender discrimination in the modern workplace is complex and diffuse, often it is described as a

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42. See Render, *supra* note 9.

43. See *id.*; see also Yuracko, *supra* note 2, at 227 (stating that partners prefer to hire deferential women for their firm and yet they tend to promote only those who are tough and aggressive to the partnership level).

44. Sturm, *supra* note 2, at 459.

45. *Id.* at 468-69.

46. Lobel, *supra* note 19, at 420.

collection of individual biases rather than a general or even actual bias against women. Moreover, in this picture of the “new workplace” there is a lack of malfeasance with respect to gendered outcomes. There is an absence of an intent to discriminate, and there is the sense that most system participants genuinely seek solutions to problems such as the gendered-attrition problem that our hypothetical BigLaw faces.

But, while the picture of second generation discrimination seems observationally accurate—and certainly formal gender restrictions are no longer the primary problem—it seems that the universality and persistence of gendered treatment and outcomes in workplaces in which policy-makers sincerely seek to recruit and foster female employees, requires more of an inquiry into the nature of the gender bias being enacted in the workplace. The “why women” question—or as it is refined herein, “why some women” or “why these particular women”—seems to me to be of great significance in evaluating approaches that may best resolve the problem that I do believe most participants do genuinely want to resolve.

But we cannot resolve a discrimination that we have stopped seeing, and we certainly cannot know which model will better inhibit gender discrimination at work, if we are unclear what we mean when we say “gender discrimination.” Rare is it the workplace that fails to recruit or even under-recruit women, and yet women do not succeed on a level that is commensurate with that ostensible neutral “equal opportunity.”<sup>47</sup> A handful of women rocket to the top, and most plateau. Understandably, we have difficulty synthesizing these truths into a unifying discriminatory theory. Still, as a starting place, it is worth exploring the degree to which the hierarchical orderings of gendered identities and expression has not actually been transcended at all, but have instead remained static while the desirability of sex diversity has been added to the workplace calculus.

If it were the case that the andocentric ordering of gendered preferences has in fact remained somewhat static but the element of the desirability of sex diversity has been added to the employment calculus, how would this affect women’s relative experiences and successes in a workforce dominated by an andocentric-assimilation model? If the model in question defines competence and attendant cluster qualities in contrast to an individual’s distance from andro-ideals (and assuming again that we live in a social structure in which sex diversity is desirable), one might expect to see a minority of women who happen to fall within proximity to andro-ideals benefiting

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47. See Patton, *supra* note 3, at 173 (showing that a majority of female lawyers work for a private practice firm and still they are underrepresented as partners).

disproportionately from the model; we would also expect to see another subset of women who fall anywhere along the gendered identity spectrum but who are able to approximate andro-ideals benefits; and on the other end of the spectrum, women who exploit traditionally misogynistic and subordinating ideals about feminized women would “succeed” in a manner of speaking. If this model were the prevailing paradigm, where would that leave *most* women, assuming most women are reluctant to settle for the “success” attendant to objectifying feminization and are unable to approximate andro-ideals? Following the model to its logical terminus, it would leave a sliver of women in positions of power, a handful of women in exploitation-power, and most women in positions of relatively low pay, respect, and responsibility.

Moreover, if this model were silently but significantly molding the gendered topography of the workforce, it might too be serving to obscure its own role in that process and thereby aiding women in making their peace with the existing gendered inequities. For example, the model might serve to obscure its overall subordinating effect by clouding the causal effect that an andocentric definition of competence and worth has on the choices, options and preferences of the subordinate gender paradigm. Successful actors within this model represent false assurance that the powers that be are either “gender-blind” or that they have a neutral relative valuation of all gendered expressions. It is not about prejudice, the andocentric-assimilation model would hold, it is not about hierarchy, it is not about gender at all—it is about competence (or an attendant quality). “And we can prove it: our *chairman* is a woman! Be competent like the pastel-avoidant, and this too could be yours.”<sup>48</sup> If inequity in outcomes

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48. This may itself sound promising enough to some, but what if an individual is not able to “be like” the pastel-avoidant simply by avoiding pastels? Are egalitarian sensibilities satisfied with a definition of competence that also happens to overlap with traditional valuations of femininity and masculinity, rendering all women initially handicapped until they are able to rebut the presumption that they secretly like pink? Twenty years ago andro-assimilation was less closeted, so to speak. See Beverly G. Kempton, *The Language of Clothes*, WORKING WOMAN, Sept. 1984, at 157 (reporting that clothes may help to camouflage a less andro-identified woman as long as she is not too attractive).

Grant McCracken, assistant professor at the University of Guelph, in Ontario, Canada, was one of several to seek an answer. His study told us that recent styles indicate a “changed concept of femaleness.” In addition to still wearing the radical feminist ‘uniform,’ women are now striving to create an “authority look” in their workwear, an attempt, he explained, “to isolate certain symbolic properties of male business clothing and incorporate them into female fashion.”

McCracken hastened to add that this is not simply imitation in “pursuit of greater prestige and status.” Quite the contrary; women are being splendidly tactical. They have mirrored and adapted the concepts of men’s wear in the workplace in order to “appropriate its expressive qualities. The object of this undertaking is to give

exists, the model might hold, it is because so many women chose not to play by the rules, they chose not to work hard, they chose to wear pastels, and they chose to spend their time elsewhere.

However, there is of course both a tautological and an ad hoc problem with these claims. Tautology first: if the model defines competence and attendant cluster qualities in contrast to an individual's distance from andro-ideals, it should not be surprising to find that most women compare unfavorably to identically qualified men. If BigLaw is assigning an important client to someone with a J.D. from Harvard, there may be several choices. If BigLaw is assigning an important client to someone with a J.D. from Harvard who embodies a "proactive" attitude, perhaps wholly associated in the assigning partner's mind with maleness, it seems likely that women at BigLaw are going to taking a beating from the gate. Latin second: if the model results in disparate treatment and opportunity for women in such a way that, to return to our hypothetical, our female associates—each of whom labored for seven years in competitive educational settings, competed for clerkships, and, like their male colleagues, spent on average ten to twelve years preparing for this, their jobs—spend their days filing, faxing, and organizing instead of brief-writing, researching, and arguing, is it surprising under these circumstances, that they may eventually prefer to spend their time elsewhere?<sup>49</sup> In other words, the model itself may obscure a causal relationship between gendered disparate treatment and gendered professional choices, while hypothesizing that women are just different, they want different things; the difference just is.<sup>50</sup>

Another manner in which this model might quietly affect workplace outcomes is by presenting a paradigm of false alternatives, thereby

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businesswomen new credibility, presence and authority in the business world." Does this pragmatic, masculine image work? At the moment, more often than not, it does, or so psychologist Thomas F. Cash's research suggested.

[However] some research disclosed that physical attractiveness can be a liability for the woman attempting to move from a secretarial job ("appropriate" for one of her sex) to a managerial position traditionally held by a man; she is "too feminine," "too sexy," in other words, too capricious to be taken seriously. Turn this inside out and behold the woman who has so perfected the authority/managerial style that she is seen as threatening, i.e., too aggressive.

*Id.*

49. This is particularly so if they are especially appreciated and needed "elsewhere." Cf. Belkin, *supra* note 33, at 42 (stating that some women are redefining success in order to achieve a better balance between family and work). While this is not a paper about disparate child care responsibilities, see generally Lobel, *supra* note 19, for a thorough discussion.

50. Cf. CATARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 243 (1989) (noting how sex equality is primarily viewed on the basis of gender as difference, rather than as dominance).

creating a “fitting in” double bind for women. First, women who fail to fit in under the andocentric competence test may be concurrently perceived to be extra-competent at non-analytical, less responsible, less engaging, detail-oriented administrative work. For example, in our hypothetical, an andocentric-assimilation reading of the assignment disparity might be that women are trusted to do the administrative work because they are better at it. Here, the model might understand Associate A to be capable of substantive work, but instead the administrative work must be done, and Associate A is in possession of a skill set uniquely suited to that work. Or, gendered expectations being what they are, and Associate A’s workplace options being what they are, it bothers Associate A less to do the work, so her temperament is better suited to that work than a male associate’s might be. Or it bothers the partner less to assign the non-legal work to her, either because he perceives her to be especially well suited to it, or because he knows her options to be fewer. In any of the scenarios Associate A may be seen as an especially good “fit” with the bad work.

Similarly, women who do meet andocentric expectations of competence may be rewarded with—to stay within our example—the better work, but if the norm of andro-idealism remains undisturbed, those women too will always be playing against a handicap.<sup>51</sup> A major

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51. Consider Doris Weichselbaumer’s study on workforce gender discrimination published last year. Doris Weichselbaumer, *Is It Sex or Personality? The Impact of Sex Stereotypes on Discrimination in Applicant Selection*, 30 E. ECON. J. 159 (2004). Dr. Weichselbaumer stated that the purpose of the study was to “[investigate] whether women have less access to attractive, traditionally male jobs because their sex-stereotypical personality does not fit the job.” *Id.* at 160. The object of the study was to distinguish between plain discriminatory sex selections, such as preferring men to women, from circumstances in which the employer actually prefers male gendered qualities over those of “a traditional female.” *Id.* Dr. Weichselbaumer hypothesized that women are under represented in traditionally masculine jobs—she identifies the job of “manager,” by way of example—because employers lack insight into the relevant gendered personality traits of an applicant, and as a result employers use sex stereotypes to save on information costs, assigning women traditionally feminine qualities and men traditionally masculine qualities. *Id.* at 167. Offering the example of three equally qualified applicants: a feminine female, a masculine female, and a man (no further nuance is necessary in the world of the completely internalized andro-ideal), Dr. Weichselbaumer predicts that the inability of the masculine woman to communicate her gender identity fluently to the prospective employer will unfairly disadvantage her vis-a-vis the male applicant:

In a situation of *incomplete information*, where gender identity is not observable, the male will receive preferential treatment in a masculine job, while the two women will be treated the same. This is because the employer cannot distinguish between the two women. Masculinity is highly valued in the job, but the masculine female cannot be identified as providing the required characteristics and suffers statistical discrimination. In a *feminine* job, however, where feminine characteristics are required, the masculine female *benefits* from statistical discrimination. Although in fact she would be less suited for the job since she is lacking the feminine characteristics, she will be treated like the feminine female, because the employer just uses sex as an

flaw of the assimilation model of female liberation is of course that even when women are inclined or able to particularly distance themselves from the inferiority associated with femininity and express along andro-idealized lines, women will never be as ideal as men, because the hierarchical preference for an andro-ideal is not only a preference for a collection of so-called masculine qualities—although that is reflected—it is also a concordant devaluing, or differently valuing depending on the context, of the non-maleness of non-males. It is a power-based preference, a schematic, in which the dominate paradigm of maleness is, all other things being equal, preferred to the subordinate paradigm of femaleness. Inhabitants, of the subordinate paradigm, willingly or otherwise, are rewarded for their relative proximity to the dominate paradigm, and their value may increase as they approach the ideal, but they will, as a matter of simple definition, never reach it.<sup>52</sup> In this context women are defeated in the framing of the question: how like the self is the other? How is this applicant like me? How does fostering the success of this litigation associate

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indicator for gender and expects both to have equivalent personality traits. *Id.* at 166 (emphasis in original). Thus, Dr. Weichselbaumer identifies the problem of sex stereotyping along pro-assimilation lines. She takes care to disaggregate gendered qualities from sex itself, and then identifies the primary problem of sex stereotyping—as opposed to gendered expression stereotyping which she enthusiastically affirms—to be the obstacle it presents to women with the preferred “masculine” gender identity or expression, stating:

If a woman can demonstrate that she does not correspond to her sex stereotype and in fact does have the stereotypical personality traits of a man, she should be treated like a man. A woman with identical human capital and personality should be equally productive as a man—no other conceivable variables might determine productivity apart from knowledge and personality traits. Consequently, she should receive equal treatment. If such an equal treatment is not observable, we argue, discrimination has been documented.

*Id.* at 160. However, in Dr. Weichselbaumer’s view, if a woman is not offered the “manager” job because the employer correctly identifies her as a non-masculine woman, then discrimination has not occurred. *Id.* at 176. To explore this hypothesis, Dr. Weichselbaumer designed a study in which her equally qualified gendered trio each apply for both a masculine job expected that the masculine woman would fare better than the feminine woman in what she designated the “masculine” job of network technician. *Id.* at 176-77. She also expected the masculine woman would fare about as well as the male applicant. *Id.* However, the study showed that while the masculine female was preferred to the feminine female in the network technician setting, the man fared much better than either of them. *Id.* at 173. “From the 117 enterprises tested, [seventy-three] percent contacted the male applicant, [sixty-three] percent the masculine female and [fifty-eight] percent the feminine female for an interview.” *Id.* Moreover, while Dr. Weichselbaumer felt it was not significant—perhaps because she was not considering the possibility that andro-presentation was preferred not because the job requires masculine qualities, but because andro-presentation more closely approximates the andro-ideal—it is worth noting that the masculine woman was also slightly preferred to the feminine woman in the “feminine” job of secretary. *Id.* at 174.

52. See *id.* at 172-74 (showing that while the masculine female fared better than the feminine female in a job interview, the masculine man was still preferred over a masculine female).

validate myself, and my own access to relative privilege?

Another manner in which the andocentric-assimilation model may be skewing views of women's relative subordination is by perpetuating the belief that the actual physical immigration of albeit a small number of women into positions of real power has or will result in the increased relative valuation of "women" as a category, both because the powerful women will carry into those jobs their own higher valuation of women generally, and because their positive intercourse with men in power will increase the power structure's valuation of women generally. This belief might be likened to a "trickle-down" theory of relative gender empowerment, and as an avenue of access to genuine increased power for women generally within the hierarchy, it seems unlikely for a number of reasons. First, and most obviously, it is possible that we all, including the women who succeed, have internalized the schema described here. If that is the case, then physical immigration of women alone is probably not going to be of overwhelming assistance in reordering the paradigms, particularly if we remain largely unaware of the subtly gendered nature of the hierarchy and therefore we do not carry the tools by which to deconstruct relative gender orderings into our professional environments. There is no reason to assume that women, who may themselves fall anywhere on the gendered spectrum and who themselves operate within the present model, are more likely than men to devalue andro-norms and prioritize nonandro-norms.<sup>53</sup> Further, given their successful navigation of the existing gendered ordering, women in power have the survivor's disincentive to decry the "gender neutral" paradigm.<sup>54</sup> Ultimately, whatever set of likely

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53. See, e.g., Blanton, *supra* note 39, at C1 (noting that despite being woman-led, Goodwin Proctor has a "low ratio of female-to-male partners [that] is typical of large law firms: Forty of 217 partners are women, and [nineteen] of 128 equity partners, an elite group with ownership in the firm, are women"). Moreover, the article states that Lawrence Casey, an attorney who is representing a former Goodwin associate presently suing the firm for gender discrimination has stated that he "has interviewed several women attending a legal conference in 2000 who allege that Pisa told an audience, in effect, 'women with children were going to have a hard time getting to the top, that it was not realistic for women to have it all.'" *Id.* Ms. Pisa has denied making such statements, but whether such a sentiment can be attributed to a particular individual, it is hardly a novel idea that for women to succeed within existing structures they must adapt to them. Men who succeed within the existing structure overwhelmingly have someone else raising their children. It follows within an assimilation-model that women wishing to access the same path must either find wives or forego children.

54. Consider the observations of "mature [women] career lawyers" reflecting on the relationship between assimilation and the attainment of relative power for women: "To the extent that women assumed leadership positions, they did so often as the 'token woman,' champions of gender neutrality typical of this generation of pioneer women lawyers who were encouraged to fit in rather than make waves." Reichman & Sterling, *supra* note 7, at 54.



complex psychological and circumstantial reasons, there is little evidence to show that women in power are more likely to promote other women to positions of power.<sup>55</sup> As a result, the promise of the andocentric-assimilation model that female immigration will resolve existing disparities if we remain patient seems, at present, largely illusory.

Finally, perhaps the most important way in which the andocentric-assimilation model obscures gender subordination (and thereby desensitizes women to that subordination) is by failing to present a locus or narrative of blame. Within this model, both as it functions and as it is properly understood, there are no villains or villainesses, there is no law to repeal, there is no court ruling to protest, and making peace with inequity is easiest when there are no architects of oppression at which to take aim. For example, in the anecdote that introduced this piece, the inequity is easily identified as the woman litigator reveals the truth about women litigators and the bad work, but the oppressor is not. In our “women litigators” hypothetical, there is no law that mandates that men and women are assigned substantively different work—indeed there exists a body of law proscribing such assignments. There is no law firm plan or policy enforcing this protocol, nor is there an individual partner or administrator or even oligarchy who we could ferret out and hold singularly responsible for the disparity. The firm itself cannot be held out as a rogue hot-bed of misogynistic preferences—these types of gendered outcomes are prevalent in law firms.<sup>56</sup> Taking the abstraction further, fingering law firms generally, or the legal profession in its entirety, also fails to satisfy our narrative need for a moustache-twirling villain, women faring as they do about as well in law as elsewhere.<sup>57</sup> In our hypothetical scenario, there are no

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55. However, there is some evidence. See, e.g., Grace H. Saltzstein, *Female Mayors and Women in Municipal Jobs*, 30 AM. J. POL. SCI. 140, 158 (1986) (demonstrating that cities with female mayors correlated with an increase in female employment, part of which may be attributed to the mayor actively promoting the hiring of women).

56. See Patton, *supra* note 3, at 173 (providing data on the under-representation of female partners in law firms); see also Rhode, *supra* note 4, at 1002-03 (noting that these gender outcomes are present in various occupations within the legal field); see also Reichman & Sterling, *supra* note 7 (revealing the gap in compensation between men and women extends beyond the legal profession).

57. Equality-wise, women fare better in law than in some other occupations, and also less well than some other occupations. Also, I would be clear that the use of women litigators as a hypothetical category of women experiencing disparate treatment at work is not an attempt to speak about or isolate the particular types of gendered treatment experienced by women lawyers, which, while an encompassing important experiential lessons about a subset of women in the workforce, is also a topic which has been thoroughly explored by a number of scholars. See, e.g., Shelley Hammond Provosty, *DRI Task Force Examines the Status of Women Litigators at Law Firms*, 24 NO. 7 OF COUNSEL 5 (2005); Sandy Mastro, *Courtroom Bias: Gender*

architects of hierarchical inequity, only adherents.

Moreover, the lack of an epicenter of injustice is magnified by a growing sense of blamelessness in and among its adherents. The gendered outcomes speak for themselves, yet instances of second generation discrimination are “frequently difficult to trace directly to intentional, discrete actions of particular actors, and might sometimes be visible only in the aggregate. Structures of decision-making, opportunity, and power fail to surface these patterns of exclusion, and themselves produce differential access and opportunity.”<sup>58</sup> In this vision of workplace dynamics, gendered outcomes are less the result of an intentional systemic desire to suppress the uppity women as they are the result of a complex set of shifting conscious and unconscious factors and circumstances.<sup>59</sup> But as we adopt this amorphous understanding of the motivations at play behind the structural inequities in opportunity and access, we fail to draw the necessary broad and causal conclusions regarding our residual misogynistic notions about women and the way these ideas inform both the action of structures and decision-making. In sum, an extremely complex, subtle, defuse and variable set of orderings seems to be at work behind gender disparities. But in the broadest possible sense, in the pan-historic sense, in the depressed class-wide outcomes sense, and the norm-entrenching sense, it may still largely boil down to a collective and deferential preference for the alpha, even in the absence of a law to that effect.

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*Discrimination Against Pregnant Litigators*, 8 WM. & MARY J. WOMEN & L. 155 (2001).

58. Sturm, *supra* note 2, at 460.

59. In contrast to the simple animus-based discriminatory theory which accounts for the “wrong” of “first generation” discrimination as the deliberate exclusion of women, Susan Sturm suggests three possible discriminatory theories which might account for the “wrong” of second generation gender discrimination:

One such theory would apply to decisions or conditions that violate a norm of functional, as opposed to formal, equality of treatment. This theory defines discrimination to include differences in treatment based on group membership, whether consciously motivated or not, that produce unequal outcomes. Second generation bias could also violate a norm of equal access, which defines discrimination to include employment decisions that are formally fair but functionally biased in favor of the dominant group by using criteria that advantage one group over another for arbitrary reasons, meaning reasons that do not advance the articulated goals of the employment decision. A third possibility is that these subtle, exclusionary practices violate an antisubordination principle, which itself is a plural normative category that could include stereotyping, gender policing, undermining women’s competence, or maintaining gender or racial hierarchy.

Depending on the context, one or a combination of these discrimination theories may be implicated. Indeed, aspects of second generation bias frequently blend with circumstances that themselves may not violate any current legal norm.

*Id.* at 473-74 (citations omitted).

*B. If to Schema is Human, then Whether to Schema  
is not the Question*

However, even if it is the case that a societal androcentrism lies behind gendered disparate treatment and other gendered outcomes, the normative implications of such a system are not self-evident. Not only is it unclear what can be done about it given the lack of an identifiable agent of oppression, it is also not obvious that anything should be done about it. This lack of obviousness results in part from a movement away from a hyper-idealized understanding of human intercourse that presumed society could adopt an indifference to superficial constructs like gender and race.<sup>60</sup> The “even playing field” workforce ideal presumed on a very concrete level that all other things would indeed be equal—in the gender-indifferent sense. An even playing field is meaningless if when you get there, you find that someone has to be the cheerleader and, nothing personal, but you are the only one who fits the uniform.<sup>61</sup> It was not that the ideal misunderstood the inherently subordinating role of cheerleader, it was that the model underestimated the recalcitrance of an ordering which dictates that someone has to be the quarterback and someone has to be cheerleader. It underestimated the degree to which dominance would replicate itself such that actual sex aside, the dominate paradigm would continue calling the plays. In this way, the hyper-idealized model envisioned that an absence of gendered hierarchy would follow the deconstruction of gender roles, and in this, it failed to adequately understand the complexity and persistence of hierarchy.

Increasingly the intricacy and omnipresence of our social hierarchies has been a topic of observation and discussion among social scientists and policy advocates. Social scientists explain that processing, categorizing and ordering is the manner by which we distinguish between wives and hats, and how we decide which to save when the house is on fire.<sup>62</sup> Intuitively we understand that our concept of reality is relational, compartmental, and structured around schematics which are necessarily hierarchical as are our organizing cognitive processes, and even the processes by which we describe those processes. It may be unrealistic to expect our social evaluations

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60. And in presuming this, presume too that race and gender were superficial constructs.

61. Other critiques of neutrality are similarly apt here. For example, an even playing field is useless if you can never get there because you have nowhere to leave the kids.

62. See OLIVER SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT* 20 (Touchstone 1998) (1970) (explaining how our mental processes involve classification and organization).

and intercourse to be divorced from these mappings and schema. Looking through the long lens of history, it is impossible to ignore the prevalence of Caesars and chiefs, slaves, and untouchables, and according to Jerry Kang, a look at the present snap-shot of social cognitive studies would seem to confirm the inevitability thesis.<sup>63</sup> As he explains it:

We employ schemas out of necessity. Our senses are constantly bombarded by environmental stimuli, which must be processed, then encoded into memories (short- and/or long-term) in some internal representation. Based on that representation of reality, we must respond. But we drown in information. Perforce we simplify the data stream at every stage of information processing through the use of schemas . . . . To be clear, this most basic process operates not only on inanimate objects, such as chairs or bananas, but also on human beings. When we encounter a person, we classify that person into numerous social categories, such as gender, (dis)ability, age, race, and role.<sup>64</sup>

This picture of social hierarchy may prove initially discouraging from a feminist standpoint, in part perhaps because of the problem presented by the fabled past, alluded to above. Our most theoretical egalitarianism operated implicitly from an expectation that separate gendered paradigms might be valued equally in the same context followed. This ideal is distinct from valuing the utility of different qualities equally—i.e. valuing women’s nurturing as it is suiting to child-rearing as much as we value men’s assertiveness as it relates to the board room. Instead, the most ideal vision of gender equality imagined that the concepts of “man” or “woman” would have no particular bearing on the concepts of nurturing or assertive or child-rearer or board member. There was a supposition that the categories could be hollowed out and rendered meaningless, and that once this process was complete, previously gender-stratified people would be equal. In this vision, equality of category overlaps largely with immateriality of category, which itself folds neatly into indifference to category, which began to sound a lot like sameness of category. But if this hyper-idealized picture of an absence of social hierarchy reflects an inaccurate or overly simplistic account of human cognition—if we must order what we categorize, and categorize what we process, is it

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63. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1494 (2005).

64. *Id.* at 1499. Professor Kang describes the phenomena of “agentic backlash” in the context of a gender study as an example of a way in which implicit bias against women affects interpretive bias. The study as he describes it (find this primary source) adopts an understanding that bias may be identified when subjects misunderstand the “match” between the agentic candidate and the agentic job, thereby replicating the implicit biases towards sex-disaggregation and assimilation much that way as Dr. Weichselbaumer’s study. *Id.* at 1517.

realistic to expect gender “equality”—in the indifference sense—amid the reality of persisting and discernable gendered differences?<sup>65</sup> Even if the categories of “men” and “women” are rendered meaningless, actual people and their varying embodiments of the qualities previously tethered to those categories will continue to live in the same places on the hierarchical schematic.

Given this theoretical picture, it is perhaps a fair question to wonder what is wrong with leaving people and their varying embodiments of gendered qualities where they presently lie. Much skepticism has been directed to the concept of gendered equality, particularly as it veers near sameness, and if there ever was a scholastic captain of the gender-sameness ship, few scholars remain on board.<sup>66</sup> For that matter, much skepticism and a full parade of horrors has assembled around the concept of “equality” itself as a societal goal, equality in these dialogues frequently flanked with an individuality-crushing homogeny, and other assorted ills at the end of which marches the iconic threat of a “wholly centralized” and entirely intrusive government.<sup>67</sup> Equality within this stream of reasoning is either a very silly or a very bad idea. At worst, it stands in opposition to diversity, autonomy, individualized choices, and even principles of anti-subordination.<sup>68</sup> At best it is an absurdly paternal or hubristic account of humanity, failing to account for the fact that people possess differing innate abilities, goals, and subjective self-interests. To quote Catharine MacKinnon: “on the first day, difference was; on the second day, a division was created upon it; on the third day, irrational instances of dominance arose.”<sup>69</sup> But if indeed gendered difference is (even disaggregated as it may be from sex), and if someone has to be on top, who is to say that in preferring an andro-

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65. Here the concept of “gendered” as opposed to gender (e.g. sex) is important. “Gendered” here is used to capture variances in gendered qualities, identities and expressions.

66. It is interesting to compare queer activists’ struggle with the push-pull dilemma of sameness and difference with the heterosexual paradigm referential. See, e.g., *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* (Edward Stein ed., 1990).

67. See, e.g., *United States v. Morrison*, 529 U.S. 598, 601 (2000) (striking down a federal law for victims of gender motivated violence).

68. For a perspective on equality in tension with autonomy, see Martin Shapiro, *Father and Sons: The Court, the Commentators, and the Search for Values*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T* (Blash ed., 1983) (comparing the Warren Court to the Burger Court). For a perspective of equality in tension with principles of anti-subordination, see JUDITH A. BAER, *OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE* 15 (1999) (theorizing that the gender-neutrality principle in Equal Protection jurisprudence has worked to exacerbate rather relieve women’s subordination).

69. MACKINNON, *supra* note 50, at 220.

ideal we have crowned the wrong king?<sup>70</sup> Adding to the problem of conceptualizing equality in a hierarchical schema is the uncomfortable acknowledgment that in walling off gender and race—the two boxes that we have most often collectively determined to protect—we are swinging with a terrifically blunt instrument. In a real sense our hierarchical schema appears to function more as a delicately calibrated complex logic game, in which qualities and combinations of qualities are relatively valued and valued again differently in differing contexts. The qualities which are accorded echelon-identifying weight in this game certainly include the categorical criteria outlined in Title VII—particularly as these are often coarsely used as proxies for the substantive qualities such as competence and intelligence—but significant too are the intricate qualities that signal not only membership in the broader classes, but which inform relative worth within those structures.<sup>71</sup> These include qualities that concern the package (skin tone, height, weight), and the person (gender-expression), and the personality (quality and tone of voice), to name just a few. Moreover, if these qualities too can be outcome predictive, how do we determine which of these hierarchies are tolerable and which are not? This is a difficult question with answers that must be culled and synthesized from democratic theory, political philosophy, social equilibriums, and jurisprudential doctrine. The simple answer for the purpose of the discussion here is that in terms of suppressing oppressive private hierarchies, immutability plus a history of subordination is where it has come out.<sup>72</sup> It is not intuitively obvious that immutability plus a history of subordination is where the line should be drawn, nor do they together comprise a wholly determinative criterion. For example, does weight discrimination carry with it a history of subordination?<sup>73</sup> What about disability?<sup>74</sup> What about height?<sup>75</sup> Is beauty super-ordinate?<sup>76</sup> Is

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70. This is not to suggest that the persistence of social hierarchies dictates that one or another gendered paradigm must dominate.

71. 42 U.S.C. §§ 2000e-2000e-15 (2004).

72. This answer is not meant to minimize the importance of the question; a full treatment of the issues concerned exceeds the scope of this discussion.

73. See generally Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004) (evaluating the societal and legal impact of the obesity epidemic); Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57 (2002) (describing the extent and nature of weight-based employment discrimination).

74. See generally Lisa A. Montanaro, *The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621 (1995) (arguing that Congress did not intend to give individuals with disabilities suspect or quasi-suspect class under the Americans with Disabilities Act).

75. See Nicola Persico et al., *The Effect of Adolescent Experience on Labor*

sexual orientation immutable?<sup>77</sup> In drawing these boundaries, bias is imposed, hierarchies of oppression are created, and relative valuations are entrenched. It is not a perfect standard nor is it ever perfectly applied.

Nonetheless, and setting aside the factor of immutability for the present, the relevance of a history of subordination does provide insight into an essential lynch pin to conceptualizing gender equality in a hierarchical schema. If our erstwhile hyper-idealized egalitarianism relied too much on sameness and reflected too little on hierarchy, at the other end of the egalitarianist spectrum—the more world-weary antisubordination end which never underestimates hierarchy—we have focused too little on liberty.<sup>78</sup> Focusing as

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*Market Outcomes: The Case of Height*, 112 J. POL. ECON. 1019, 1021 (2002) (stating that short men earn thirteen percent less than tall men and that by comparison, black men earn fifteen percent less than white men).

76. See Karen Zakrzewski, *The Prevalence of "Look"ism in Hiring Decisions: How Federal Law Should be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431, 431-33 (2005) (illustrating the problems inherent in workplace appearance discrimination).

77. See generally WAYNE R. DYNES, *HOMOSEXUALITY: A RESEARCH GUIDE* (1987).

78. These days, many people are talking about liberty the way people used to talk about equality, including perhaps most notably five of the Big Nine. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (holding that *Bowers v. Hardwick*, 478 U.S. 186 (1986), "misapprehended the claim of liberty" presented there and extolled the presumption of liberty inherent in our constitutional scheme). On the liberty wagon, the Court held *inter-alia* that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct." *Id.* at 562. The Court also stated that,

[Petitioners'] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once though necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

*Id.* at 578-79 (citations omitted); see also Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, in *CATO SUPREME COURT REVIEW* 2002-2003 21, 21 (Cato Inst. Ctr. for Const'l Stud. ed., 2003) (explaining how the *Lawrence* majority did not protect a right of privacy but protected a liberty right); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 3-4 (2004) (defending the constitutional doctrine of originalism from a libertarian perspective and presenting an outline for understanding the constitution to embody a presumption of liberty). So much has "liberty" become an "it" dialectic, that a few years ago Rebecca Brown cleverly dubbed it "the new equality." See Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1495-96 (2002) (supporting a claim that the egalitarian-minded generally have laid too little claim to the utility of liberty-based arguments, particularly where equality-based claims fail to redress representational failures). Nonetheless, this present paper's focus is on a decidedly less pragmatic deconstruction of the equality-liberty, and one which is applied particularly to the gender context. The arguments presented here are not offered to participate in the liberty-renaissance, but instead to support the idea that the equality-

antissubordinationists have on the falseness of self-determination within a system that defines the subordinate, we have wandered away from an understanding that all allocations of power being relational, equality in a hierarchy at best means being as self-determined as other people are, being “as free” as the dominate paradigm. Working in an inherently relational model, it is important to resist one’s exclusion from the referential, and to continue to object to that exclusion because with those objections the subordinate paradigm reaffirms its commitment to self-define and reassesses the definition accorded it.<sup>79</sup> With those resistances, objections, and reassessments lays the sole hope for a systematic reordering—and in this sense, for real change. Yet at the same time, it is important to bear in mind that self-determination is not an inscrutable concept. It in fact resides at certain places that we can drive to, assuming we can find a sitter. It lives in places like our local polling precinct, our schools, and our workplaces. At these three gates in particular—suffrage, education, and access to work—the subordinate paradigm’s autonomy interests coalesce with greatest force against society’s competing obligations and interests. That there are other important autonomy concerns and egalitarian aspirations for any minority paradigm is beyond question. But without “as much” economic independence, “as much” education, and “as much” suffrage as the dominate paradigm, we cannot meaningfully access them.<sup>80</sup> In contexts where inequality implicates self-determination, “equality” begins to be inexorably linked to liberty. It is at these autonomy intersections that the concept of “equality” of classes (which are comprised of individuals with differing innate abilities, goals, and subjective self-interests) within an inherently contextual scheme begins to make sense.

Moreover, at this juncture in feminist discourse, the intersection of the factors discussed above (the persistence of subordinate gendered construct and gendered difference; the imperfection of the criteria by which we have decided to protect some classes and not others; the lack of a locus of blame for gendered outcomes; and the possibility that human orderings may be inherently hierarchical) tend to cloud the imperative of resisting the present andocentric ordering, making its discriminatory impact easy or even desirable to ignore. We stop, in

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liberty dichotomy actually is a false dichotomy in the gender context, particularly in the case of disparate treatment at work.

79. See MACKINNON, *supra* note 50, at 241 (noting that the first task of a movement for social change is to face one’s situation and name it). Moreover, the need to self-define so that devalued gendered paradigms may be unshackled is as acute as it was when MacKinnon first introduced us to the concept.

80. Here, “as much suffrage” is not used in respect to sheer numbers, but in terms of the subordinate paradigm’s vote counting as much as the dominate paradigm’s.



a real sense, urging the inhibition of gendered outcomes because we are no longer certain that we want them to be interrupted. Maybe we want difference to be facilitated, maybe that is what “equality” means in the gender context. Maybe we have to settle for or we should embrace separate spheres because in an apples and oranges context, it is better to succeed as an apple than to fail as an orange. Maybe we have to choose among the relegated options, and make our peace with our choices, because it seems impossible to restructure so complex a set of social hierarchies.

In the ensuing relativist fog it is easy to lose perspective, but here women are fortunate to have so solid and proximate a history to ground us. It is helpful in this respect to recall that eighty-five years ago women were not permitted to vote in this country,<sup>81</sup> that we were not educated routinely until about forty years ago,<sup>82</sup> and forty-two years ago it was permissible to refuse us work.<sup>83</sup> We decry the male referential, the andro-ideal, and we should, but we should know too that when power is involved (and when is it not) equality for the subordinate paradigm means, at best, having “as much” structural access to power as the dominate paradigm has. And in this initial step we still have a long way to go.

### *C. Discrimination as Tyranny: Gender and the Liberty Axis*

As she stood trial for casting an illegal vote, Susan B. Anthony famously said, “Resistance to tyranny is obedience to God.”<sup>84</sup> The religious implications aside, she framed the issue in a manner that many modern feminists have often moved away from: she understood the issue of women’s “equality” to be a liberty concern, and she understood the disenfranchisement of women to be a tyranny. Now granted Anthony was dealing with the state’s suppression of her vote, and the state as a tyrant is a familiar picture. Also, voting itself evokes classically revolutionary drama, tea in harbors and so forth. But Anthony was seeking the right to vote—the contra-constitutional right to vote, it must be noted—in a state where other people could vote. Hers was both an egalitarian demand and a democratic crisis, the denial of which implicated her autonomy in a manner that is so painfully obvious that we barely perceive it to be separate from her stake in equality. Yet it is separate. If Anthony were seeking to vote

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81. *United States v. Virginia*, 518 U.S. 515, 531 (2000) (providing that women gained the right to vote in 1920).

82. *Id.* (detailing history of discrimination against women).

83. Title VII was enacted in 1964.

84. This quote is from the trial of Susan B. Anthony on the charge of illegal voting. BARBARA GOLDSMITH, *OTHER POWERS* 346 (1999).

despite the fact that she failed to meet an age or citizenship requirement, hers would be a claim to autonomy only. But instead, Anthony was demanding to do what a man in her place would be free to do, and in this way she linked her expectation of freedom to the freedom afforded the dominate paradigm. She expected to be as free to vote as a man in her place would be.

However, in the example of the age or citizenship requirement we may see a whirling cyclone of collapsing principles: could not Anthony's hypothetical citizenship claim be recast in the liberty dialectic as a demand to be "as free" as a citizen? Many readers perhaps soared off the page from the cusp of this slippery slope. But the answer is, well, no. Here is where it is essential to recall the discussion, at Part II.B, of the difficult question of *which* potentially subordinating hierarchies should be inhibited by the democratic collective and which should not.<sup>85</sup> This question must always be answered first in the context of deciding whether exercises of power—either by the state, or by individuals, or oligarchies—will be checked or go unchecked. The answers may change and probably will change "[a]s the Constitution endures, [and] persons in every generation can invoke its principles in their own search for greater freedom,"<sup>86</sup> but so far we have decided that we will not abide tyrannies which are directed at a class that is organized around an immutable quality, when that class also carries with it a history of subordination. Thus as to Anthony's hypothetical claim within our present structure: it is not permissible to deny her the vote because she is a woman although it would be permissible to deny her the vote were she not a citizen.

If the foregoing Anthony analysis seems complicated in light of its intuitively obvious result, unhappy news lies ahead. Unfortunately for those who prefer determinative outcomes, the suffrage example is as simple as it gets because few "liberties" and few "equalities" operate as a toggle—on or off—in the way that suffrage does. We know well by now that most liberties and equalities slide along a continuum, their content defined by tensions and contrasts. In the anti-discrimination context, much thought has been devoted to understanding equality as it is in tension with individual freedom, and reconciling that

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85. Yes, there will be hierarchies of oppression, but there will be hierarchies of oppression regardless of one's rendering of these issues. The point is that we must do our best, but we must decide, because in not deciding which hierarchies to interrupt and which to not interrupt, we decide too. Cf. BARNETT, *supra* note 78, at 22 (discussing the tension between the nineteenth century progressive movement, through which the legislature enacted restrictions on economic activity as well as "morals" legislation, and subsequent Supreme Court decisions holding otherwise by citing "liberty" interests).

86. *Lawrence*, 539 U.S. at 579.

tension.<sup>87</sup> Where liberty has been considered in this context, it has been considered largely as a means for capturing desirable outcomes that elude a rights-base discourse. Much of this equality-liberty dichotomy, particularly of late, has centered roughly on a New Deal/civil rights versus Federalism/anti-regulatory framework, the substance and relative merit of which will be discussed in greater depth in Part III. For the moment, it is sufficient to consider the accuracy of the dichotomy itself. Is “equality” in a hierarchical schema inherently in tension with liberty? In the interest of preserving the possibility that the reader might reach the end of this piece within her lifetime, the inquiry is here limited to: is gender equality in inherent and particular tension with individual autonomy?

Consider the following rendering of the dichotomy:

In [the 1980s], Americans seemed, for the first time since the New Deal, deeply divided about the proper relationship between citizens and the government. Shapiro had forecast that division, noting the radical opposition between a perspective that the government should compensate social, political, and economic underdogs until true equality was reached and a perspective that combined, in a ‘conservative political philosophy,’ a commitment to the autonomy and privacy dimensions of individual freedom with aggressive definitions of the constitutional principles of separation of powers and federalism.<sup>88</sup>

So in the broadest sense, the debate has long pitted autonomy interests of the-would be discriminator against the public value of repairing class-based distributive inequities. Gender equality falls into this celebrated divide between government intervention into private autonomy, and the “compensat[ion] of social, political, and economic underdogs”<sup>89</sup> primarily by way of Title VII’s prohibition against sex discrimination by private actors in the work place.<sup>90</sup> Title VII itself is able to reach private conduct by way of the Commerce Clause.<sup>91</sup> The Commerce Clause, therefore, is the primary route by which concern for gender equality is in “tension” with private orderings, and so it is

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87. See, e.g., Barnett, *supra* note 78.

88. See G. Edward White, *Unpacking the Idea of the Judicial Center*, 83 N.C. L. REV. 1089, 1154-55 (2005) (analyzing Martin Shapiro’s equality-liberty dichotomy); see also Shapiro, *supra* note 68, at 219 (illustrating the tensions between “hard choices over freedom versus equality”).

89. White, *supra* note 88, at 1155.

90. See *infra* Part III (presenting a brief consideration of the constitutionality of this particular gendered preference inhibition).

91. See U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to regulate interstate commerce); see also Daniel B. Rodriguez & Barry R. Weingast, *The Positive Theory of Legislative History*, 151 U. PA. L. REV. 1417, 1469 (2003) (explaining that Congress based its authority to regulate workplace discrimination in the Commerce Clause).

here that gender meets with autonomy-based flack, most of which is directed via federalism at the aggregation principle.<sup>92</sup> The resolution of those federalism/aggregation arguments is not paramount here, but what is important within this discussion is understanding that Title VII's inhibition of gendered hierarchies does not begin to touch the places where most of our "private" gendered interactions occur. It does not regulate gendered hierarchies in all the important aspects and areas of our lives outside of our professional lives.<sup>93</sup> It only touches that one place where the potential for economic self-sufficiency resides: work.<sup>94</sup>

Therefore, the principle of inhibiting gendered tyrannies only significantly burdens private conduct where private tyrannies would otherwise threaten women's access to economic self-sufficiency. Where the private-actor-employer would have treated women in a manner that did not violate Title VII, then his conduct has not been coerced. Where the private-actor-employer is forced to comply with Title VII in contradiction to his autonomous preferences, his unregulated preferences would otherwise serve to threaten the ability of women, as a class, to access economic self-sufficiency. Is this "tension" really a dichotomy in which all the liberty interests reside with the private actor-employer while women's relative autonomy remains unimplicated?

It depends on one's conception of liberty. To begin a discussion of the liberty implications of nondiscriminatory access to work, it is probably necessary, in light of the times, to make clear that the argument which follows is not a bid for women's piece of the proverbial pie.<sup>95</sup> This is not a capitalism-as-political philosophy

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92. See, e.g., White, *supra* note 88.

93. Of course to many, this is a failure of the civil rights model. See discussion *infra* Part III. It is worth noting too that serious "private conduct" regulation concerns are not implicated by our current method of inhibiting gender-bias in the other two areas identified herein as essential gateways of liberty: education and suffrage. Gender-bias in the education context is inhibited by Title IX, which for good or ill offers a state action "hook." See 20 U.S.C. §§ 1681-1688 (2004). Suffrage of course won its own amendment. See U.S. CONST. amend. XIX, § 1.

94. This paper will not address issues that have been ably addressed elsewhere concerning the relative valuation, benefits of, and potentially hardwired gendered nature of unpaid work disproportionately or traditionally done by women. See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (arguing for a prioritization of the mother-child dyad and public support for the unpaid work of child-rearing); ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* (2001) (arguing that the very necessary work of mothers has yet to truly earn our respect).

95. Discriminatory treatment (or disparate treatment) and discriminatory access to work, while themselves separate concepts, are used here interchangeably in that they are both stages of the same wrong, and are both the product of the andocentric-ideal model. See discussion *infra* Part II.A.

argument. It is not an argument that confuses free markets with personal autonomy, or wealth-access with freedom. Nor is it a Marxist argument, premised on an idea of autonomy which is connected to a woman's ownership of her own labor. It is an argument about relative freedom in an inherently hierarchical schematic. The premise of the argument is that if work is the avenue by which we get the things we need to live, then a gender-bias which systemically disadvantages women in terms of finding sustaining, meaningful work and keeping that work diminishes women's freedom relative to the freedom of non-women.<sup>96</sup> Discriminatory treatment at work means women have fewer choices regarding how and whether they are educated, where and with whom they live, whether they have children, and the manner in which their children are raised. It also means women have less choice about the apportionment of their time in accordance with the dictates of their internal lives, choices, for example, regarding the amount of their finite time which will be spent with others, with avocations, with themselves. If work is a gateway to relative power in our present power structure, then it is essential that women, who as a class already occupy a subordinate power position, should be at least as free as non-women are to access it directly.

Particularly, in the present, Vikki Schultz's writing in 2000 described with eloquence the non-economic, psychological, and spiritual significance of work:

People need more than money or property: We need life projects. We need goals and activities to which we can commit our hearts, minds, and bodies. We need to struggle with our capacities and our limits, in sustained ways in stable settings. We need to work alongside others in pursuit of common goals. We need to feel that we are contributing to something larger than ourselves and our own families.<sup>97</sup>

Professor Schultz's point is still well taken today, but in our present cultural moment as the dominant paradigm pushes more aggressively towards the private enforcement of public values, nondiscriminatory access to work is not only something that we may need to be fulfilled as human beings, it is something that we must have in order to participate in a privately ordered system which is largely replacing public discourse and regulation. In the age when the Renew Deal looms on the horizon, it is more essential than ever that women ensure they have structural access to "as much" as non-women of

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96. Also, this is not an affirmative claim for women to find meaningful or sustaining work. It is an argument that women must have as much claim to finding meaningful or sustaining work as non-women.

97. Vikki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1928 (2000).

whatever currency will stand in for autonomy and power within the potentially new “private” paradigm.<sup>98</sup> We must be vigilant in tying our fates to those who cut the pie, not because pie itself is inherently good, but because otherwise we lose our relative say in how it should be cut. If private is the new public, and the new leviathan is less the actual government and more a tyrannus-mercatus, then nondiscriminatory access to relative power within that system is essential to self-determination. It is about participating in our own governance, no less than Susan Anthony’s own fight. In this sense, disparate treatment at work is a liberty concern.

The introduction of this paper described the liberty interest at stake here in terms of the degree to which women are as free as our male colleagues are to find work and to find meaning in our work, to procreate or not, and, if we choose, to stand alone. Is this conception of the liberty interest at stake for women at work merely rhetorical flourish, or does employment particularly intersect with gender in our culture in a way that is concrete and instrumental in terms of accessing basic autonomies? Is it possible that gendered-bias has affected and continues to affect workplace outcomes such that women’s relative freedom to choose to engage in intimate relationships or to have children is affected?

Consider, for example, that “[forty-nine percent] of women over [forty] who earn more than [one hundred thousand dollars] a year are childless. That compares with [nineteen percent] of men in the same category. And lest you assume that these women chose the life they’re living, only [fourteen percent] said they had not wanted children.”<sup>99</sup> We have concentrated much on what it costs women to bear children when they do not want to, but we have considered too little what it costs women not to bear children when they do want to. Choosing between engaging work (or for many women, economic self-sufficiency of any sort) and children is a Hobson’s choice that men in this culture do not face. As important as autonomy is with respect to decisions concerning intimate relationships, how does the fact that single women are one hundred percent more likely to live in poverty than single men translate into respective liberties?<sup>100</sup> If

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98. See generally Lobel, *supra* note 19.

99. HEWLETT, *supra* note 17.

100. Karen Christopher et al., *Gender Inequality in Poverty in Affluent Nations: The Role of Single Motherhood and the State*, in CHILD WELL-BEING IN MODERN NATIONS 199, 207 (Vleminkcx, K. & Smeeding, T.M. eds., 2001) (presenting data which showed that in all countries except Sweden and France, the single women’s poverty figure was one hundred percent higher than men’s). Also, lest this variance be attributed to the persistent assumption that single women have more children than single men, consider that,

Single father families are less likely to be poor and these fathers are more

statistics like that bear out, then to what degree do gender discriminatory aspects of women's ability to access work affect women's relative ability to stand alone—to be economically unindentured to a parent or a partner or the state itself—particularly in light of the fact that a central aspect of the long history of women's subordination in this country has revolved around women's ability to escape legally enforced intimate servitudes and access direct power through work.<sup>101</sup>

And what about our hypothetical women litigators? How has gender-bias within an ostensibly neutral power structure constructed an obstacle to their ability to find meaningful work and to find meaning in their work? After years of study and training, how many of them will leave private practice, and how many more will leave law altogether? Were those years of study and training an invitation down to a road that ultimately leads nowhere? And, importantly, if we shared this parable with women law school applicants upon receipt of their applications, would it affect their decision to write that big tuition check?

## II. THE ROLE OF THE STATE IN INHIBITING PRIVATE HIERARCHICAL PREFERENCES

Catherine MacKinnon famously stated that “feminism has no theory of the state.”<sup>102</sup> Deborah Rhode likewise observed in 1994 that “the state does not occupy a central role in feminist jurisprudence. Most political treatments of the state have had little to say about gender, just as most feminist theory about gender has been uninterested in conceptual approaches to the state.”<sup>103</sup> Ideas of a feminist theory of

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likely to be in the paid labor force than female-headed families and single-mothers. However, single father families tend to be poorer and have lower labor force participation than married fathers . . . . Single fathers have fewer children than married fathers, but more than single mothers.

KIRK BLAIR, OHIO STATE UNIVERSITY EXTENSION FACT SHEET, SINGLE, CUSTODIAL FATHERS, <http://ohioline.osu.edu/hyg-fact/5000/5310.html> (last visited Feb. 5, 2006).

<sup>102</sup> This should be apparent, but the word servitude in this sense is used to communicate that women previously did not have the choice to stand alone economically. This is not to imply that the women who have other options, but nonetheless choose not to work outside the home, are engaged in some form of intimate servitude. Also, Dorothy E. Roberts writes with respect to servitude to the state. See, e.g., Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1032-35 (2004) (observing the manner in which welfare reform has dictated choices for poor women).

<sup>102</sup>. MACKINNON, *supra* note 50, at 157.

<sup>103</sup>. Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1181 (1994).

the state have followed, many of them good ideas.<sup>104</sup> But the project of viewing the state through the lens of feminist theory can be problematic, in that feminism is a contextual, responsive theory—it is a theory about what has happened to women, what is happening to women, what should happen to women, and why it should happen (here enters those theories of broader application). Thus, our feminism, modern American feminism, is in many ways a product of our particular state, because the story of what has happened to women here—which informs our theories of what should happen—occurred within this particular set of organizing principles, with its attendant and unique advantages and limitations. That is not to say it lacks broader application by analogy to other contexts, or that our feminism is not itself informed by theories of broader application: on the contrary. But our feminism directly applied to a matriarchy (it could happen) would make little sense. So this paper does not offer a feminist theory of the state, it merely considers existing structures within this state from a feminist perspective.

Still, in the course of evaluating structures within a state, it may be helpful to sketch a vision of the basic obligations of that state, if only to establish a framework within which critiques or advocacies can be evaluated. Here, our republic, with its Bill of Rights and separation of powers, is arguably a liberal democracy and while a consideration of the obligations of a liberal democracy are certainly far beyond the scope of this discussion, in the interest of finding a rudimentary place to begin a conversation about whether the state should regulate gender discrimination in the workplace, it may be useful to posit that, among other things, liberal democracies are supposed to protect individual autonomy and self-determination. It follows that, generally speaking, when self-determination is imperiled by actors, public or private, a liberal democracy is obliged—to some degree—to protect individual liberty by disrupting the operation of those oppressions.<sup>105</sup>

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104. See, e.g., Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L. J. 47, 48 (1997) (analyzing the roles of "public women" and "private women"); Karen Knop, *Borders of the Imagination: The State in Feminist International Law*, 38 AM. SOC'Y INT'L L. PROC. 15, 15 (1994) (contending that the rigid thinking of many feminists hinders their imagination).

105. See IAN SHAPIRO, *DEMOCRATIC JUSTICE* 30 (1999) (discussing democratic "oppositionalism" which concerns dimensions of democracy that have to do with resistance to "arbitrary hierarchy and domination"). For an excellent account of this theory and its account of the role of a democratic state in inhibiting private subordination, see generally David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005). David Sklansky describes the history of this theory of democracy:

[Democrats, in the theory of democratic oppositionalism] are driven less by a utopian vision than by the conviction that certain existing and unjustified forms of domination should be abolished. There is a long history of viewing this leveling impulse as the core of democracy. Tocqueville, for example, thought the democracy he found exemplified in America was first and



When the oppressive actor is the state itself, this idea is less controversial. Protecting individual liberty from the potential tyranny of the state was evidently on the forefront of the founding fathers' thoughts, as well as on the tip of their quills. However, the question of whether and to what degree the state can or should step in when private (as in non-state) power is used in a discriminatory manner is less easily conceptualized or resolved.

For example, when Ollie at Ollie's Barbeque prefers not to serve black customers inside his establishment, Ollie is privately enforcing his private racial hierarchy. The degree to which the state can or should impose a different world-view on Ollie—essentially reordering by legal mandate the racial hierarchy that Ollie prefers—is not self-evident. Similarly, if Ollie decides he prefers not to hire women cashiers—perhaps because in his subconscious gendered ordering he has unwittingly associated good math skills with men and poor math skills with women—should the state through the collective action of legislation or the counter-majoritarian action of judicial mandate be permitted to second guess Ollie's ideas about men and women and math? Or should Ollie's gender preference, which disadvantages women, be permitted to stand? What if Ollie is Wal-Mart?<sup>106</sup>

*A. Should the State Play a Role in the Regulation of  
Private Tyrannies?*

In inhibiting discriminatory gender preferences, the state necessarily reaches into the presumptively autonomous zone of an individual's private conduct and reorders it.<sup>107</sup> Whether we think the state should intervene in the example of gender discrimination in the

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foremost a matter of "equality of condition[s]"—and, more precisely, a matter of sweeping aside the powers and privileges of monarchs and aristocrats. Lincoln famously drew on the same idea when he tied democracy to ending slavery: "As I would not be a slave, so I would not be a master. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy." And when W.B. Gallie identified democracy a half-century ago as an "essentially contested concept," he argued that what held the concept together was "a long tradition (perhaps a number of historically independent but sufficiently similar traditions) of demands, aspirations, revolts and reforms of a common anti-inegalitarian character." The core use of the term democracy, Gallie suggested, was to invoke "certain political aspirations which have been embodied in countless slave, peasant, national, and middle-class revolts and revolutions, as well as in scores of national constitutions and party records and programs"—aspirations that were "centered in a demand for increased equality" and were advanced against regimes committed to prolonging "gross forms of inequality."

*Id.* at 1803-04 (citations omitted).

106. "Wal-Mart is the largest private employer in the world." *Dukes v. Wal-Mart*, 222 F.R.D. 137, 141 (N.D. Cal. 2004).

107. Private here is used in the non-state ordered sense, not in the public/private dichotomy sense.

workplace which is predicated on a complex set of potentially subconscious or at least unintentional andocentric preferences, as is suggested herein, largely depends on a number of factors beginning with the degree to which we think that andocentric gender preferences offend other principles which we hold in high regard. If we determine, for example, that unchecked andocentric gender preferences offend notions of egalitarianism which we hold in high regard, we may be inclined to advocate for the state to intervene to some degree and in some instances. If we believe that unchecked andocentric gender preferences in fact imperil important liberty/self-determination concerns, as this paper suggests, we may similarly be inclined to advocate for the state to intervene to some degree and in some instances. On the other hand, if we find unchecked andocentric gender preferences inoffensive, or normatively neutral in the grand scheme of things, we may be less interested in seeing the state stick its oar into private preferences. If we hold efficiency in particularly high regard, or rights exercised against the state in special esteem, we may find the regulation of gendered hierarchies to be less appealing, and so forth.<sup>108</sup>

It is doubtful that it will come as a surprise to the reader at this point in the journey that this paper nurtures the perspective that unchecked andocentric gender preferences harm women as a class in a way that the state should care about. This article assumes the

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108. A related question to be considered concerns whether a particular state can reach the private conduct—that is, is the particular state in question constrained by an expression prohibition or a lack of authority to reach the particular conduct in question? With respect to our state and the gender discrimination considered here, there are actually several schools of thought bearing on the question of whether our state can reach it. There is a version of the federalism critique, which holds that at least the federal branch of the state cannot reach the private discrimination because it lacks authority to do so under the Commerce Power or any other enumerated power. See *United States v. Morrison*, 529 U.S. 598, 618-19 (2000) (holding that the Commerce Clause did not grant Congress the ability to enact the Violence Against Women Act because it did not regulate an activity that affected interstate commerce). Others would argue that Title VII is an appropriate exercise of the Commerce Power and therefore our state can reach this conduct if it opts to, which it has. See, e.g., Jeffrey A. Mandell, Comment, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1062 (2005) (arguing that by basing Title VII in its Commerce Clause power, Congress avoided potential claims of unconstitutionality). Still others would argue that the authorization to inhibit the gender hierarchies described herein originates in the Due Process Clause of the Fourteenth Amendment and that this provision not only authorizes state intervention to inhibit private tyrannies, but when coupled with the democratic imperative that the state inhibit private tyrannies when those tyrannies construct class-based obstacles to fundamental freedoms, these constitutional authorizations for action are transformed into a command. See, e.g., Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 948 (2002) (suggesting a “synthetic reading of the Fourteenth and Nineteenth Amendments that is grounded in the history of the women suffrage movement”).

position that disparate treatment predicated on andocentric ideals inhibits women's relative liberty interests in a way that a liberal democracy, and we democrats that comprise it, should collectively try to hinder. In the context of disparate treatment in the workplace, this article embraces the value of women's access to meaningful work over other competing and otherwise important values—and most particularly over, in this instance, the value of being free to use one's private power (like Ollie's power to employ) in accordance to one's personal and inherently hierarchical worldview. In the instance of disparate treatment, Ollie's autonomous employment preferences mean less to me than the prospect of correcting a broad-based cultural inequity which ultimately (and admittedly not without intervening causes) results in single women being one hundred percent more likely to live in poverty than single men.<sup>109</sup>

Yet before anyone dons a beret and runs headlong towards the Bastille, if we set aside for a moment the normative value being vindicated, the concept that the state should or even must act to interrupt some private but oppressive uses of power is not controversial. For example, in our hypothetical BigLaw figuratively shackles its female associates to the administrative work, but if BigLaw instead adopted a practice of literally shackling unwilling associates in those tiny cell-like offices, it is likely that even the most dogmatic of libertarians would agree that the state is obliged to attempt to inhibit this use of force. This may be because the idea of limiting an individual's freedom by force offends norms of autonomy and self-determination that are central to our understanding of a free society as they are outlined in our constitution; or it may be because a state in which some are confined while others are free offends norms of egalitarianism that are central to our understanding of a free society as they are outlined in our constitution; or it may be because by using violence to enforce its will, BigLaw is usurping the role of the state as a violence-monopolist, and thereby creating a threat to the stability of the state and the overall efficiency of its society; or it may be because a primary purpose, function or goal of a democracy is to oppose "arbitrary hierarchy and domination."<sup>110</sup> Whichever of these views one embraces, all converge in agreement that our state is usually obliged to inhibit the violent imposition of one individual's will upon another.<sup>111</sup> Thus, as a starting place, all agree that some form of

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109. See Christopher, *supra* note 100, at 207 (providing that fifteen percent of single men in the U.S. live in poverty compared to thirty-two percent of single women).

110. Sklansky, *supra* note 105, at 1809.

111. See, e.g., ROBERT NOZICK, ANARCHY, STATE, UTOPIA 25 (1974) (arguing that the only state necessary is a minimal one that "provide[s] protection for all in its

private subordination should be inhibited by the state, and so the remainder of the project is determining where the anti-subordination line should be drawn.

Beyond the point of actual violent imposition on a neighbor, of course, views diverge as to the degree to which the state is obliged or authorized to interrupt private subordination. Some understand the obligation and authorization of the state's intervention to end with violence itself, believing that absent violence, an individual may use whatever power he legally possesses to leverage increasingly greater advantage of his relative position.<sup>112</sup> An unmodified version of this dogmatically anti-state interventionist view would hold that in the context of our hypothetical, even given the situation that the second-year women associates are already at an experiential deficit due to privately enforced gendered preferences, it is legitimate for assignments to be allocated in accordance with gendered preferences, and it is also legitimate for the male associates to use their relative advantage to continue to attract the plum assignments and increase the experiential gender gap. At the point where the experiential gap has effectively rendered the women unqualified for advancement, the anti-interventionist would hold that the women should leave—as they do both in our hypothetical and in reality of the BigLaw market—which may well be acceptable to the anti-interventionist when weighed against other values he holds in higher priority.

Then, on the other hand, there are those who would favor some type of intervention to check private gendered hierarchies, which result in disparate treatment and outcomes at work. The question is which type of intervention is best. For the most part, the only system that has been in place up until now is the so-called “civil rights” or “regulatory model” of dealing with gender discrimination. In this model, private hierarchical preferences are prohibited by law, and legal penalties attach to private actors who violate the anti-discriminatory norms articulated by the statutes/doctrines. The civil rights model represents the dominant model of antidiscrimination enforcement, it is the antidiscrimination model, which has taken us from the Civil Rights Act of 1964 until the present moment, and it has always been controversial.

*B. Governance Versus Regulation:  
Welcome Back to the Machine*

Remember the 1980s? There was a great deal of fervor foretelling

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territory”).

112. *Id.*

of the end of “big government” and advocating trickle-down theories of distributive justice, amid, generally speaking, rather a lot of Izods. Well there are those among us who predict that the recent resurrection of up-turned collars on day-glow Izods may be harbingers of other things eighties to come. There is talk of revolution (again) in legal discourse, and some are selling the moment as one of “crucial . . . renewal and reinvention” and honoring the “analytical tour de force” which harkens “a shift from the traditional New Deal regulatory” paradigm to the better day of unshackled market forces, and increased faith in the corporation-paternalus.<sup>113</sup> Other voices are more temperate, but generally advocates of the governance approach tend to see it as a response to a changing world of technology innovation, globalization, and the concurrent development of a “new” workplace, while opponents might describe it more politically, attributing deregulation successes to a shifting of ideology on the bench. Many advocates and opponents see both opportunity and pitfalls within the new deregulation paradigm as it applies to the workplace.<sup>114</sup> But, they decidedly see it coming.<sup>115</sup>

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113. Lobel, *supra* note 19, at 343-44. Professor Lobel further describes the model:

The Renew Deal governance model imports features from the organization of the market into the public sphere. At the same time, albeit to a lesser degree, it orchestrates the importation of public values into the new private-sector economy. A recurring theme of the new model is that state and government agencies should learn from the practices of private organizational models and market-based management theories. The use of private firms as an analogy to other social spheres reflects the growing opinion that broad developments in the market economy trigger direct changes in law. In many contexts, the interconnections between the object of regulation (the economy) and the strategy by which it is regulated (law) motivate the push for renewal through the adoption of market practices in the public sphere.

*Id.* at 365-66 (citations omitted).

114. For an overview of both the opportunities and pitfalls within the deregulation movement in the employment context, see Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 322 (2005).

Self-regulatory processes in which workers participate can introduce flexibility and responsiveness into the regulatory regime, and can reduce the costs and contentiousness associated with litigation, while promoting the internalization of public law norms into the workplace itself. The problem, of course, is that the move toward self-regulation has coincided with a drastic decline in unionization, the only legally sanctioned vehicle in the United States for employee representation within the firm.

*Id.*; see also Sturm, *supra* note 2, at 470 (describing the pitfalls that arise due to subjective decision making); see also Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1, 67 (1997) (outlining normative advantages of governance over regulation, while identifying the limited scope of the application of negotiated rules).

115. See Estlund, *supra* note 114, at 324 (expressing concern over the decline of unions at the same time that deregulation is occurring); see also IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 3-7 (1992) (addressing the pitfalls of deregulation with a theoretical new model called responsive regulation, whereby regulations form in response to the specific needs and

While there are many versions of the “governance” model as it stands in contrast to the “regulatory” model, there are common threads throughout. Advocates of governance as opposed to regulation tend to agree that the regulatory model is “hierarchical, state-centric, bureaucratic, top-down and expert-driven,” and that its primary failing concerns its one-size-fits-all approach to workplace problem solving, which produces “fragmentary, piecemeal, and highly prescriptive regulatory interventions,” which tend to result in an “impossibly complex and tangled web” of rules.<sup>116</sup> Moreover, in service of the goal of inhibiting—in our context—gender discrimination, the regulatory paradigm applies these nonspecific piecemeal rules in a manner that makes future applications difficult to predict, and in a manner which often misses the point of the value which was to be protected.<sup>117</sup> In the process of shoving round problems into the square holes carved out by courts, the model chills innocuous behaviors thereby imposing even greater burdens on individual autonomy, and often times aggravating gendered disparities.<sup>118</sup> Similarly it often produces very inefficient results as employers must address potentially discriminatory problems by weighing litigation risks rather than modeling results-oriented solutions.<sup>119</sup>

In contrast, the “governance” model while, again, varied, tends to aspire “instead to be more open-textured, participatory, bottom-up, consensus-oriented, contextual, flexible, integrative, and pragmatic.”<sup>120</sup> In many versions of the model it realizes this adaptiveness through a “best practices” paradigm of “information

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pressure points of an industry).

116. Bradley C. Karkkainen, *“New Governance” in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 474 (2004).

117. Sturm, *supra* note 2, at 470.

118. *Id.* at 477. Sturm identifies potentially aggravating applications:

For example, lawyers may counsel employers to avoid sexual harassment problems by discouraging informal or social contact among men and women. Of course, this advice fails to achieve the sought-after status of a legal safe harbor, and it undercuts the capacity of preventive action to further the goals of equal employment opportunity. Advice of this character necessarily trivializes the problem of sexual harassment. It defines the scope of the problem underinclusively so that the general and fundamental problem of women’s access and participation remains unaddressed.

*Id.*

119. *Id.* at 476. Sturm states, “In a rule-enforcement process, problems tend to be redefined as discrete legal violations with sanctions attached. Fear of liability for violation of ambiguous legal norms induces firms to adopt strategies that reduce the short-term risk of legal exposure rather than strategies that address the underlying problem.” *Id.*

120. Karkkainen, *supra* note 116, at 474.

feedback loops [and] benchmarking.”<sup>121</sup> The common operational theme of the model is a devolution of the litigation model of rights enforcement, and the evolution of voluntary compliance with antidiscriminatory standards within employment contexts. Cynthia Estlund has described this notoriously difficult to articulate model within the employment context, explaining:

Procedures vary, but they typically involve charging one or more employees with overseeing compliance with legal requirements (as part or all of their job), and establishing procedures for other employees to report apparent violations. Those programs respond in part to the Federal Sentencing Guidelines, which promise mitigation of criminal sentencing for firms with effective internal compliance programs. The Sentencing Guidelines play a minor role in the labor and employment arena, where criminal liability and prosecution are rare. But doctrinal developments under the employment discrimination laws . . . have played a similar role in spurring the growth of internal compliance regimes in the employment context. Both regimes are representative of a legal and political climate that has promoted the growth of habits and structures of internal compliance across a wide range of regulatory arenas. The existence of these structures has, in turn, enhanced the credibility of firms’ demands for more cooperative regulatory approaches and for more latitude to self-regulate their labor practices.<sup>122</sup>

Professor Estlund further observes that the movement to deregulate has not “made major inroads on the basic federal labor standards statutes themselves. Still, state and federal regulatory agencies have begun to experiment with forms of self-regulation within the confines of these command-and-control statutes.”<sup>123</sup> Moreover, although accounts of the degree to which the implementation of federal employment standards should (or would or will) be delegated (or deferred) or privately enforced compliance schemes by courts (and/or agencies), for the model to realize its maximum responsiveness and flexibility-based potential there must be at least some form of public relief from the ever-present risk of litigation. In the gender context, if the model indeed arrives in fullest force, we should expect some litigation-curbing either in the form of increasing doctrinal relief, or EEOC promulgated relief, or possibly even some form of Congressional relief amending the current statutory/administrative agency scheme.

Some employment-egalitarians are cautiously optimistic about the

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121. *Id.*

122. Estlund, *supra* note 114, at 342 (citations omitted).

123. *Id.* at 342-43.

potential application of the model to the employment context.<sup>124</sup> For example, scholars such as Sturm see opportunity for the greater flexibility of the model to provide better workplace outcomes, which are clearly not being satisfactorily addressed by the current regulatory regime. Sturm describes the application of a problem-solving framework to gendered employment problems:

[The problem-solving] process identifies the legal and organizational dimensions of the problem, encourages organizations to gather and share relevant information, builds individual and institutional capacity to respond, and helps design and evaluate solutions that involve employees who participate in the day-to-day patterns that produce bias and exclusion. An effective system of external accountability, including judicial involvement as a catalyst, would encourage organizations to identify and correct these problems without creating increased exposure to liability, and to learn from other organizations that have engaged in similar efforts.<sup>125</sup>

By way of contrast, a strictly regulatory regime, Sturm contends, diverts emphasis and resources away from solving particular workplace problems, and towards protecting the employer from liability. Moreover, the allocation of resources which must be directed towards protecting against liability is so substantial that alternative methods of solving gendered workplace problems are rarely explored. Also, and importantly, Sturm views liability-protecting legal commitments often to be in conflict with what might otherwise be internally-driven solutions to gendered problems.<sup>126</sup> Sturm also notes that an internally-driven problem-solving regime lacks theoretical grounding to broad-based discriminatory problems. She encapsulates the dilemma thusly: “Externally-imposed solutions also founder because

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124. See generally *id.*; Sturm, *supra* note 2.

125. Sturm, *supra* note 2, at 475.

126. *Id.* at 475-76.

Under the current system, employers producing information that reveals problems or patterns of exclusion increase the likelihood that they will be sued. Thus, lawyers counsel clients not to collect data that could reveal racial or gender problems or to engage in self-evaluation, because that information could be used to establish a plaintiff's case.

*Id.* However, this particular example illustrates less a problem with the regulatory approach, and more the tension within particular companies between the value of gender equality and other competing values. If a company compiles information regarding gender discrimination and does not act on that information, the data becomes a liability. Of course, in failing to act where a discriminatory pattern exists also exposes the company to liability. But where the company compiles the data and takes steps to remedy the problem, as it should, then its exposure to liability is less than it would have been without collecting the data. The problem is not that the company may be unjustly punished for trying to learn about its gendered practices, the problem is that the company may learn about its gendered practices and chose not to act.



they cannot be sufficiently sensitive to context or integrated into the day-to-day practice that shapes their implementation. Yet, internally-generated solutions are often insufficiently attentive to their normative implications, or to the connection between those local practices and the general antidiscrimination norm.”<sup>127</sup>

This statement perhaps best isolates the choices that egalitarian-minded advocates face in assessing the possibilities and pitfalls of scaling back employer liability in the context of gender discrimination. On the one hand, the regulatory approach is insensitive to particular employment situations and often poorly tailored to specific problems. On the other hand, an internally-driven system which is not directed at addressing systemic inequities or fostering less misogynistic notions about women will not address those inequities or foster those norms.

The question then becomes whether we should primarily be trying to address the employment problems of individual women in their specific contexts, or if we should be trying to create system change through the enforcement of uniform norms. Sturm believes that we can do both if we are open to the possibilities of the governance model, while retaining mandatory procedural safeguards such as third-party disinterested monitors to oversee compliance with federal baselines. If these procedural safeguards could be effectively utilized, the innovative and adaptive nature of the model could better respond to the particularized needs of women in specific employment contexts while not comprising the overall goals of anti-discrimination measures if these problems stem from a systemic, broad-based and complex set of biases directed against gendered qualities.<sup>128</sup> This would be wonderful. It would be wonderful if individual employment problems could be more efficiently and effectively resolved without compromising the ability of federal regulation to promote broad-based anti-discrimination norms.

However, one of the potential problems of an approach that attempts to retain federal baseline prohibitions against “gender discrimination” yet allows employers or third-party moderators to ensure compliance with those guidelines is that it presents something of a “hydra” dilemma. “Guidelines” or baselines or whatever set of norms we institute and avoid calling rules must be interpreted. The problem of interpretation is a central aspect of the regulation model—it is perhaps the primary aspect of the model that makes it so unresponsive and burdensome—but it is also a problem that simply

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127. *Id.* at 475-76.

128. *Id.*

cannot be severed from any system in which there are baseline antidiscriminatory standards. To have a baseline means to have a substantive understanding of permissible behaviors. Under a governance model, the problem of substantively interpreting and applying those standards remains the same, but the responsibility of resolving that problem is simply relocated to different actors.

Who then should define the substance of norms relating to gender equality? This question returns us again to the issue of what we are trying to achieve with anti-discrimination measures. If we are trying to solve individual employers' problems, then individual employers or their compliance teams may well be the most competent people to decide what does and what does not constitute discrimination. However, if we are trying to redress the fact that individual employers evidence a preference or andocentric ideals, then individual employers may not be the go-to guys regarding defining discrimination. More: if we are trying to eradicate a situation in which single women are one hundred percent more likely to live in poverty than single men, then BigLaw's voluntary compliance team may not be the most sensible place to begin. And in terms of transferring the responsibility of defining the substantive parameters of anti-discrimination measures from the courts to third parties or other actors, ultimately and unfortunately for women, we must recall here who is sitting at that decision-making table of the third-party monitor or the voluntary compliance team. Women are underrepresented in positions of power in virtually every employment situation in which governance would replace regulation.<sup>129</sup> When we are talking about a system of substantive gate keeping that controls women's access to fundamental liberties, are we comfortable leaving that responsibility in the hands of the same hierarchical dynamic that constructed the disparity initially?

Here, the significance of identifying the nature of bias that accounts for second generation gender discrimination becomes clear. If, as this paper posits, an andocentric-assimilation model of female liberation accounts—at least to a significant degree—for the disparate employment outcomes that exist within our current model, and if it follows that employers are both largely unaware of their own andocentric preferences and the manner in which these preferences lead to disparate treatment and ultimately disparate outcomes for most women—then a model which is directed at solving individual workplace problems is much less likely to address and compensate for those preferences. Instead, within a system where the bias is already

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129. See Jones, *supra* note 29.

thoroughly obscured, a model which moves away from objective and broad analysis directed at the manner in which BigLaw (to return to our example) treats *all* female associates as compared to *all* male associates is unlikely to capture the problem at BigLaw. An individualized inquiry into each woman's experience at BigLaw fails to create a discriminatory picture. My friend, for example, who opened our tale was assigned administrative work. No one told her this was because she was a woman, and likely no one in power at BigLaw—including the assigning partner—consciously thought it was “because” she was a woman. Indeed, my friend might not have thought this except that she had the example of all the other equally qualified men and women associates to give her particular situation context. To solve the problem at BigLaw, one has to be willing see it within its larger framework—to see that something is afoot with respect to women and assignments.

Also, to solve the problem at BigLaw, one has to agree that there is a problem. To the extent that BigLaw fails to identify that the assigning process is gendered—finding instead, for example, that each individual associate was a particularly good fit with the bad work for a reason that they can not only articulate, but that they believe—it will be difficult for BigLaw to craft a solution that address BigLaw's gender preferences. BigLaw sees the problem from the inside and is confident that on an individual level, no one is acting out of an animus directed against women as a class. However, under the regulatory model, BigLaw cannot be satisfied that it is not acting out of misogynist impulse. Under the regulatory model, BigLaw has to worry about what a judge or a jury may think of the facts of the situation from the outside: all of the women and none of the men doing the bad work; an incredibly high female attrition rate; remarkably few women partners. Whether BigLaw ever confronts its internalized andocentric preferences, the regulatory model forces BigLaw to be afraid of disparate outcomes, which is incredibly important for women given the illusiveness of this particular bias.

In this sense, one of the primary social goods of antidiscrimination law in the gender context is not its ability to solve particular workplace problems for particular women, or particular employment sectors, or even particular markets, but is instead in its ability to respond meaningfully to nonparticularized, broad-based, and systemic problems like those posed by the andocentric-assimilation paradigm of gendered preferences. In the gender context, antidiscrimination law's primarily strength lies in the threat of liability attached to outcomes and appearances, rather than subjective intent. In other words it is the inefficiency of this very inefficient body of law that provides its primary benefit to women living in a patriarchy. It is the

broader application of articulated principles, and their attendant inflexibility and lack of responsiveness, that allows the fast-paced evolution of the doctrine to account for and address *inter alia*: disparities in bargaining positions; the sometimes absence of economic alternatives or other market-based corrections; the often unintentional or unconscious nature of the imposition of hierarchical preferences; and the frequently self-sustaining systems of oppression the imposition of those preferences erect. In other words, the critics are correct that the model is over-inclusive, and under-inclusive, that it fails to account for individual variances, and to conform to the particulars of particularized contexts, that it offers vague guidelines and unpredictable future outcomes which have a chilling effect and which inevitably spawn poorly tailored internal corrections. These are its strengths.<sup>130</sup>

However the critics are not right that the model discourages or tramples innovation. The pro-governance discourse itself empirically denies this claim. All accounts of the model point to the fact that the private sector is already engaged in the projects of innovative problem solving, the appointment of compliance teams, and the business of serious self-regulation. Moreover, the regulatory model does not target these experiments in innovative compliance. The regulatory model assesses and potentially punishes the results of the employment laboratories only within the same imperfect machinery that it regards all efforts at compliance: where the experiments trigger systemic oppressions, the hulking regulatory system will try to punish, and where these concerns are not triggered, the regulatory model is indifferent to the efforts of experimental compliance. Further, the governance model itself recognizes that in the absence of punishment (so where their experiment did not run afoul with basic norms), innovation is its own reward—which is why the trend towards self-regulation already exists within the regulatory framework. Whether

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130. Another strength of the regulatory system is that it places the control over whether BigLaw is likely to care about a particular problem in the hands of the individual is affected by that problem. In the absence of the threat of litigation, many scholars have argued that market-driven forces will encourage individual employers to seek solutions to particular problems, which could be true. But, under that system of incentives, if an individual employee faces a bias-based problem that the market for whatever reason fails to care about or correct for, then BigLaw has little incentive to craft a solution. In contrast, under the regulatory model, where an individual employee faces a bias-based problem, she can still seek direct redress from BigLaw. However, if the problem is one that the market does not correct for, or BigLaw otherwise does not care about it, the employee can insist that BigLaw respond, if only by investigating the legitimacy of her complaint due to the implicit threat of litigation. Under the regulatory model, the employee is not beholden to BigLaw or compliance teams, or third party arbitrators to recognize her problem as one that merits redress, and in this way she retains an important degree of control over the process.

these trends reflect an effort either to shield itself from litigation burdens or to build stronger, more humane, or more competitive businesses, they are not bad trends. They are experimental, they are interesting, and they may even turn out to be better problem-solvers. They are fine compliments to existing protections. But make no mistake: they are not a substitute.

*C. Working it out Together (While Carrying a Big Stick):  
The Value of the Civil Rights Model*

Certainly it must be worked out together. Even on the most abstract level, there is of course no alternative. Even within the regulatory model, broad-based rules and articulations of principle must be applied by people, and therefore most of the decisions that affect our daily lives and overall prospects in the workplace are arrived at through individualized interpretations and applications. In this, it is also helpful that we may start from the proposition that, again, there are no moustache twirling villains to be vanquished here. Rarely is the problem one of determined policy. We may start from the premise that most of the working it out will occur between fair-minded, well-meaning colleagues. The rules are a floor; a framework, a fire escape that reaches two-thirds of the way to the ground. From there we jump and rely on the kindness of strangers, the hope of gender immigration, and the power of our basically egalitarian-inclined culture, and the distant prospect of future court appointments: and longevity of memory—we rely on that as well.

I, for example, remember that Sandra Day O'Connor graduated law school in 1952,<sup>131</sup> and yet when my father graduated law school twenty-five years later there were four women in his class. Four. I graduated in a class that was fifty-four percent female. What happened in the generation that separates my father and I, that failed to happen during preceding generations—for example, during the generation in which women got the vote, or in the one in which Rosie the Riveter marched into the factory and home again, during the relative sexual liberties of the 1920s or the cultural deconstructions of the 1960s?<sup>132</sup> *Reed v. Reed* happened.<sup>133</sup> *Griswold* happened.<sup>134</sup>

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131. See Brenda Kruse, Comment, *Women of the Highest Court: Does Gender or Personal Life Experiences Influence Their Opinions*, 36 TOL. L. REV. 995, 999 (2005) (providing that when Justice O'Connor graduated from Stanford in 1952, she was unable to find work in the private sector despite great academic achievement).

132. See Jennifer E. Sturiale, *The Passage of Community Property Laws, 1939-1947: Was "More than Money" Involved?*, 11 MICH. J. GENDER & L. 213, 232 (2005) (explaining that Rosie the Riveter was a government created character used to encourage World War II women to join the workforce).

133. 404 U.S. 71 (1971) (overturning an Idaho statute that preferred men over women as estate administrators).

Title VII happened. Civil rights law happened.

For example, in 1984, a woman named Hishon walked into a federal court to court to challenge King & Spalding's informal practice of never inviting women to be partners.<sup>135</sup> Prior to the enactment of Title VII, Hishon would have pled that the practice was unfair. In 1984 she was able to describe it as illegal. Is it possible that we should forget the difference this makes?<sup>136</sup> It is the difference between asking hat in hand for equal consideration in the face of broad-based institutional preferences to the contrary, and requesting one's due with the full force of the law standing silently behind you. The civil rights model makes manifest the difference between subordinate and equal.

Yet, it is not a perfect model. It is certainly, certainly not the most efficient model that might be adopted. It is over-inclusive and it is under-inclusive. It fails to account for individual variances, and to conform to the particulars of particularized contexts. It offers vague guidelines and unpredictable future outcomes which have a chilling effect and which spawn poorly tailored internal corrections. It has failed to eradicate gender prejudice from the hearts of men (and women). It is not a perfect model, and like every hero, it becomes a bore at last.<sup>137</sup> For example, sixteen years after the *Hishon* decision, at the turn of a new century the New Jersey Supreme Court wryly observed:

Women were perhaps overly sanguine in 1984 following the Supreme Court's decision in *Hishon v. King & Spalding*, holding that women could claim bias in partnership decisions by employers. Some said that the decision "proclaimed the end of the 'old boys' network." Apparently not so. Old habits die hard. While Hishon's suit was pending in the Supreme Court, it was reported that the firm considered holding a wet t-shirt contest for the firm's summer associates.<sup>138</sup>

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134. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that state law forbidding birth control use was unconstitutional).

135. *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

136. See Judge Stephen Reinhardt, *Legal & Political Perspectives on the Battle over Same-Sex Marriage*, 16 STAN. L. & POL'Y REV. 11, 13 (2005).

The campaign for women's rights hit its stride when its advocates adopted the NAACP's model and pursued two interconnected litigation strategies. First, American Civil Liberties Union (ACLU) lawyers adopted a step-by-step approach aimed at persuading judges that gender discrimination was analogous to racial discrimination and, therefore, deserved heightened constitutional scrutiny.

*Id.*

137. Ralph Waldo Emerson, *Uses of Great Men*, in REPRESENTATIVE MEN (1850).

138. *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38, 38 n.10 (2000) (refraining from actually criticizing the civil rights model, but stating this as an example of the

Old habits die hard. But do we imagine for a moment that women at King & Spalding were better off when they were never considered for partnerships *and* they were inducted into wet t-shirt contests? Old habits indeed die hard. Twenty-one years ago, King & Spalding was in the habit of never inviting women to be partners.<sup>139</sup> Thirty-three years ago Harvard Law School was in the habit of never hiring women as tenured faculty.<sup>140</sup> Eighty-five years ago our own democratic experiment was in the habit of never allowing women to cast a ballot.<sup>141</sup> Old habits die hard, but they do, eventually, die—particularly with the assistance of a state-issued mandate.

And finally, the women litigators: what of the failure of the rules-based model to address their discrimination issue? They have two choices in this model. They could sue—they may win, and in the evolving jurisprudential climate, they may lose. If they win, firms will be forced to be afraid to be indifferent to gender disparities in assignments, and that particular manifestation of the andocentric-assimilation model will likely be improved. If they lose, the protection of the chilling effect of the unresolved question of gendered-assignments will be lost and that particular problem may be aggravated.

Alternatively, the women litigators could, right now, without deregulation and within the regulatory model, try to negotiate with their respective firms' administrations a better, fairer, less discriminatory method of assignment allocation. This route, too, might result in a solution to their problem and likely even a better solution for these particular women than a law suit would render. The powers that be well might be motivated to tailor a remedy to their complaint, and if that happens, it seems likely that the tailored resolution will redress the particulars of the issues these women raise. It may happen that BigLaw will be moved to negotiate with the women litigators—these otherwise fully fungible workers, whom BigLaw has hired knowing their tenure is statistically likely to be brief. But if it happens that BigLaw is motivated to negotiate with these women, it will be because when they come to the table they stand there holding a big, silent, motivating stick. BigLaw will have to decide whether it would be

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persistent observation that despite important legal victories, sexism itself has failed to disappear).

139. In 2003, thirty-five of King & Spalding's two hundred partners were women. See Sarah Rubenstein, *A First for Law Firm King & Spalding*, ATLANTA BUSINESS CHRONICLE, May 16-22, 2003 <http://kslaw.com/library/pdf/tandyarticle.pdf>.

140. See Basile, *supra* note 3, at 144 (noting that today, women comprise sixteen percent of Harvard Law School's tenured faculty).

141. Today one hundred percent of qualified women are permitted to vote, more or less. U.S. CONT. amend. XIX.

more efficient to change their discriminatory practice or roll the dice on an unfavorable ruling. On the other hand, absent a complaint by an individual employee with the specific threat of litigation behind it, in BigLaw's view it has been more efficient for the last decade to allow women associates to hemorrhage out, and hire new ones than to solve its gendered attrition problem. So no, the civil rights model is not a perfect system, but the burden of a vast majority of its imperfections fall against efficiency, not equality or liberty; they fall against the employer, not the employee; they fall against the machine rather than the women within it.

#### CONCLUSION

Given the prevalence of the andocentric-assimilation paradigm, and a workforce landscape in which women are underrepresented in positions of power, women are better served by an antidiscrimination model which stresses the ad hoc application of broad-based rules, the substance of which are defined by an unpredictable neutral arbitrator. In other words, we are better served by the regulatory system we have spent the better part of the last thirty-five years building. That is not to say that more cannot be done or should not be done or that innovation has no place solving problems presented by the current ordering of gendered preferences. It is only to say that "new" ideas and applications can sometimes be *additional* ideas and applications, they need not always be prefaced with a ceremonial burning of the bridge that got us this far. We should not allow existing protections to recede. Instead, we should work to understand the nature of the gendered biases that continue to color our professional opportunities and advocate for those new ideas about discrimination to transform our ever-evolving gendered norms. Finally, at a cultural moment in which andocentric norms remain unchecked and in which we seem to confuse increasingly capitalism with democracy and unfettered markets with liberty, to conclude that women's own big sticks would be more sagely wielded by tyrannus-mercatus, is, I think, a mistake. Speaking for myself, I'll keep the stick.