THE FORMAL EQUALITY THEORY IN PRACTICE: THE INABILITY OF CURRENT ANTIDISCRIMINATION LAW TO PROTECT CONVENTIONAL AND UNCONVENTIONAL PERSONS

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The purpose of this Article is to expose the way in which Title VII and equal protection law fail to protect adequately all persons in instances where social judgment of what it means to be a man or a woman ("gender") rather than biology ("sex") is at issue. This Article posits that, in a world where men and women are increasingly permitted to have both "feminine" or "masculine" preferences, the current antidiscrimination model does not adequately ensure equality for all persons. Instead, the law in this context inevitably champions the preferences or characteristics of particular categories of persons to the possible detriment of others, depending on whether a court finds that there is a similarity or difference between the sexes. In both scenarios, the law oftentimes arbitrarily deprives entire groups of persons of legal protection.

In light of this criticism, this Article has two goals. The first is to develop and illustrate how the current equality model results in a predictable framework applicable in both Title VII and Equal Protection Clause cases. This framework permits one to anticipate which categories of persons will be benefited and/or potentially harmed when men and women are proclaimed to be either the same or different from each other. The objective in developing this framework is to help practitioners and courts better understand the repercussions of these findings for persons of both sexes. This, in turn, should enable practitioners to better advocate for their clients and encourage courts to consider and discuss, more transparently, the repercussions of sex discrimination decisions for members of both sexes. The second goal of this Article is to suggest an alternative way of

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thinking about equality that better ensures the protection of persons of both sexes, regardless of individual gender preferences or characteristics.

In consideration of these goals, this Article is divided into two parts. Part I discusses the formal equality principle, which constitutes the theory of equality currently underlying both Title VII and equal protection law. Part I's analysis demonstrates why formal equality's requirement that the sexes be compared in order to determine whether discrimination has occurred works well in the context of biology, where the sexes are uniformly either like or unlike each other, but less well in the context of gender. It also illustrates how the formal equality theory results in a distinctive framework that consistently champions the gender preferences or characteristics of one category of persons to the potential detriment of others, depending on whether a court chooses to affirm or deny a similarity between the sexes. Part I then applies this framework to actual case law in order to demonstrate its accuracy in predicting which categories of persons are benefited or harmed when a court affirms that men and women are like or unlike each other.

Part II of this Article proposes an alternative theory of equality that is better able to protect persons of both sexes, regardless of their gender preferences or characteristics. This alternative theory of equality is prefaced on the assumption that true sex equality cannot mean that some categories of persons are treated better than others based solely on a court's arbitrary determination that men and women are like or unlike each other in a particular context. As a result, this theory requires a court to undertake a two step analysis, determining first whether persons of both sexes with *identical* preferences or characteristics are being treated equally, and second whether persons with *corresponding* gender preferences or characteristics can also gain access to the opportunity at stake. Part II then applies this new theory of equality to two case law examples in order to demonstrate how this alternative theory might work in practice.

I. THE FORMAL EQUALITY FRAMEWORK

A. The Difference Between Sex and Gender

Before explaining why current antidiscrimination law is unable to accommodate the preferences and characteristics of all persons, it is important to understand the distinction between "sex" and "gender." While "gender" and "sex" have sometimes been used synonymously in sex

discrimination law,[1] numerous scholars have recognized that these terms mean two very different things. "Sex" refers to the "anatomical and physiological distinctions between men and women."[2] By contrast, the term "gender" is defined as "a social judgment of what it means to be a man or a woman, in other words, femininity or masculinity."[3] What society deems culturally "feminine" and culturally "masculine"[4] is therefore premised on a "stereotype," a social determination regarding which gender preferences or characteristics are conventionally associated with biological males and females. These culturally assigned characteristics and preferences encompass everything from "physical appearance to clothing and self-presentation, to personality and attitude, . . . to patterns of speech and behavior."[5] Indeed, Case notes that:

> Gender in our culture is marked by differences in voice (femininity is associated with high-pitched voices, at best soft-spoken, at worst shrill; masculine voices are louder and deeper);

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[1] According to Case, the conflation of "sex" and "gender" in the Supreme Court case law first started with Ruth Bader Ginsburg. Case notes:

> As one of the premier litigators of Supreme Court sex discrimination cases in the 1970s, Ginsburg often represented male plaintiffs, pointing out that laws based on stereotypical assumptions about the sexes hurt both women and men who violate these assumptions. . . . According to Ginsburg, "[f]or impressionable minds the word 'sex' may conjure up improper images" of what occurs in porno theaters. Therefore, she stopped talking about sex discrimination years ago. . . . [S]he explained that a secretary once told her, "I'm typing all these briefs and articles for you and the word sex, sex, sex, is on every page. Don't you know those nine men [on the Supreme Court], they hear that word and their first association is not the way you want them to be thinking? Why don't you use the word 'gender'? It is a grammatical term and it will ward off distracting associations."

Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminine Jurisprudence*, 105 YALE L.J. 1, 9-10 (1995).

[2] *Id.* at 10.

[3] Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 76 (1982).

[4] Note that these terms are based on Christine Littleton's use of the terms "culturally-male" and "culturally-female" in her discussion of the same topic. Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

[5] Case, *supra* note 1, at 20.

> gesture (femininity is associated with grace, gentleness, tentativeness, and deference; masculinity is physically more bold, aggressive, and decisive; it takes up more space in a room); clothing and personal appearance (femininity is associated with pastel or bright colors, above all with shades of pink, with frills, ruffles, and soft fabrics, with skirts and dresses. Masculinity is more drab and practical: its paradigm may still be the gray flannel suit; it generally is free of ornaments such as jewelry, makeup, and long or elaborate hairstyles).[6]

Gender assignments encompass "[n]ot only jobs in the workplace, but tasks in the home (breadwinner vs. caregiver, mowing the lawn vs. ironing, work with hammer and nails vs. needle and thread), hobbies (hunting vs. knitting), and children's toys (guns vs. dolls . . .)."[7] Even certain personality traits have been conventionally coded as masculine.[8]

While these gender stereotypes may have been accurate in the United States sixty years ago, when American culture afforded men and women a much narrower spectrum of choice, the current multiplication of career, reproductive, and family structure options has led to increased intra-group differentiation of preference among both sexes.[9] Women with

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[6] *Id.* at 20-21.

[7] *Id.* at 21.

[8] For example, a list of masculine traits on the Bem Sex-Role Inventory (BSRI), the most frequently used measure in sex-role research, includes adjectives such as: "'aggressive,' 'ambitious,' 'analytical,' 'assertive,' 'athletic,' 'competitive,' 'dominant,' 'forceful,' 'independent,' 'individualistic,' 'self-reliant,' 'self-sufficient,' and 'strong.'" *Id.* at 12.

[9] Many scholars have noted this progression:

> Numerous developments have converged in recent years to complicate the traditional associations between biological sex, gender identity, gender roles, and power in the workplace and in the broader society. The entry of women into traditionally male-dominated workplaces, the increasingly shared responsibility for parenting, and the growing visibility of sexual minorities and transgendered persons have all played a role in destabilizing the alignment of sex, gender, status, and power which has historically perpetuated the biologically dichotomous view of gender and gender-based power relations.

Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay:" Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J.L. & FEMINISM 155, 240-41 (1999). *See also* Phyllis T. Bookspan, *A Delicate Imbalance–Family and Work*, 5 TEX. J. WOMEN & L. 37, 37 (1995) ("'We are witnessing the breakup of the ancient system of sex

culturally-masculine preferences or characteristics and men with culturally-feminine preferences or characteristics no longer comprise a negligible group of persons that can be ignored.[10] Moreover, the fact that today a person need not be uniformly culturally-feminine or culturally-masculine in all preferences and characteristics (e.g., a woman can choose to become a mother, which is considered culturally-feminine, while simultaneously choosing to work an eighty-hour work week, which is considered culturally-masculine), complicates this landscape even further.

In order to capture the difference between biological sex and gender, this Article will use the terms "feminine" or "culturally-feminine" and "masculine" or "culturally-masculine" to describe the preferences and characteristics society has traditionally associated with biological men and women, but that are capable of manifesting themselves in either sex. It will also use the terms "conventional" and "unconventional" to denote the association between certain gender preferences and characteristics and the biological sex of those who possess them. Thus, when members of a particular biological sex exhibit gender preferences or characteristics that society typically associates with that sex, they will be labeled "conventional." Conversely, when they exhibit gender preferences or characteristics that society generally attributes to the opposite sex, they will be labeled "unconventional." Under this definition, preferences and characteristics that are considered "conventional" in one sex will necessarily be considered "unconventional" in the other sex and vice-versa. Note that the purpose in characterizing persons this way is not to suggest that individuals are uniformly culturally-feminine or uniformly culturally-masculine in *all* of their preferences or characteristics, nor to imply that gender stereotypes are static. In using these terms, this Article's goal is merely to create manageable conceptual boxes for the purpose of moving the discussion forward. At no point should these conceptual boxes, nor the definitions injected into them, be construed as a broader statement regarding the veracity or rigidity of these gender labels.[11]

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roles under which men were assigned a monopoly of access to money-making and mature women were restricted to the home.'") (quoting BARBARA R. BERGMAN, THE ECONOMIC EMERGENCE OF WOMEN 3 (1986)).

[10] Note that this Article reserves judgment on whether gender preferences are either biologically or socially engrained; this debate is inapposite for purposes of this discussion.

[11] Admittedly, there may also be instances where there are no "corresponding" culturally-feminine and culturally-masculine assignments for a particular preference or characteristic.

B. The Formal Equality Theory

In order to comprehend why Title VII and the Equal Protection Clause are problematic when gender is at issue, it is first important to understand the underlying principle of equality upon which these laws are based.[12] This guiding principle, generally known as the formal equality principle, is premised on an inevitable comparison between two things. It mandates that two "like" things be treated the same, while permitting two "unlike" things to be treated differently. The model is binary in the sense that the item being compared can only be "like" or "unlike" the source of comparison. There is no third option.

Adopted initially in the context of Fourteenth Amendment race discrimination claims, the formal equality principle carries slightly different assumptions in the context of sex-based discrimination. While contemporary notions of race typically assume that persons of different races are "like" each other in most instances, thereby warranting equal treatment,[13] formal equality in the sex context assumes that men and women are more consistently "unlike" each other, thereby more often warranting differential treatment. Sex discrimination determinations are therefore less predictable than race discrimination determinations, since courts more frequently assert a difference between the sexes. As a result, in the context of sex, when a court finds a *similarity* between the sexes, the two sexes are considered "like" each other and must be treated equally. Conversely, when a court finds that there is a *difference* between the sexes, the two sexes are considered to be "unlike" each other and may be treated differently.

In light of this framework, the formal equality model is least problematic in the sex discrimination context when the alleged distinction is based solely on an actual biological difference between the sexes. This is because treating men and women differently in situations where actual anatomical or physiological differences exist is not premised on social

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[12] The idea that antidiscrimination law is premised on a particular definition of "equality" stems from Owen Fiss's work recognizing that "[t]he ideal of equality . . . is capable of a wide range of meanings." Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL.& PUB. AFF. 107, 108 (1976). According to Fiss, the "antidiscrimination principle" adopted in both Title VII and the Equal Protection Clause is merely a "mediating principle" chosen by courts and commentators to fill the concept of equality. *Id.*

[13] Note that in the context of equal protection, laws that treat races differently may be upheld in rare instances where they survive "strict scrutiny." *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (holding that a military order requiring exclusion from described West Coast areas of all individuals of Japanese ancestry did not violate the Equal Protection Clause).

judgments or stereotypes regarding what it means to be a man or a woman. Biological distinctions between the sexes will apply to all members of a particular sex regardless of their own individual preferences or characteristics. To illustrate, consider a hypothetical "job position" as a sperm donor. Under the formal equality principle, a sperm bank can "discriminate" against women for sperm donation because women lack the requisite anatomy to perform the job and are therefore different than men in this regard. Categorically excluding women from sperm donation is not unlawful discrimination because foreclosing women from pursuing jobs they are fundamentally incapable of performing is a rational policy and has nothing to do with stereotypes.

Discrimination premised on actual biology, however, is rare. Indeed, many alleged biological affirmations of difference between the sexes turn out to be premised not on biological or physiological attributes, but rather on stereotypes regarding a sex's biological capabilities (e.g., men are strong, women are weak), or on tendencies associated with men or women. As a result, a good benchmark for determining whether an alleged sex difference is biological or gender-related is whether the distinction collectively applies to *all* members of a sex *regardless* of their personal preferences or character traits.

The example of pregnancy resulting in childbirth illustrates this distinction. Although the capacity for pregnancy and childbirth is often characterized as a quintessential biological difference between the sexes,[14] pregnancy and childbirth are no longer biological inevitabilities for many women, but clear choices.[15] They are therefore best viewed as culturally

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[14] This is even a statutory assumption. The Pregnancy Discrimination Act of 1978 (PDA) amended Title VII by adding a new subsection that states:

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

42 U.S.C. § 2000e(k) (2006).

[15] Of course, the ability to exercise options sometimes comes down to context; unintentional pregnancies and rape, for instance, may effectively eliminate "choice" for women in the first instance where pregnancy and child-bearing are concerned. The important point to consider, however, is that even though there is clearly a biological component to pregnancy, many women *are* ultimately able to choose whether or not to remain pregnant and/or bear children even in these contexts.

gendered preferences, since not all women with the biological capacity for reproduction choose to reproduce. In other words, women's preferences with respect to pregnancy and childbirth are not homogenous. Women may exhibit what society considers the "conventional" choice of getting pregnant and having a child, or they may exhibit the "unconventional" choice of opting never to get pregnant and/or have a child.

The formal equality principle is more problematic however when an alleged difference or similarity between the sexes is based on preferences or characteristics commonly associated but imperfectly correlated with biological sex. This is because the formal equality principle requires that men and women be compared to each other in order to determine whether sex discrimination has occurred even in instances where preferences or characteristics capable of manifesting themselves in *both* men and women are at issue. In this context, courts have only two choices: they can find that men and women are alike, thereby demanding equal treatment, or they can find that the two sexes are unlike each other, thereby permitting or requiring differential treatment.

A finding that the sexes are alike will result in equal treatment across the sexes, which benefits "unconventional" persons. "Unconventional" persons include women with culturally-masculine preferences or traits who want to be treated like men, and men with culturally-feminine preferences or traits who want to be treated like women. Conversely, a finding that the sexes are unlike each other which results in differential treatment across sex will typically benefit "conventional" persons. "Conventional" persons include women with culturally-feminine preferences or traits who want to be treated differently from men, and men with culturally-masculine preferences or traits who want to be treated differently from women. A finding that the sexes are unlike each other may also result in the reification of current sex stereotypes that commonly associate sex with a particular gender preference or characteristic.[16]

While the formal equality principle in both scenarios may end up helping certain groups, it also possesses the potential to systematically exclude entire categories of persons from the discrimination inquiry.

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[16] This particular pattern arises because male and female plaintiffs who currently bring gender-related discrimination suits fall disproportionately into two different categories. The first category of plaintiffs consists of persons with "unconventional" preferences or characteristics for their sex who want to be treated like members of the opposite sex with identical preferences or characteristics. The second category of plaintiffs consists of persons with "conventional" preferences or characteristics for their sex who want to be treated unlike members of the opposite sex with different preferences or characteristics. These two categories of plaintiffs are examined in further detail below.

Specifically, formal equality's fixation on men and women as distinct and internally homogeneous biological entities that can be collectively compared to one another *at best* ensures that the preferences or characteristics of one category of men or women are met without depriving other categories of persons of the same opportunities. At worst, however, formal equality deprives entire groups of opportunities and protection merely because the individuals belonging to that group do not fit a court's own assumptions regarding the similarities and differences between men and women.[17]

In order to understand this dynamic more fully, consider the groups of persons who are negatively impacted by the assertion that men and women are either like or unlike each other in instances where gender, rather than biological sex, is at issue. An affirmation that men and women are the

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[17] Given the enormous repercussions that a finding of similarity or difference among the sexes has for different groups, it is not suprising that a well-mapped sameness/difference debate has evolved regarding this issue.

Courts and feminists seeking to promote the idea that the sexes are fundamentally like each other are known as "equal treatment" proponents. Equal treatment supporters are quick to characterize all differences between men and women as unlawful stereotypes that represent the vestiges of an oppressive past. They criticize "rigid, constrained notions of sex that recognize[ ] only a simplistic dichotomy between biological males and females." Axam & Zalesne, *supra* note 9, at 240. They are skeptical of antidiscrimination models that "take members in a statutory group as biologically given and permanently fixed . . . ." Kathy Abrams, *Title VII and the Complex Legal Subject*, 92 MICH. L. REV. 2479, 2527 (1994). They are also quick to recognize the importance of disaggregating sex and gender. *See* Case, *supra* note 1, at 2. In doing so, they argue that an affirmation of difference between the sexes will always result in unlawful stereotyping because it presupposes that sex is a proxy for a gender decision or a trait that both men and women are capable of expressing.

Courts and feminists that seek to promote the idea that the sexes are inherently different, on the other hand, are known as "special treatment" proponents. Arguments in favor of differential treatment between the sexes are generally premised on affirming that a particular trait found in men or women is not a stereotype, i.e., the conflation of "sex" with a cultural gendered preference, but rather an actual biological difference that needs accommodation. This assertion is particularly strong in the pregnancy context, where special treatment proponents have argued that "women's participation in the workforce is shaped by biological differences related to gestation and childbirth and by gender-role expectations that affect behavior in the workplace and require the integration of conflicting responsibilities of work and family." Abrams, *supra* note 17, at 2480. In instances where the alleged discrimination is clearly premised on gender, special treatment supporters will oftentimes argue that men and women have inherent biological predispositions for certain preferences and characteristics. Special treatment proponents often use utilitarian arguments in this context to argue that even if there are women capable of displaying culturally-masculine characteristics, most women are culturally-feminine by nature. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE 170 (1982) (finding not only that young boys and girls took different approaches to the resolution of moral conflicts, but that the incomplete moral development psychologists had attributed to female subjects was largely a consequence of their having been measured against a model created by and for males).

same with regard to a particular gender preference or characteristic, while benefiting "unconventional" persons who want to be treated like members of the opposite sex, has the potential to harm persons of *both sexes* with the opposite gender preference or characteristic (e.g., men and women with feminine preferences if the "unconventional" or masculine woman is benefited, or men and women with masculine preferences if the "unconventional" or feminine man is benefited). This potential results because once all persons with the gender preference or characteristic *at issue in the case* are treated the same, formal equality assumes that the demand for equal treatment has been met. The formal equality principal does not require courts to then turn to the corresponding gender preference or characteristic exhibited in both sexes to determine whether that preference or characteristic can also be accommodated. The persons who possess this corresponding gender preference or characteristic, many of whom may also be subject to injurious stereotypes, are therefore never considered, and the stereotypes they face are not dispelled, despite the fact that the eradication of such stereotypes is the driving force behind the assertion that men and women must be treated equally in the first place.

Similarly, an affirmation of *difference* between the sexes that results in either the perpetuation or institution of a sex-based accommodation, while championing the preferences of "conventional" persons who want the accommodation, can be detrimental to persons of both sexes whose preferences are deemed "unconventional" for their sex. An affirmation of difference accomplishes this by either affirming or imposing a sex-based accommodation that includes or excludes entire categories of persons based on their biology rather than their actual preference for the accommodation. Persons who may want the accommodation are therefore deprived of it, while persons who do not want the accommodation are indirectly forced to pay for it because it applies across the board to their sex.[18]

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[18] Christine Jolls has demonstrated how an assertion of disparate impact can result in accommodations that render all members of a particular sex more costly in the eyes of the employer. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 665 (2001) [hereinafter Jolls, *Antidiscrimination and Accommodation*]. In doing so, Jolls defines all accommodations as "a legal rule that requires employers to incur special costs in response to the distinctive needs . . . of particular, identifiable demographic groups of employees . . . ." *Id.* at 648. For example, Jolls argues that "[s]ome aspects of disparate impact liability in the pregnancy context are in fact accommodation requirements . . . because the provision of medical leave, even unpaid medical leave, entails real financial costs for employers in connection with the employment of women of childbearing age . . . ." *Id.* at 661.

This phenomenon manifests itself, for example, in the context of employment. An affirmation of difference between the sexes which permits them to be treated differently, such as a liberal maternity leave accommodation, results in a situation in which employers are unable to distinguish ahead of time which women will actually use the costly accommodation. An employer therefore has the incentive to engage in statistical discrimination, defined as "the practice of attributing verifiable aggregate group characteristics to individual members of a group because of the cost or inability to assess accurately the likelihood that any particular individual will behave in a manner that departs from the aggregate group expectation."[19] In doing so, the employer begins to view all members of the accommodated sex as more costly, despite the fact that, on an individual level, their preferences or characteristics might not match the preference or characteristic the accommodation is meant to help. Sex-based accommodations therefore harm persons of the accommodated sex with unconventional preferences or characteristics (e.g. in this case "unconventional" women) who do not need or want the maternity accommodation, but who are viewed as potentially more costly solely because they are women.[20]

A court's affirmation of difference between the sexes may also harm unconventional persons of the opposite sex (in this case feminine men) who might benefit from the accommodation, but who are not eligible

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[19] Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2168 n.59 (1994).

[20] Depending on how stringently anti-discrimination laws are enforced, statistical discrimination may also result in the failure to hire members of the accommodated sex, including conventional persons who would actually benefit from the accommodation, for fear that they will, in fact, use the accommodation at the employers expense. In these instances it is clear that accommodations can help only members of the unaccommodated sex who do not want or need the accommodation.

See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000). According to Jolls, the effect an accommodation mandate will have on the targeted group depends on the degree to which the laws on wage and employment differentials are able to effectively constrain an employer's behavior. If, for instance, wage and employment restrictions are fully "binding," in that they compel the employer to hire members of the targeted group for a particular set wage, Jolls argues that targeted accommodations can in fact benefit their intended beneficiaries at the expense of the non-targeted workers. This occurs even in instances where the value of the benefit to the targeted worker is less than its cost to the employer. Jolls concludes, however, that because "enforcing rules against discrimination in the hiring of workers is relatively difficult, it is often reasonable to assume that only restrictions on wage differentials are binding . . . ." *Id.* at 227-28. When only restrictions on wages are binding, Jolls predicts that "the employment level of the accommodated group will fall . . . no matter what the value-cost relationship for the mandated accommodation is." *Id.* at 228.

to receive it because they belong to the sex that traditionally is thought not to need or want it. Thus, a court's affirmation of difference, while intended to protect the lifestyle choice differentials of conventional men and women, simultaneously harms or neglects unconventional members of both sexes by legitimating the injurious sex stereotypes that render their preferences unconventional in the first place.

The general pattern of exclusion that develops under the formal equality theory thus results in a predictable framework that permits one to ascertain ahead of time which categories of persons will potentially benefit and which will potentially be harmed by a court's sex discrimination holding. This framework is explored in more detail below.

C. Applying the Framework to Title VII and Equal Protection

1. Title VII

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 and the Civil Rights Act of 1991,[21] makes it an unlawful employment practice for a government employer or any private company of over fifteen units to discriminate against an individual because of his or her sex. Several different theories of sexual discrimination have developed since the enactment of Title VII.[22] The most relevant to this discussion are disparate treatment and disparate impact, examined in more detail below.

a. Disparate Treatment

Disparate treatment liability arises when an employer is found to have intentionally disfavored workers on the basis of sex, unless the sex discrimination was reasonably necessary to promote normal business operation. To successfully allege discrimination, an employee must first offer proof of a discriminatory motive by showing that he or she was qualified for an employment position but was treated differently than other similarly situated employees because of his or her sex.[23] If the plaintiff

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[21] 42 U.S.C.A. § 2000(e) *et seq.* (2006).

[22] *See, e.g.*, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) (laying out the framework for Title VII sexual harassment claims).

[23] For example, to establish a prima facie case of discrimination under disparate treatment analysis in the failure to hire context, a plaintiff must show: (1) that the plaintiff belongs to a particular class (man or woman); (2) that he or she applied and was qualified for

makes out a prima facie case, the employer can rebut the presumption of discrimination by showing that the alleged discriminatory practice was justified because it was a bona fide occupational qualification (BFOQ) that is "shown to bear a demonstrable relationship to successful performance of the job."[24] The burden then shifts back to the plaintiff to demonstrate that the employer's proffered reason was merely a pretext for intentional discrimination.[25]

Title VII is consistent with the formal equality model in that it requires employees to be treated the same only when they are similarly situated.[26] Disparate treatment therefore requires equal treatment among men and women employees considered alike, but permits employers to treat men and women employees differently in instances where they are considered to be unlike each other.[27] An affirmative finding of disparate treatment liability is therefore often equivalent to an assertion that men and women are the same (with respect to a particular employment requirement) and must be treated in an identical fashion. Conversely, a failure to find

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a job for which the employer was seeking applicants; (3) that despite the plaintiff's qualifications he or she was rejected; and (4) that after the plaintiff's rejection, the position remained open and the employee continued to seek applicants with plaintiff's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Simply stated, if the plaintiff is from a protected class, but cannot prove that he or she was qualified for the job to the same degree as other non-protected employees, then he or she cannot assert a discrimination claim. *Id.*

[24] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[25] For this basic framework, see, for example, *McDonnell Douglas Corp.*, 411 U.S. at 802-03.

[26] *See, e.g.*, Jolls, *Antidiscrimination and Accommodation*, *supra* note 18, at 643 (noting that Title VII's disparate treatment theory declares it unlawful to discriminate against otherwise similarly situated employees and applicants on the basis of certain protected characteristics); Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 354 (2003) ("The premise of Title VII [disparate treatment] is that similarly situated employees should be treated equally and not on the basis of immutable, protected characteristics such as race or [sex].").

[27] Note that Title VII is more permissive with sex than race, allowing employers to differentiate between male and female employees when there is a legitimate bona fide occupational qualification (BFOQ) that justifies the different treatment, but not permitting the BFOQ defense in the context of race. *See, e.g.*, Swint v. Pullman-Standard, 624 F.2d 525, 535 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 273 (1982) (stating that, since the omission of race as BFOQ was intentional by Congress, the defense is not available in race discrimination cases).

disparate treatment may operate as an assertion that the sexes are different because an employer is permitted to treat men and women dissimilarly in the absence of a disparate treatment finding.[28]

As discussed previously, the utilization of the formal equality model in gender-related disparate treatment claims may have a detrimental impact on specific categories of persons. Because plaintiffs bringing gender-related disparate treatment claims usually contend that they had the appropriate qualifications for the job (e.g., the correct gender preference or characteristic for the job), and were therefore only deprived of the job because of their sex,[29] a court will ordinarily take the job requirements asserted by the employer at face value rather than inquire into whether those alleged requirements are indeed demanded by the job at issue.[30] A court will therefore focus its attention exclusively on determining whether the plaintiff is indeed *identical* to his or her biological sex counterpart, such that denial of the job or differential treatment in the job is unwarranted. This inquiry does *not* require the court to examine the actual structure or demands of the job itself to determine if persons with the corresponding gender preferences or characteristics are being arbitrarily deprived of the employment opportunity based on gender attributes. This acceptance, without scrutiny, of an employer's definition of the necessary characteristics for an employment position summarily disregards individuals who do not possess those characteristics, but who nevertheless may want access to and are competent to perform the job. Thus, even where a court finds disparate treatment liability and officially asserts sameness between the sexes, the formal equality analysis stops short of extending that principle of equality to all persons.

Conversely, a court's failure to find disparate treatment that permits an employer to treat men and women differently can also be detrimental to

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[28] There are many different reasons why a plaintiff may fail to make out a disparate treatment offense, including: that the plaintiff failed to convince a jury that s/he was similarly situated to other employees; that discriminatory treatment *had* occurred; or that the defendant successfully rebutted the plaintiff's prima facie case through a BFOQ defense. While it is true that a court that fails to find disparate treatment in this context is not necessarily asserting that men and women are *actually* different, a failure to mandate equal treatment, for whatever reason, permits employers to engage in the allegedly differential treatment of men and women until a disparate treatment claim is successfully asserted.

[29] Other scholars have noticed this phenomenon as well. *See, e.g.*, Littleton, *supra* note 4, at 1325 ("Requiring a female complainant to establish 'qualifications' for a traditionally male job is to require her to establish that she is socially male, at least in this context.").

[30] *See* discussion *infra* at Part I.D.1.

persons of both sexes, albeit for different reasons. As discussed above, a failure to recognize sameness between the sexes results in the creation or perpetuation of a sex-based accommodation. This type of accommodation neglects "unconventional" persons of the *opposite sex* as the accommodated plaintiff who are not eligible for but may desire the accommodation. As discussed above, it also bears the potential to harm "unconventional" persons of the *same sex* as the accommodated plaintiff who do *not* want the accommodation but who may be indirectly forced to "pay" for it because they belong to the sex for whom it is targeted.[31]

b. Disparate Impact

Disparate impact liability occurs when an employer utilizes practices that, although facially neutral, cause disproportionate harm to employees of a particular sex. The contested practice may be justified, however, if the employer can show job-relatedness and business necessity. Thus, disparate impact liability employs a burden shifting framework similar to the one set forth in the disparate treatment context. To successfully state a claim, a plaintiff must prove that an employer's facially sex-neutral policies have a disproportionate impact on the plaintiff's sex. If this burden is met, the employer must then articulate a legitimate business reason for this practice by showing that the challenged requirement has a manifest relationship to the employment in question. If the employer can prove that the challenged requirement is job-related or necessary to the employer's business, the plaintiff then has the opportunity to rebut this defense by showing that an alternative policy exists that could accomplish the employer's job-related purpose with less of a discriminatory impact. The employer's refusal to institute the substitute policy may then be used as evidence that the employer was employing the current practice as a pretext for intentional discrimination.[32]

Like disparate treatment, the theory of disparate impact is also founded on formal equality's premise of treating like categories alike and unlike categories differently, necessitating a comparison between the sexes. Disparate impact liability results when the feminine woman or masculine man is able to show that men or women are disproportionately affected as a class by a facially neutral employment practice because they are different

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[31] *See supra* note 18 and accompanying text.

[32] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971) (laying out the general burden-shifting framework established by Title VII employment discrimination claims); Albermarle Paper Co. v. Moody, 422 U.S. 405, 411 (1975) (same).

from the opposite sex. When disparate impact liability is found, employers are required to treat men and women differently (e.g. to institute an "accommodation") in order to effectuate equality of outcome. When it is denied, employers are permitted to continue treating men and women employees according to the same facially neutral standard.

Disparate impact therefore falls into the same general framework observed in the disparate treatment realm. A finding of disparate impact liability which results in differential treatment between the sexes benefits members of the accommodated sex with "conventional" preferences or characteristics who want the accommodation. In doing so, however, it oftentimes harms individuals with "unconventional" preferences or characteristics either who belong to the sex that the accommodation serves but do not want it, or who want the accommodation but are deprived of it because they do not belong to the sex for whom the accommodation is targeted. Conversely, a rejection of disparate impact liability is equivalent to an assertion that the sexes are alike in that particular instance.[33] As a result, it benefits "unconventional" persons of a particular sex who do not want or need a sex-based accommodation, but may harm persons of both sexes who might want and benefit from the accommodation.

2. The Equal Protection Clause

The Equal Protection Clause of the United States Constitution prohibits governmental entities from intentionally discriminating against particular categories of individuals. The Supreme Court has operationalized this prohibition by subjecting state-sponsored, group-based classifications to various levels of scrutiny. The level of scrutiny adopted ultimately determines how often members of that particular group are required to be treated the same. Classifications based on sex, like classifications based on race, alienage, and national origin, are inherently "suspect" and are subject to heightened scrutiny by the court. But while race is subject to strict scrutiny due to the supposition that different races are almost always required to be treated equally, sex is subject to a less stringent, intermediate

[33] Note that, like disparate treatment, there are many different reasons why a plaintiff may fail to make out a disparate impact offense, including that the plaintiff failed to establish a prima facie case or that the defendant successfully rebutted the plaintiff's prima facie case by asserting a legitimate business reason for the practice. Likewise, while a court's failure to find disparate impact does not mean that the court necessarily believes that the sexes are the same in that particular instance, it can function in the same way as an assertion of equal treatment because it does not affirmatively require an employer to provide a sex-based accommodation.

scrutiny standard.[34] It is therefore constitutionally permissible to treat men and women differently, but only when sex-based classifications serve important governmental objectives and are substantially related to the achievement of those objectives.[35]

Because it applies only in instances of *intentional* discrimination,[36] the equal protection framework mirrors the disparate treatment framework of Title VII. Accordingly, a judicial determination that sex-based equal protection rights have been violated, like a finding of disparate treatment liability, generally benefits persons with "unconventional" preferences or characteristics who want to be treated like members of the opposite sex. Conversely, a determination that sex-based equal protection rights have not been violated generally benefits persons with "conventional" preferences or characteristics who want to be treated differently from members of the opposite sex.

The shortcomings and limitations of the judicial inquiry utilized in the Title VII context thus occur in the equal protection context as well. Like in Title VII, an affirmative finding of equal protection liability operates in the same way as an assertion that the sexes are the same. This finding, in turn, has the potential to harm persons with preferences or characteristics deemed "conventional" for their sex and persons of the opposite sex with an "unconventional" preference for the accommodation. On the other hand, a failure to find equal protection liability that results in differential treatment across sex, harms persons with "unconventional" preferences who would prefer to be treated the same as members of the opposite sex. This finding also may harm persons of the opposite sex who want the accommodation but who are denied it because they do not belong to the sex for which it is fashioned.

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[34] The presumption that men and women have more real differences between them than the races is analogous in many ways to the presumption made in Title VII that permits affirmative defenses in the context of sex, but not in the context of race.

[35] For this basic framework, see *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001).

[36] The Supreme Court has held that disparate impact is not available under 42 U.S.C. § 1981 or under 42 U.S.C.§ 1983 in suits enforcing the Equal Protection Clause of the Constitution. *See, e.g.*, Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979).

D. The Formal Equality Theory in Practice

The formal equality framework results in the same categories of persons being repeatedly either benefited or harmed, depending on whether a court affirms a similarity or difference between the sexes. As suggested by the discussion of Title VII and the Equal Protection Clause above, this distinctive pattern stems from the fact that antidiscrimination claims typically fall into one of two different categories. The first category consists of disparate treatment claims brought by unconventional persons who want to be treated like conventional members of the opposite sex with preferences or characteristics identical to their own.[37] The second category consists of disparate impact claims brought by persons with "conventional" preferences or characteristics who want to be treated differently from persons of the opposite sex.[38] These plaintiffs are primarily comprised of

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[37] Theoretically, the formal equality principle would allow "conventional" persons to also assert claims asking to be treated like members of the opposite sex with identical preferences or characteristics. However, "conventional" persons do not, as a general rule, bring suits asking to be treated like members of the opposite sex because the logic of formal equality would require them to be compared to persons of the opposite sex with identical preferences or characteristics. This, by definition, would mean that they would have to be compared to "unconventional" persons. Since persons with "unconventional" preferences or characteristics are still battling sex stereotypes that result in unequal treatment themselves this comparison does not get a plaintiff with "conventional" preferences or characteristics very far.

The case of *Paci v. Rollins Leasing Corp.*, No. 96-295-SLR, 1997 WL 811553 (D. Del. Dec. 18, 1997), *aff'd*, 182 F.3d 904 (3d Cir.1999), concretely illustrates this point. There, a male plaintiff in a branch manager position at his firm sued his employer for reverse discrimination under Title VII when he was fired for the alleged sexual harassment of a co-worker. The plaintiff argued that he had been treated differently from female employees because his status as a man "created a virtually risk-free opportunity" for the employer to fire him in order to avoid liability from the female co-worker, since it would be more difficult for a man to prevail on a discrimination suit. *Id.* at *5. The court rejected his claim, finding that he had failed to produce evidence that *comparably situated female employees* were treated differently by the employer. *Id.* at *8.

[38] Note that persons with "unconventional" preferences cannot, as a general rule, bring gender-related antidiscrimination suits asking to be treated differently from members of the opposite sex. This is because the logic of formal equality would require these plaintiffs to compare themselves to persons of the opposite sex with preferences or characteristics that were different from their own. This type of comparison, however, is not possible in the gender-related antidiscrimination context. Under Title VII disparate impact, the only claim that affirmatively supports finding a difference between the sexes, plaintiffs must show that they are *disproportionately impacted* by a sex-neutral policy. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971). Persons of a particular sex can only be disproportionately impacted by a policy, however, if the preferences or characteristics that are impacted are *prevalent* in that particular sex. Because society stereotypically views masculine women and feminine men as the "unconventional" or minority group, it would be

feminine women seeking an accommodation that would permit them to be treated differently from masculine men.[39] The remainder of this section is devoted to exploring the way in which these two types of claims have resulted in the distinctive framework described above.

1. Disparate Treatment

Price Waterhouse v. Hopkins[40] is a classic case demonstrating how an assertion that the sexes are like each other may honor the preferences and characteristics of the "unconventional" plaintiff (in this case, the masculine woman) to the detriment of all individuals with the opposing gender preference or characteristic (in this case, feminine women and feminine men). In *Price Waterhouse,* Ann Hopkins, a senior manager at an accounting firm, sued her employer under a Title VII disparate treatment theory of liability, arguing that Price Waterhouse had discriminated against her on the basis of sex by depriving her of partnership status. Although the plurality remanded the case for further proceedings due to the use of an incorrect evidentiary standard by a lower court, it agreed with the lower courts that Hopkins was indeed "like" the masculine man in her preferences

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difficult for a court to find that members of a particular sex with those preferences or characteristics were disproportionately impacted by a sex-neutral employment practice.

This difficulty is illustrated in *DeSantis v. Pacific Telephone and Telegraph Co., Inc.,* 608 F.2d 327 (9th Cir. 1979). There, male homosexuals brought civil rights actions against their employers claiming, among other things, that discrimination against homosexuals disproportionately affected men because of the "greater likelihood of an employer's discovering male homosexuals compared to female homosexuals." *Id.* at 330. The Ninth Circuit declined to find Title VII protections for homosexuals, per se, but in his concurring and dissenting opinion, Judge Sneed recharacterized the appellants' claim as "the contention that the use of homosexuality as a disqualification for employment[,] . . . a facially neutral criterion, impacts disproportionately on males because of the greater visibility of male homosexuals and a higher incidence of homosexuality among males than females." *Id.* at 333. Judge Sneed noted that, to prevail on a disparate impact claim, it would be necessary "to establish that the use of homosexuality as a bar to employment disproportionately impacts on males, a class that enjoys Title VII protection . . . ." Judge Sneed observed, however, that this would only be possible "were male homosexuals a very large portion of the total applicable male population." *Id.* The fact that it would be extremely difficult, if not impossible, for men with sexual preferences that are deemed "unconventional" for their sex or even deviant by society to prove that they comprise a "very large portion of the total applicable male population" explains why persons with unconventional preferences rarely (if ever) bring disparate impact claims.

[39] The asymmetrical nature of this tendency may result from the fact that many workplace environments were, until recently, primarily male.

[40] 490 U.S. 228 (1989).

and characteristics. In arriving at this conclusion, the plurality paid special attention to the statements written by other partners describing her as "overly aggressive," "unduly harsh," and "macho," and indicating that she "overcompensated for being a woman."[41] The plurality also took note of the statement of one partner, who observed that "in order to improve her chances for partnership . . . Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[42]

The plurality concluded that, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[43] It then went on to state that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[44] However, in making this assessment, the plurality appeared to accept the way in which the workplace was currently structured, when it noted that "[a]n employer who objects to aggressiveness in women but *whose positions require this trait* places women in an intolerable and impermissible catch 22 [sic]: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[45]

The plurality's determination that Hopkins could potentially prevail on a disparate treatment claim suggests that it regards this situation as one where the sexes were like each other, thereby warranting equal treatment. The court's assertion that Price Waterhouse must treat employees who have identical gender preferences or characteristics the same benefits masculine women, like Hopkins, whom otherwise might have been denied a culturally-masculine job because social stereotypes dictate how their sex should act or dress. In its determination, however, the plurality gives no thought to *feminine* men and women who might also have been interested in being promoted to partner at Price Waterhouse. Rather, its acceptance that the partnership of an accounting firm actually demanded culturally-masculine traits is evidenced in its suggestion that only aggressive women

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[41] *Id.* at 235.

[42] *Id.*

[43] By "gender," the Court really means biological "sex." *See* Case, *supra* note 1 and accompanying text.

[44] 490 U.S. at 251.

[45] *Id.* (emphasis added).

are placed in a "catch-22."[46] The plurality's sole concern is to therefore ensure equal treatment for the *masculine* woman capable of performing a job that had been structured in a *culturally-masculine* way. Once accomplished, the disparate treatment inquiry does not require the Court to determine whether persons with the corresponding gender preference or characteristic can be accommodated as well.[47]

Diaz v. Pan American World Airways, Inc.[48] mirrors *Price Waterhouse*, by illustrating how an affirmation that the sexes are alike can sometimes honor the preferences of the "unconventional" *male* plaintiff (here the feminine man) to the possible detriment of men and women with opposing gender preferences or traits (here masculine men and masculine women). In *Diaz*, a male plaintiff who was denied employment as a flight attendant on the basis of his male sex brought a disparate treatment claim against Pan American World Airways, Inc. (Pan Am). In response, Pan Am admitted that it had a policy of restricting its hiring of cabin attendants to women, but argued this was a "bona fide occupational qualification" (BFOQ) reasonably necessary to the normal operation of Pan Am's business. In holding that a disparate treatment violation had indeed occurred, the Fifth Circuit rejected the lower court's finding that female attendants were generally superior in "non-mechanical aspects of the job," such as "'providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as

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[46] Case agrees:

> Ann Hopkins, I fear, may have been protected only because of the doubleness of her bind: It was nearly impossible for her to be both as masculine as the job required and as feminine as gender stereotypes require. But the Supreme Court seems to have had no trouble with the masculine half of Hopkins's double bind; there is little indication, for example, that the Court would have found it to be sex discrimination if a prospective accounting partner had instead been told to remove her makeup and jewelry and to go to assertiveness training class instead of charm school.

Case, *supra* note 1, at 3.

[47] This is also because the formal equality principle does not recognize intentional discrimination when *both* culturally-feminine men and culturally-feminine women or *both* culturally-masculine men and culturally-masculine women are equally deprived of the job. Intentional discrimination can only be proven if persons of one sex are being deprived of a job that persons of the opposite sex with *identical* preferences or characteristics are receiving.

[48] 442 F.2d 385 (5th Cir. 1971).

possible within the limitations imposed by aircraft operations.'"[49] The Fifth Circuit also declined to accept that Pan Am's passengers "'overwhelmingly preferred to be served by female stewardesses [and had] psychological needs . . . better attended to by females.'"[50] Further, the Fifth Circuit rejected the district court's finding that "'to eliminate the female sex qualification would simply eliminate the best available tool for screening out applicants likely to be unsatisfactory . . . .'"[51] The Fifth Circuit's repudiation of this rationale and its emphatic affirmation that the sexes were fundamentally alike in their capacity to serve airplane passengers unquestionably benefited the "unconventional" plaintiff, here the feminine man, wanting to participate in a culturally-feminine job but precluded from doing so on account of his sex.

In addition to benefiting the feminine man, the Fifth Circuit's affirmation that the culturally feminine characteristics of the job are "tangential"[52] also theoretically opens the position to men and women with culturally-masculine preferences or characteristics. Additional dicta, however, implies that the judgment is more like *Price Waterhouse* in the court's tacit acceptance of the job structure and employment characteristics asserted by Pan Am. The Fifth Circuit's eventual reassurance that Pan Am can continue to take culturally-feminine characteristics into account when hiring flight attendants suggests that the court may actually believe that these characteristics are more integral to the position of flight attendant than its decision technically holds, or at least that it is not prepared to searchingly scrutinize Pan Am's assertion of its importance. Thus, this dicta leaves open the possibility that Pan Am might be able to comply with Title VII as long as it alters its sex-based hiring policies towards a policy of hiring *both* men and women with culturally-feminine characteristics. This, in turn, would permit Pan Am to continue to discriminate against masculine men and masculine women who lack traits deemed "tangential," but important nevertheless, to the job.

Diaz and *Price Waterhouse* illustrate situations in which a court decision benefited an "unconventional" plaintiff and dispelled sex stereotypes. By contrast, *EEOC v. Sears, Roebuck & Co.*[53] highlights how

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[49] *Id.* at 387.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 388-89.

[53] 839 F.2d 302 (7th Cir. 1988).

an assertion that the sexes are *different* in the disparate treatment context promotes the interests of the "conventional" plaintiff to the potential detriment of "unconventional" individuals, thereby perpetuating sex stereotypes. In *Sears*, the EEOC argued that Sears's hiring, promotion, and compensation practices resulted in the disparate treatment of its female employees due to the larger concentration of men in higher-paying sales jobs that were compensated by commissions. In affirming the district court's determination that no discrimination had occurred, the Seventh Circuit upheld "three key findings" of the lower court, including: "(1) commission sales were significantly different from noncommission sales at Sears; (2) women were not as interested in commission sales as men; and (3) women were not as qualified for commission sales as men."[54] In doing so, the Seventh Circuit reviewed evidence indicating that men and women were indeed different in their interests, with women preferring "product lines like clothing, jewelry, and cosmetics that were usually sold on a noncommission basis" rather than "product lines involving commission selling like automotives, roofing, and furnaces."[55] The court also gave weight to testimony indicating that "[w]omen were also less interested [than men] in outside sales which often required night calls on customers" as opposed to noncommission sales "associated with more social contact and friendship, less pressure and less risk."[56] According to this testimony, lack of interest in commission sales stemmed from "a fear or dislike of what they perceived as cut-throat competition, and increased pressure and risk associated with commission sales."[57] The Seventh Circuit also noted that the EEOC's own Commission Sales Report indicated that "female applicants in the 'sales' pool were younger, less educated, less likely to have commission sales experience, and less likely than male applicants to have prior work experience with products sold on commission at Sears."[58]

The Seventh Circuit's failure to find disparate treatment liability in this context operates as an implicit (albeit possibly unintentional) affirmation of difference between the sexes which allows Sears to continue treating men and women differently in the context of commission sales. In doing so, the *Sears* court suggests to employers that they can continue to

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[54] *Id.* at 319.

[55] *Id.* at 320.

[56] *Id.* at 320-21.

[57] *Id.* at 320.

[58] *Id.* at 322.

assume that women are inherently predisposed to culturally-feminine non-commission sales jobs. Masculine women in this context can therefore continue to be deprived of culturally-masculine sales jobs because of their sex. Moreover, this finding will also make it difficult for feminine men to get hired for non-commission sales jobs since they too must overcome the judicially sanctioned presumption that men are predisposed to culturally-masculine commission sales.

2. Equal Protection

Because, as discussed above, equal protection claims are essentially coterminous with Title VII disparate treatment claims, the same pattern that emerges in *Diaz*, *Price Waterhouse*, and *Sears* also appears in the equal protection context. *United States v. Virginia*,[59] an equal protection case, is analogous to *Price Waterhouse* in that it highlights how a violation of the Equal Protection Clause champions the preferences of the "unconventional" plaintiff to the detriment of men and women with opposing gender preferences or characteristics. In *Virginia*, the United States sued the Virginia Military Academy (VMI), alleging that VMI's exclusively male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. In response, Virginia argued that single-sex education provided important educational benefits and that the school's "adversative approach" would have to be modified if VMI admitted women.[60] In doing so, Virginia described VMI's "adversative approach" as an educational model intended to produce "citizen-soldiers" through "'[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior and indoctrination of desirable values.'"[61] VMI cadets, in turn, lived in "spartan barracks" where "surveillance [was] constant and privacy non-existent."[62] They ate together, wore uniforms, and regularly participated in drills. New cadets were also forced to endure the "rat line," where they were tormented and punished in order to ensure a bond between the new students.[63]

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[59] 518 U.S. 515 (1996).

[60] United States v. Virginia, 766 F. Supp. 1407, 1412-13 (W.D.Va. 1991).

[61] *Virginia*, 518 U.S. at 522.

[62] *Id.*

[63] *Id.*

In the first instance, the district court ruled in favor of VMI, finding that its all-male admissions policy survived intermediate scrutiny because the program "brought diversity to an otherwise coeducational system" which was "enhanced by VMI's method of instruction."[64] On appeal, however, the Fourth Circuit reversed the district court and remanded the case, assigning Virginia initial responsibility for selecting a remedial course.[65] In response, Virginia proposed a parallel program exclusively for women. According to this proposal, the Virginia Women's Institute for Leadership (VWIL), would be a four-year, state sponsored undergraduate program located at Mary Baldwin College, a private liberal arts school for women. While VWIL would share VMI's mission to produce "citizen-soldiers," it would replace VMI's "adversative method" with "a cooperative method which enforces self esteem."[66] The program would therefore not be in military format, would not require its women students to eat meals together or wear uniforms during the day, and would have different academic offerings.[67] The district court found that the plan met the requirements of the Equal Protection Clause and the Fourth Circuit affirmed.[68]

The Supreme Court, however, rejected Virginia's VWIL approach. While it acknowledged the "expert witness estimation on average capacities or preferences of men and women,"[69] it stressed the importance, under its own precedent, of taking a "hard look" at such generalizations and closely scrutinizing "'fixed notions concerning the roles and abilities of males and females.'"[70] Under this standard, the Court found that Virginia had not

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[64] *Virginia*, 766 F.Supp. at 1415.

[65] United States v. Virginia, 44 F.3d 1229, 1233 (4th Cir. 1995).The Fourth Circuit suggested the following options to Virginia: admit women to VMI, establish parallel institutions or programs, or abandon state support leaving VMI free to pursue its policies as a private institution. *Id.* at 1242.

[66] *Id.* at 1233-34.

[67] *Id.* at 1234.

[68] *Id.* at 1242.

[69] United States v. Virginia, 518 U.S. 515, 541 (1996). The Court also acknowledged the district court's findings regarding "gender-based developmental differences" between the sexes, based on the opinions of Virginia's expert witness who observed that while "[m]ales tend to need an atmosphere of adversativeness . . . [f]emales tend to thrive in a cooperative atmosphere." *Id.*

[70] *Id.*

shown an "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI.[71] In addition, the Court found that VWIL did "not cure the constitutional violation, i.e., it [did] not provide equal opportunity,"[72] noting that VWIL was not only separate but "different in kind from VMI and unequal in tangible and intangible facilities."[73] It also rejected Virginia's argument that the methodological differences between the two programs were "justified pedagogically" because they were based on "important differences between men and women in learning and developmental needs" that were "'real' not 'stereotypes.'"[74] The Court emphasized that "generalizations about 'the way women are,' estimates of what is appropriate for *most* women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." The Court concluded that as "[v]aluable as VWIL may prove for students who seek the program offered, Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade."[75] As a result, "[w]omen seeking and fit for a VMI-quality education cannot be offered anything less [than VMI], under the Commonwealth's obligation to afford them genuinely equal protection."[76]

The Court's finding that the VMI/VWIL combination violated equal protection champions the interests of the "unconventional" or masculine women. As in *Price Waterhouse*, however, the Court is solely concerned with the treatment of this subcategory of women, rejecting the VWIL alternative out of hand because it cannot benefit masculine women. In doing so, the Court gives little thought to whether *feminine* women and men can be simultaneously accommodated through a program like VWIL. The *Virginia* Court's limited analysis demonstrates yet again the shortcomings of the affirmation of sex sameness principle which is preoccupied only with ensuring equal opportunity for *one* gender-based

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[71] *Id.* at 534.

[72] *Id.*

[73] *Id.* at 547. Reasons why VWIL did not qualify as VMI's equal in the eyes of the Court were that "VWIL's student body, faculty, course offerings, and facilities hardly match VMI's . . . [n]or can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige and its influential network." *Id.* at 551.

[74] *Id.* at 549-50.

[75] *Id.* at 555.

[76] *Id.* at 557.

preference or characteristic while ignoring whether men and women with corresponding gender preferences or characteristics can also be accommodated.

The classic case of *Muller v. Oregon*,[77] on the other hand, parallels the *Sears* disparate treatment case discussed above in that it highlights how the *rejection* of an equal protection claim champions the preferences of the "conventional" plaintiff (here the feminine woman) to the possible detriment of men and women with "unconventional" preferences or characteristics (here masculine women and feminine men). In *Muller*, the Court upheld an Oregon statute limiting a woman's workday in factories and laundries to ten hours per day. In finding that the Oregon law constituted a legitimate exercise of police power and could therefore not be compared to the constitutional rights of liberty of contract previously established for men,[78] the Court noted that "women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence."[79] It further asserted that this was

> especially true when the burdens of motherhood are upon her . . . [since] continuance for a long time on her feet at work, [and] repeating this from day to day, tends to have injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of a woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.[80]

The Court also noted that a woman in employment was "not an equal competitor with her brother" because women had "always been dependent upon [men]" and were denied education that would have increased their capacity for business affairs.[81] While recognizing that "[d]oubtless there are individual exceptions," the court concluded that protective legislation was

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[77] 208 U.S. 412 (1908).

[78] *Id.* at 422-23. This right was established in *Lochner v. New York*, 198 U.S. 45 (1905). There, the Court struck down a law providing that no laborer could be required or permitted to work in a New York bakery for more than sixty hours in a week or ten hours in a day, holding it to be an unreasonable and arbitrary interference with the right and liberty of men.

[79] *Muller*, 208 U.S. at 421.

[80] *Id.*

[81] *Id.* at 421-22.

necessary for women since "[t]he two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, [and] in the capacity for long continued labor . . . ."[82]

The Court's failure to find an equal protection violation in this instance results in an affirmation of difference between the two sexes which promotes the preferences of feminine women who fit the sex stereotype envisioned by the court and who need the extra protection of the law in order to be treated fairly by their employers.[83] As in previous examples, however, the imposition of a sex-based accommodation that applies to all women regardless of their individualized gender preferences harms masculine women who feel competent contracting for their own wages or are willing to work longer hours. In addition, the accommodation excludes "feminine men" who might have appreciated this same protection but are unable to take advantage of it because of their sex.

3. Disparate Impact

Disparate impact claims, although premised on the idea of "legitimate distinctions" between the sexes, also fit squarely into the framework described above. *Goicoechea v. Mountain States Tel. & Tel. Co.*[84] demonstrates how a failure to find disparate impact liability can promote the preferences of an "unconventional" plaintiff (here the masculine woman) to the detriment of men and women with opposing gender preferences or characteristics (here feminine women and feminine men). In doing so, it falls into the second major category of sex discrimination cases whereby individuals with *conventional* preferences or characteristics argue that facially neutral policies are discriminatory because they disparately impact members of their particular sex.

In *Goicoechea*, a culturally feminine woman brought a disparate impact claim when her employment as a cable splicer was terminated after she refused to comply with the employer's (facially sex-neutral)

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[82] *Id.* at 422.

[83] Although it would be unusual to find such blatant sex stereotypes in a court's reasoning today, *Muller* very acutely exemplifies how an affirmation of difference between the sexes, based on stereotypical assumptions regarding men and women, categorically harms persons of both sexes who do not fit the stereotype. This phenomenon is still reflected in case law and legislation today. *See, e.g.*, The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978) (providing that employment discrimination on the basis of "pregnancy, childbirth, and related medical conditions is sex discrimination for purposes of that Act.").

[84] 700 F.2d 559 (9th Cir. 1983).

requirement that employees in her job category travel for extended periods of time.[85] The plaintiff argued that this condition of employment had a discriminatory impact on females because a significant segment of the workforce consisted of women who, like her, were divorced mothers with full-time custody of minor children.[86] The Ninth Circuit rejected the plaintiff's disparate impact claim and declined to grant her a "reasonable accommodation" for her childcare needs, finding that, although the travel policy did have a prima facie impact on female employees, it was justified by its manifest relationship to the employment.[87] The court's refusal to impose a sex-based accommodation permits the plaintiff's employer (and other similarly situated employers) to demand "conventionally male" attributes of their employees. This finding, in turn, benefits persons with conventionally masculine lifestyle preferences while declining to address the needs of women and men that possess what society regards as "feminine" family preferences.

Conversely, *Nashville Gas Co. v. Satty*[88] demonstrates how a finding of disparate impact can honor the preferences of the "conventional" plaintiff (here the feminine woman) to the possible detriment of "unconventional" persons (here masculine women). In *Satty*, the court found that a policy denying accumulated seniority to female employees returning from pregnancy leave, while facially neutral, resulted in disparate impact because it disproportionately deprived women of employment opportunities.[89] The court noted that depriving employees of their accumulated seniority imposed on women a "substantial burden that men need not suffer."[90] In a footnote, the court even suggested that permitting pregnant women to keep their seniority would actually be more cost efficient because, among other things, the current policies resulted in

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[85] *Id.* at 560.

[86] *Id.*

[87] *Id.*

[88] 434 U.S. 136 (1977).

[89] *Id.* at 143. The Court was able to find that this was a sex-neutral policy because this case was written pre-Pregnancy Discrimination Act. Recall that the Pregnancy Discrimination Act of 1978 (PDA) amended Title VII by adding a new subsection, which provided that employment discrimination on the basis of "pregnancy, childbirth, and related medical conditions is sex discrimination for purposes of that Act.". *See* The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978).

[90] *Satty*, 434 U.S. at 142.

women being "less motivated to perform efficiently in their jobs because of the greater difficulty of advancing through the firm."[91]

The court's finding that men and women are differentially impacted by the employer's accumulated seniority practice results in a sex-based accommodation for culturally feminine women (those choosing to become pregnant and have children). Assuming, however, that the employer declined to give accumulated seniority to pregnant women in the first place precisely because it viewed such policies as excessively costly, this judicially imposed accommodation quite probably renders all female employees more costly in the employer's eyes. Although potentially harmful to both feminine and masculine women at the hiring stage, this type of court-mandated accommodation is *most* detrimental to the masculine woman who is already employed at the company because she neither needs nor wants this type of accommodation. Such an accommodation may result, for instance, in the masculine woman getting passed up for promotions or experiencing other more subtle non-actionable disadvantages in her employment on account of the employer's fear that she might actually take the costly pregnancy leave.[92]

This section has demonstrated that the inability of the formal equality principle to provide different categories of persons with equal opportunity of choice is endemic to the model's inherent structure, which assumes that men and women are separate, internally cohesive groups and *requires* a formal comparison of these two fictitious entities by a court. Part II of this Article attempts to address this structural defect by delineating the contours of an alternative model of equality that is better able to capture the gender preferences and characteristics of all persons, regardless of their sex.

II. TOWARDS A NEW MODEL OF EQUALITY

A. An Alternative Theory of Equality

The alternative theory of equality discussed in this section rejects the premise that men and women should be treated collectively like or collectively unlike each other based on arbitrary and oftentimes unpredictable assumptions about the sexes. As a result, the goals of this new

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[91] *Id.* at 143 n.5.

[92] Note, however, that because this accommodation is for pregnancy (a gender choice that only women are capable of making), rather than childcare (a gender choice capable of manifesting itself in both sexes), feminine men are not harmed by this sex-based accommodation.

model are twofold: (1) to ensure that members of *both* sexes can honor their particular gender preferences or characteristics,[93] and (2) to provide an accommodation for corresponding sets of gender preferences or characteristics whenever possible.

In order to meet these goals, "equality" as conceptualized in this theory consists of two different elements. The first element is premised on the affirmation of sex sameness principle, discussed above, which seeks to dispel the conflation of sex with certain gender preferences or characteristics that results in sex stereotypes by asserting that the sexes are fundamentally alike. Consistent with this principle, this model rejects the idea that gender can be equated or highly correlated with a particular sex. Instead, it requires a sex-neutral inquiry that asks only whether men and women with *identical* gender preferences or characteristics have equal access to the opportunity in question.[94] Asking only whether men and women with identical gender preferences or characteristics are treated equally prevents courts from making unpredictable and inaccurate determinations regarding whether men and women, as a general matter, are like or unlike each other on a particular issue. In doing so, this model is better able to accomplish the original goals of sex discrimination law which is to ensure equality for all persons.

The second element of this alternative theory is premised on the affirmation of sex difference principle, discussed above, which seeks to effectuate a sex-based substantive change in the way opportunities are currently structured in cases where the sexes are found to be different from each other. Unlike the affirmation of sex difference principle, however, this model of equality is not focused on whether members of a *particular sex* need an accommodation, but rather on whether a *particular gender preference or characteristic* can be accommodated in a sex-neutral fashion. The relevant question therefore becomes whether culturally-feminine and culturally-masculine preferences or characteristics can both be

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[93] As mentioned previously, this Article acknowledges the fact that gender preferences or characteristics in persons are oftentimes not as static and binary as this Article might originally appear to suggest. The purpose in characterizing gender preferences and characteristics in this fashion, however, is not to *exclude* persons with more "hybrid" options from the equation, but to create conceptual clarity for purposes of discussion.

[94] This Article defines "opportunity" broadly to mean any sort of choice that is currently being made in the context of employment, family, etc., that society labels culturally-feminine or culturally-masculine.

accommodated in order to ensure that as many persons as possible have access to the same opportunity.[95]

Before applying this framework to concrete examples, it is important to clarify the nature of sex-neutral accommodation this theory would support. First, the framework described above recognizes that while accommodations for corresponding gender preferences or characteristics should be given whenever possible, accommodations are not always *required* for equality to be satisfied. As a result, this theory acknowledges that there will be instances where certain gender preferences or characteristics simply cannot be accommodated. In such instances, it is appropriate to deprive specific categories of persons of certain opportunities so long as *all persons* that possess that gender trait are equally deprived. Although the exact mechanics of how this theory of equality should be implemented is beyond the scope of this Article, in determining whether an accommodation is warranted, courts should be required to look at whether an opportunity's preclusion of a particular gender characteristic is actually necessary to the integrity of the opportunity at stake. The level of scrutiny applied by the court in this inquiry should be stringent enough to ensure that the opportunity is not merely accommodating one set of gender preferences or characteristics over the other due to sex stereotypes or preconceived notions based on the way an opportunity is historically structured. Although this type of inquiry is inevitably infused with subjectivity, a stringent standard that actually forces courts to defy their own preconceived notions and stereotypes will hopefully ensure that corresponding gender preferences or characteristics will be accommodated whenever possible. This model therefore seeks to prevent costly accommodations from being exclusively associated with one sex to the detriment of members of that particular sex who do not want and/or need that accommodation.

A second important facet of this theory is that it focuses on ensuring equal access to the *same* opportunity, as opposed to providing equal treatment across *different* opportunities. The latter concept represents the cornerstone of Christine Littleton's alternative theory of equality, which she terms "equality as acceptance,"[96] and is premised on the notion that equality can be achieved by equalizing the costs of different but

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[95] Note that it would be very difficult to structure options that took into account all of the "hybrid" preferences or characteristics currently in existence. It therefore makes sense to speak about structuring opportunities in a way that would accommodate both culturally-feminine and culturally-masculine preferences or characteristics in their purest form.

[96] Littleton, *supra* note 4, at 1285.

"comparable" culturally-masculine and culturally-feminine opportunities.[97] By contrast, the theory proposed here disagrees with the assumption that equality is achieved in the first instance by identifying "comparable" but different feminine and masculine opportunities and valuing them in an equivalent fashion. True equality is not accomplished, for example, by finding that caregiving and practicing law are "comparable" culturally-feminine and culturally-masculine preferences respectively, and by consequently compensating these roles in the same fashion. Such an approach deprives persons of particular opportunities even where access to them might be feasible. Instead a court should be required to assess whether practicing law and caretaking could *both* become available to persons with culturally feminine and culturally masculine preferences or characteristics.[98] This inquiry guarantees, if feasible, that as many persons as possible have access to the *same* opportunities rather than merely ensuring that persons engage in *different* opportunities at the same price.

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[97] Littleton provides several examples of how her "equality as acceptance" model might work in practice. With respect to childcare, for instance, Littleton observes that "[e]qual acceptance cannot be achieved by forcing women (or the rare man) individually to bear the costs of culturally female behavior, such as childrearing, while leaving those (mostly men and some women) to engage in culturally male behavior such as private law firm practice, to reap its rewards." *Id.* Instead, Littleton's model might require that "women and men who opt for socially female occupations, such as child-rearing, be compensated at a rate similar to those women and men who opt for socially male occupations, such as legal practice." *Id.* at 1301. Other "complementary" but different opportunities that could also be paired and compensated equally under the "equality as acceptance" theory, according to Littleton, are mother and soldier (since both professions involve "danger and possible death"), elementary school teacher and garbage collector, and nurse and real estate appraiser. *Id.* at 1329.

Littleton is not the only scholar to have proposed this type of solution. Other scholars have also proposed "comparable worth policies," which entail comparing occupations that are predominantly male to occupations that are predominantly female according to criteria that usually include measures of skill, effort, responsibility, and working conditions for purposes of compensation. *See, e.g.*, Martha Albertson Fineman, *Contract and Care*, 76 CHI-KENT L. REV. 1403, 1411-12 (2001) ("[E]ven though there may be some recognition that caretaking is of public benefit, no compensation and scant accommodation have been given to caretakers by societal institutions other than the family . . . . This injustice can only be addressed by policies that both subsidize and accommodate caretakers."); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 5 (1996) ("[D]enying housework its status as work is costly to those who perform it. . . . A consistent account within the law of housework's economic value would benefit those who perform the work—predominantly women.").

[98] For instance, a court might require a law firm to accommodate persons who wanted to practice the law on a part-time basis or a full-time attorney who wanted to caregive on the weekends or on his or her lunch break.

Finally, the theory of equality introduced in this Article recognizes that an accommodation resulting in *equal access* to an opportunity for persons with preferences or characteristics deemed "conventional" or "unconventional" for their sex does not necessarily mean that all persons that take the opportunity must be given *equal treatment* irrespective of their preferences. While persons with *identical* gender preferences and characteristics must *always* be treated the same, this model nevertheless anticipates room for persons with *non-identical* gender preferences or characteristics to be treated differently once a particular opportunity has become accessible to all persons.

To illustrate why this principle is significant, consider an example in the case law that does not take the possibility of this type of arrangement into account. In *California Federal Savings & Loan Association v. Guerra*,[99] the Court upheld a pregnancy-based state statute requiring employers to provide unpaid leave and reinstatement to pregnant employees. In justifying its decision, the Court found that "[b]y 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs."[100] In situations where gender preferences are involved, however, the "treating-women-differently-so-that-they-can-be-treated-equally-to-men" argument does not work as well, since only a certain category of women is benefited by this type of differential treatment. The pregnancy accommodation discussed in *Guerra* does not actually result in *all* women being treated equally to *all* men. Rather, it results in an accommodation for feminine women that masculine men and masculine women do not need. Pregnant women are placed on "equal footing" with men at the masculine woman's expense, since she is now regarded as a more costly employee irrespective of her personal choices. Attempts to equalize the cost of culturally-feminine and culturally-masculine preferences or characteristics within a particular opportunity therefore do not always lead to an equal outcome for all persons.

In light of this issue, the theory of equality posited here strives to ensure that *all* persons with corresponding preferences or characteristics have equal access to an opportunity. Once the opportunity is made available to all persons regardless of their gender preferences or characteristics, however, this theory would not require that all persons' choices be *treated*

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[99] 479 U.S. 272 (1987).

[100] *Id.* at 289.

the same.[101] Instead, it acknowledges that once a gender preference or characteristic becomes truly disaggregated from sex, it will be appropriate, in some situations, to require individuals to internalize the costs of their lifestyle choices. For example, in the caregiving context, the logic of *Guerra* would require that men and women who choose to engage in part-time work in order to fulfill caretaking responsibilities receive the same treatment in the workplace as individuals whose careers were uninterrupted by such duties. Equalization of treatment in this scenario is therefore meant to equalize the costs of these distinctly gendered choices. While the normative assumptions regarding gender choices are debatable, however, it is undeniable that the implications of each choice are different. Equal treatment across preference in this context might therefore be inherently unequal since it disregards the costs—financial and otherwise—to the employer of choices made by persons with different gender preferences. Moreover, equal treatment across preference may consequently result in the detrimental treatment of all women (or persons with feminine characteristics or preferences) as employers attempt to externalize the increased costs through statistical discrimination against persons whom they regard as more costly to employ. A decision to treat all persons in employment equally, regardless of that person's gender preferences, may therefore end up undermining the entire purpose of accommodating both preferences.

Permitting differential treatment across gender preference when equal access to an opportunity is feasible, however, does not necessarily mean that one gender preference should, or may, legitimately be disfavored. It only means that, when appropriate (e.g., when the implications of each choice are dissimilar, and when the difference at issue is truly a "choice," such that it is fair to impose its costs on the individual who makes it), the two preferences can be treated differently. In the caregiving context, for instance, while reinstatement with accumulated seniority may be important for ensuring equal access to opportunity for employees with childcare demands, it simply may not be economically feasible or cost-efficient to promote part-time employees as quickly as those who work without interruption. Conversely, while permitting all persons to take periods of leave with reinstatement may ensure equal access to the opportunity of

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[101] In allowing for this difference, this theory recognizes that "[e]quality of treatment may be denied as much by equal application of a single standard to persons unequally situated as by application of unequal standards to persons equally situated." George T. Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489, 542 (1982) (quoting 1973 Op. Wash. Att'y Gen. No. 21).

taking time off, it may not be possible for the employer to absorb the costs of such a policy. This theory, then, would require employers to accommodate different gender preferences but would, where appropriate, also require employees to internalize some of the costs of these decisions according to their actual preferences.

Although the exact mechanics of how this theory of equality should be implemented is beyond the scope of this Article, in light of the considerations discussed above, the following two elements of this theory become clear. Courts, when determining whether sex discrimination has occurred in the context of gender, should be required to ask:

> (a) whether a plaintiff is being treated differently than persons of the opposite sex with identical preferences and characteristics because of stereotypical assumptions regarding how persons comprising the plaintiff's sex behave;
> *and*
> (b) whether all persons with corresponding preferences or characteristics can also be accommodated such that they too might have access to the same opportunities in a way that accurately reflects the cost implications of their choices.

This inquiry expands the current sex discrimination law framework by mandating a consideration in every instance not only of whether unequal treatment among similarly situated persons is occurring, but also of whether persons who are not similarly situated can have equal access to the opportunity.

The theory of equality introduced in this Article therefore acts as a ceiling rather than a floor for the amount of equal treatment permitted. It requires a determination regarding whether persons with culturally-masculine and culturally-feminine preferences can have equal access to an opportunity first and foremost, but also supports equal treatment for the corresponding gender preference or characteristic within that opportunity when appropriate.

B. Application of the New Theory to Concrete Examples

1. VMI

The fact pattern in *Virginia v. United States*[102] demonstrates how the application of this alternative theory to real facts can result in a

[102] 518 U.S. 515 (1996).

relatively straightforward solution. Recall that in *Virginia*, the Supreme Court struck down Virginia's remedial proposal for VWIL, a parallel program designed exclusively for women that would replace VMI's adversative method with a cooperative method of learning. In doing so, the Court found that generalizations about "the way women are" no longer justified denying them the same opportunities available to men. It then found that, in this particular instance, Virginia could only satisfy the Equal Protection Clause by opening VMI to women who were "seeking and fit for a VMI quality education."[103] The Court's holding in *Virginia* championed the preferences of masculine women to the detriment of feminine women and feminine men (who were not even eligible for the VWIL option), both of whom would have benefited from a program like VWIL. In doing so, the case illustrated the affirmation of sex sameness principle's failure to move beyond the specific preference at issue in the case in order to determine whether opposing preferences and characteristics could also be accommodated.

By contrast, applying this Article's theory of equality to the *Virginia* case would require a court to determine not only whether masculine women were being treated like masculine men, but whether men and women with culturally-feminine preferences who wanted the opportunity to become "citizen-soldiers" could be accommodated as well. This theory would therefore require Virginia not only to open VMI to masculine women, the solution proposed in the actual *Virginia* case, but, to the extent feasible, also to implement the VWIL option for men and women.[104] In doing so, however, it would require the *quality* of the opportunity to remain the same. As a result, the concerns the Court expressed in *Virginia* regarding the inferiority of the "tangible and intangible facilities" (e.g., the alumni network and coursework options) at VWIL would remain relevant to this theory, and would play into a court's

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[103] *See supra* text accompanying notes 59-76.

[104] As this Article previously recognized, not all men and women will fit neatly into these culturally-feminine or culturally-masculine options. Realistically speaking, however, it would be extremely difficult to accommodate every nuance or combination of gender preference or characteristic in existence. Structuring opportunities for persons with both culturally-feminine and culturally-masculine preferences or characteristics is therefore a more realistic way of ensuring equal treatment for as many persons as possible because: (1) it does not prevent persons from pursuing an option merely because of their sex; and (2) it accounts for the purest form of each preference or characteristic. Persons with "hybrid" preferences or characteristics, like persons with consistently culturally-feminine or consistently culturally-masculine preferences or traits, would therefore still be permitted to choose the option that best suits their needs.

determination of whether the culturally-feminine preference could be meaningfully accommodated in the first place.[105]

2. Pregnancy in the employment context

This Article's alternative theory of equality might also provide a better solution to the *Satty* case, discussed above, relating to pregnancy accommodations in the employment context.[106] Recall that, in *Satty*,[107] the

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[105] It seems to the author that at least some of the inferiority concerns articulated in *Virginia* could be readily resolved if VWIL attendees were permitted access to the "tangible and intangible facilities" of VMI (such as the alumni network), assuming such tangible and intangible facilities could be offered to all persons on an equal basis.

[106] Note that pregnancy is a particularly charged topic that has been discussed extensively in the literature and oftentimes is a dispositive issue for theorists who study sex equality. Equal treatment proponents, for instance, argue that pregnant women should be treated "like" men. The rhetoric that supports this position therefore focuses on the fact that pregnancy accommodations will make all female employees costly "potential-pregnants" who will be priced out of the market or will perpetuate stereotypes about sex roles:

> [E]qual treatment [feminists] fear that requiring pregnancy leave will make female employees more expensive than male employees; therefore employers will respond by either hiring fewer women or paying females less than their male counterparts. . . . In addition, some feminists believe that laws giving preferential consideration to pregnancy reinforce stereotypical images of women as child bearers first and foremost.

Issacharoff & Rosenblum, *supra* note 19, at 2196.

Conversely, special treatment supporters argue that pregnant women should be treated differently than men. Rhetoric that supports this position oftentimes characterizes pregnancy as an inherent biological difference between the sexes that requires special treatment. *See, e.g.*, Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-1985) (referring to the "capacity to become pregnant and the conditions of pregnancy and childbirth" as "some sex differences which are not normative but rather inherent, or exclusive to one sex"); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 38 (1985) ("On both legal and philosophical grounds the temporary inequality that stems from the condition of pregnancy should be accommodated within a framework of equal opportunity for both sexes."). This rhetoric also emphasizes the treat-women-differently-so-that-they-can-be-treated-equally-to-men argument reflected in *Guerra* when it notes that "[s]ince women as a group have traditionally been discriminated against in the workplace because of their childbearing capacity, positive action in the form of special rights that affirmatively take childbearing into account is necessary to break down the disparities." Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1147 (1986).

The equal treatment/special treatment debate in the context of pregnancy and employment, like in many other instances, however, is unable to simultaneously accommodate the preferences of all categories of women. Because this tension is

Court found that an employer's policy denying accumulated seniority to female employees returning from pregnancy leave resulted in a disparate impact on women because it disproportionately deprived them of employment opportunities. The Court's finding that the sexes were dissimilarly situated resulted in the implementation of a costly sex-based accommodation for pregnant women to the largest possible detriment of masculine women who neither wanted nor needed the accommodation.

In light of these shortcomings, the theory articulated in this Article proposes a different solution that alters the way in which pregnancy accommodations themselves are structured. In doing so, it begins with the premise that masculine women will be the most disadvantaged in situations where the "costs" of pregnancy-based accommodations (financial and otherwise) are levied on the employer, while simultaneously recognizing the benefit of pregnancy accommodations for women who need them. In order to avoid the "either/or" scenario, two different types of accommodations are envisioned, depending on the type of job at issue. In both instances, the goal of the accommodation is to render the "costs" of pregnancy-based accommodations less of a burden to the employer, such that the employer no longer has an incentive to differentiate between the sexes based on these costs alone.

In jobs where the employer is primarily concerned with the financial costs of pregnancy leave, the solution would be to render these costs inconsequential to the employer. Although this Article does not purport to come up with a *specific* mechanism for lowering the tangible costs of accommodation, several options provide promising leads. One possibility, according to Rosenblum, is to create an insurance model along the lines of unemployment insurance that would provide a general fund from which the costs of pregnancy could be paid.[108] Wendy Williams

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irreconcilable under the formal equality theory, this debate never progresses beyond a continuous back and forth between the two positions.

[107] Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). *See supra* text accompanying notes 88-92.

[108] In this same vein, other solutions that have been proposed include a federally funded leave program where paid federal leave is funded by both employer and employee contributions. Employers would pay a yearly tax related to their size alone, rather than their employee composition. This kind of objective tax scheme would eliminate any incentives that a company might have to discriminate against the perceived higher costs associated with hiring women of child-bearing age. Heather A. Peterson, Note, *The Daddy Track: Locating the Male Employee Within the Family and Medical Leave Act*, 15 WASH. U. J.L. & POL'Y 253, 279 (2004). Another proposal is an employer-initiated restructuring of the mechanisms that foster discrimination, where firms would be given financial incentives to eliminate the

suggests that another way of at least partially lowering the costs of pregnancy accommodations might be to ensure that caregiving, which is oftentimes subsumed into the cost of pregnancy accommodations, be completely disaggregated from pregnancy so that the cost of caregiving would not automatically be associated with pregnant women.[109] Note, however, that these solutions would only be feasible for fungible jobs where the expense to the employer of hiring a "potential pregnant" are limited to readily ascertainable costs such as searching for and training a temporary replacement, continuing to pay health insurance, reassigning work to other employees, etc.

Jobs that are built on less fungible qualities, on the other hand, such as client relationships and knowledge of particular accounts, cannot be addressed solely by rendering the financial costs of pregnancy inconsequential to the employer. Where intangible costs to pregnancy exist, the solution must be to restructure pregnancy accommodations in a way that provides all women equal access to employment opportunities while simultaneously accounting for the different implications of women's choices. A pregnancy accommodation in this context should seek to provide feminine women with equal access to opportunities, while also requiring her to internalize, at least in part, the real costs associated with pregnancy leave. The appropriate type of accommodation, in this instance, may therefore be one that results in a separate practice group within the company or firm that accommodates pregnant women, caretakers, and other

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problems of subtle and explicit biases in the workplace. David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law For "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 105 (1998).

[109] Wendy Williams notes that "[m]uch of the disadvantageous treatment of pregnant wage earners by employers was based not on the pregnancy itself but on predictions concerning the future behavior of the pregnant woman when her child was born or on views about what her behavior should be." Williams, *supra* note 109, at 355. At least one appellate court has also recognized the difference between childcare and pregnancy. In *Schafer v. Board of Education*, 903 F.2d 243, 248 (3d Cir. 1990), the Third Circuit found that a collective bargaining agreement that permitted a woman to take up to one year of leave following the birth of a child was not a permissible pregnancy accommodation under Supreme Court precedent. In making this determination, the Third Circuit interpreted the Pregnancy Discrimination Act as extending to "benefits . . . 'cover[ing] only the period of actual physical disability on account of pregnancy.'" Issacharoff & Rosenblum, *supra* note 19, at 2187. In a different but analogous case, another court rationalized a similar decision by noting that "this choice [of remaining home for an extended period following the birth of a child] is not an inevitable consequence of a medical condition related to pregnancy, and leave policies that may influence the decision to remain at home after the period of pregnancy-related disability has ended fall outside the scope of the PDA." *Id.*

individuals who desire lengthy leaves of absence.[110] Rather than pretending that all employees are alike despite differences in gender preferences, permitting employers to avoid incurring losses by restructuring the workplace to account for these preferences can help alleviate intangible costs associated with pregnancy and childcare.[111]

III. CONCLUSION

While this Article's focus has been to demonstrate how the formal equality theory results in a flawed, albeit predictable pattern in the sex discrimination context, and to propose an alternative theory of sex equality, it concludes by wondering whether the shortcomings of formal equality in the context of sex may extend to other protected categories of persons as well. After all, antidiscrimination law in the context of race (and to some extent in the context of disability), requires courts to determine whether plaintiffs are like or unlike a "relevant" source of comparison for purposes of determining whether equal treatment is required or unequal treatment permitted and/or mandated.[112] This dynamic becomes particularly

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[110] Other ways of alleviating this concern for employers might be (1) using a team method to ensure knowledge on a particular project or account is held by more than one person, and/or (2) assigning shorter projects or cases to individuals who intend to take temporary leaves.

[111] As mentioned earlier, it may be infeasible in certain instances to honor the preferences of all individuals through an accommodation like the one discussed above. This may occur where the employment opportunity itself *actually requires* employees to have masculine preferences or characteristics and thus may be fundamentally incompatible with feminine preferences. In these situations, it does not make sense to institute pregnancy accommodations across the board, as some scholars would advise, since the accommodations will most likely result in an employer hiring as few women as possible for the job or only hiring women who are not of childbearing age. In the most extreme case, unwarranted pregnancy accommodations may also create perverse incentives for women of childbearing age to seek sterilization in order to prove *ex ante* that they will not need the pregnancy accommodation. *See* Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (class action suit challenging fetal protection policy that prohibited women of childbearing age from having significant workplace exposure to lead included one woman who voluntarily underwent sterilization to preserve her job). It is therefore imperative that courts recognize instances where pregnancy accommodations are not feasible, since accommodating feminine women in these particular instances will risk harming all women, including the ones whom the accommodation is meant to help.

[112] Historically, African Americans have been compared to white individuals and disabled persons have been compared to non-disabled persons for purposes of determining whether discrimination has occurred. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217 (1971) (closing down of swimming pools to avoid desegregation did not constitute an equal protection violation in absence of state action affecting blacks differently than whites);

significant when one realizes that, like men and women, persons of a particular race (or disabled persons) may also have dissimilar preferences *within* their very group. These differences in preference may result in some individuals desiring equal treatment, while others prefer an accommodation for group-based characteristics.[113] Further exploration of these questions may prove invaluable as more persons belonging to protected categories gain access to a widening range of opportunities and intra-group preference becomes ever-more differentiated.

Albertson's Inc, v. Kirkinburg, 527 U.S. 555, 566 (1999) (mitigating measures that effectively serve to correct disabilities must be taken into account when determining whether a person should be considered "disabled" under the ADA).

[113] Accommodations for persons of a particular race or persons with a disability, like sex-based accommodations, for example, burden persons who belong to the category of persons the accommodation is meant to help who neither want or need the accommodation. *See, e.g.*, Jolls, *Antidiscrimination and Accommodation*, *supra* note 18, at 698 (recognizing the connection between accommodations and affirmative action programs when observing that, "while accommodation does seem different from affirmative action in various respects, . . . [it is] similar to affirmative action in the respect [that it may] require employers to bear undeniable financial costs associated with a particular group of employees, and in that sense to "accommodate" these employees"); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 484 (1992) (suggesting that the ADA renders disabled persons more costly by making them unable to negotiate their own salaries, thereby effectively pricing them out of the market; Epstein argues that "[l]ike everyone else, the disabled should be allowed to sell their labor at whatever price, and on whatever terms, they see fit").