
Appendix 3

GENDER NON-CONFORMITY AND THE LAW: A “CRYING GAME” IN MORE WAYS THAN ONE

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Why is it that Marlene Dietrich in a tux is acceptable, even sexy, while Jack Lemmon in a dress is ridiculous, and Divine¹ makes us queasy? The answers, if any truly exist, revolve around the interaction of our unthinking assumptions governing appropriate appearance, dress, roles, characteristics and behavior based on sex, and our objective understanding that such assumptions deny a much more complex reality. That reality is getting more complex by the day.

Our understanding of sex and gender appears to be in flux and we encounter increasing opportunities to question the nature of both. This coming August, Houston will be the repeat host of the 2nd Annual International Conference on Transgender Law and Employment Policy. Stories about gender nonconformity with interesting twists flourish. These go beyond an individual of one sex displaying some of the characteristics of the opposite sex, or simply being drawn sexually to a member of the same sex. It is more than the conundrum of a lesbian being attracted to masculine women, or of gay men being attracted to effeminate men, when logic might suggest that homosexuals should be drawn to those who represent most clearly the ideal of their own sex. Such stories even go beyond traditional accounts of transsexuals who feel trapped in the body of the wrong sex. It is a blending of all this, an amalgam of sex, gender and attraction that sheds light on just how complicated the interactions of these various elements can be.

At an Indigo Girls concert last summer, the husband of one of my friends wore a T-shirt bearing the words, “Lesbian trapped in a man's body.” In the February issue of GQ, the author of a story about New Orleans was relating the overheard conversation of one of his guests, a woman planning a sex change operation. “No,” she patiently said to someone who just didn’t get it. ‘I don’t want to sleep with *women*. I want to sleep with *men*: gay men. You see, I have the soul of a gay man trapped in a woman's body.’”² The last time I visited Inklings Bookstore, I was provided a free plastic bookmark with my purchase. On it, a new book was being touted and the blurb read:

Woman or man? That’s the question that rages like a storm around Jess Goldberg, clouding her life and her identity. This powerful, provocative and deeply moving novel embraces the complexities of being a transgendered person in a world demanding simple explanations. As Jess emerges whole — a he-she weathering the turbulence — new possibilities for fully lived lives open up.³

1992 brought us *The Crying Game*, a movie that was both a critical and a popular success, nominated for an Academy Award for best picture. In large part, it is the story of Fergus, a man who falls in love with the character, Dil, someone who appears to be (and whom he believes to be) a beautiful, erotic woman, but who turns out to be anatomically male. Our assumptions about sex and sex roles made the film’s “surprise” scene both possible and powerful. But unlike most of the movies that deal directly or peripherally with transgenderal issues,⁴ this film transcended our initial assumptions about sex-roles and the question of exactly what it is that makes one a woman or a man, into intense questions about the nature of love and desire that resonated throughout the remainder of the film. Of these various stories, it is the character of Dil in *The Crying Game* that struck the most responsive chord in me, and began my musings about the subject of transgenderalism and the manner in which the society and the law deal with it. In a sense, Dil is less a springboard than an excuse

to discuss this, but she is nevertheless a perfect illustration.⁵

Gender nonconformity is perplexing in many ways, but its existence clarifies well the truth that “sex” cannot be defined as neatly and narrowly as we now define it both in society at large and in law. To confine the definition of sex to an anatomical version of male and female is to miss the very qualities that make us men and women. In this essay, I plan to briefly explore three themes suggested by Dil and company. First, I will look at the some of the origins of our beliefs about sex and gender, particularly as they relate to gender nonconformity. Second, I will examine the current legal response to gender nonconformists and the way in which that response is influenced by our beliefs. Third, I will suggest a blueprint for change.

The plethora of words and phrases available to describe various aspects of our sexual being⁶ indicates a panoply of combinations from which we can draw to consider what it means to be a certain sex and to express our sexuality with others. What are the definitions of sex, gender, identity, sexuality and social roles that interact to create a cohesive picture of what it means to be men and women, and where do these come from? There is ample room for a host of variations on the theme of sexual diversity, and for an incongruence between anatomy, personality, behavior and the object of our sexual desire. But in the end, we are dealing with combinations of the same static elements: chromosomal sex, anatomical sex, gender identity, gender role and sexual orientation. The flaw in our thinking is that we automatically assume congruence among these elements.

In short, we define a woman as a person who has XX chromosomes, internal and external female genitalia, a female identity, a “feminine” way of behaving, and a sexual attraction only to men. While this may define the majority of women, it is at heart a view that is clearly too narrow. If we decide to limit how far we will expand the definition of a woman, as opposed to expanding it to cover anyone who self-identifies as a woman, a theoretical problem arises. What criteria will we use to include or exclude individuals from a partially expanded definition? Assuming that we do not permit Dil to identify herself, a question which may be posed almost immediately about her is, what is she? I have referred to her as “she” but is she female? Is she a male homosexual who is also a transvestite? Is she a transsexual at an early stage of transition from male to female? Would the author of Stone Butch Blues call Dil a “he-she” transgenderal? Dil's body is male and she has sex with males, but if her psyche is female does that make her a heterosexual?

Labels may make us comfortable because of their precision, thus we might like to be able to accurately label Dil for reasons of comfort. But I believe that if we expand the legal meaning of discrimination “based on sex” to encompass an extremely broad definition of the word “sex,” then Dil will be included no matter what label is or is not placed on her. Why have we so narrowly defined the concept of sex? It is necessary to take a look at classic definitions, institutionalized sexism, and feminist theory in order to understand because the same beliefs that have relegated women to a second-class status in American society relegate gender nonconformists to the same lower tier. There appear to be three central, interwoven elements at work here: gender polarization, biological essentialism and androcentrism.⁷

Gender polarity (also sometimes called a binary system of male and female⁸) refers to a version of gender reality which acknowledges two discrete sexes, male and female, to which are ascribed appropriate and opposite traits. Sex refers not only to the biological construction of anatomical/chromosomal attributes but also to gender roles which have been socially constructed to match them. Gender traits encompass preordained and fixed modes of speech, dress and temperament, and personal characteristics, interests, and professional pursuits which are linked to the individual's sex.⁹ Each sex has a unique and essentially unmodifiable gender role, which includes sexual attraction only to the opposite sex, and individuals are evaluated by others on the basis of conformity to their assigned gender roles. What is not accounted for in this vision are those people whose sense of self does not conform in some respect to their ascribed roles.

Biological essentialism represents the proposition that gender differences are the inevitable result of our biology, not the result of social enculturation. It is always comforting to envision human behavior as the result of science at work. Our ongoing fascination with genetics and with the current theory of “hardwired”

homosexuality — the notion that sexual orientation comes with our physical makeup, much like computer hardware, as opposed to coming from environmental input, much like computer software — are good examples of this.

The current dominant sociobiological theory to explain sex-linked behavior was developed by Edwin O. Wilson.¹⁰ It is premised on the notion that reproductive capacity governs behavior, and that the ability of males to fertilize many females (thus passing on their genetic code as often as possible) impels them to be aggressive, indiscriminate and dominating.¹¹ This dominance then carries over into all other spheres. Females, in contrast, are impelled to be coy and choosy in deciding how to invest scarce reproductive resources, and to favor males who invest the same amounts of time and energy in the relationship that females invest in childbearing.¹² Wilson's theory continues to have its adherents among the judiciary.¹³ This is significant because our philosophical outlook cannot help but permeate our professional attitudes and judgements.

Sandra Bem proposes a simpler alternative theory that looks instead to the realities of childbearing and nursing during primitive times.¹⁴ Without access to birth control measures, and with only a mother-supplied food source for infants, females were either pregnant or nursing most of the time. By necessity, males had to undertake most other tasks, and had to organize to carry them out effectively. Leadership roles and dominance then flowed from this practice of organizing.¹⁵ Whichever theory is the more sound of the two, the modern version of the second view can easily be seen in a work world that is still organized solely around the needs, capacities, and freedom of men from the responsibility of caring for children, while women are still hampered by that responsibility. Day care is neither routinely offered within the work setting nor is it organized, offered and monitored on a national basis. This structure of the work setting without accommodation for child care needs, and the disproportionate disadvantage this imposes on women, is a prime example of androcentrism at work.

Androcentrism, literally “male-centeredness”, represents a standard for directing and judging behavior that appears to be gender-neutral but which is, in fact, a reflection of male experience and male norms.¹⁶ It is this element that figures most subtly and most destructively in our social and legal environment, for gender nonconformists as well as for women. In its early days, *Ms* magazine invited readers to share what they dubbed a “click” experience — that singular moment when sexism was borne home to them in a revelatory way. It was in reading another woman's epiphany that I found my own. Her two sons were battling in the back yard, the elder unmercifully tormenting his 5 year old younger brother, whose frustration mounted. He raged at his brother, searching for the ultimate insult, then screamed, “You . . . you . . . you *girl* you!” Click.

Our preference for male over female is never ending. It permeates virtually every aspect of our culture, including our legal system. In contemplating the nature and effect of the preference, I am reminded of a “Saturday Night Live” routine from the early episodes that opened, “Hi. I'm Chevy Chase and you're not.” Like most binary choices, female is both other than and less than male.¹⁷ From birth to grave we favor that which is male. This critical component of androcentrism works to the disadvantage not just of women but also of gender nonconformists who deviate either from a male norm or a male-defined female norm. It is those qualities that are traditionally defined as masculine which lead to the greatest success in American society.¹⁸ Conversely, we both devalue what is female and punish males more severely for deviating from male norms than we do females for deviating from female norms. Tomboys are accepted with a nod and wink, while we wince at sissies. To be butch is vastly preferable to being femme, even in a lesbian context that generally celebrates the female over the male.¹⁹ Even feminism is rife with unconscious misogyny.²⁰

From the work setting to the fashion pages, it is better to be male. The newspaper fashion section may abound with suit-clad women and ads for “boyfriend blazers,” but men in dresses do not grace the pages. In sum, to deviate from the male-defined female norm is an act of defiance; to deviate from the male norm is an act of treachery. Women are seen to at least have a biological excuse, whereas men have none. The words themselves that are associated with the learning of adult gender roles are one more indication of status. “A male ‘proves’ his manhood, a female ‘accepts’ her womanhood.”²¹ In effect, we have constructed a social

pecking order that places male-to-female transgenerals at the bottom and we view all gender deviations as threats to the social order, with some seen as particularly alarming.²²

This may be inescapable in a culture in which gender is a major cognitive pattern.²³ The first words we ever hear are an announcement of our own sex. Adults are acutely uncomfortable dealing with a child whose sex is unknown to them. Most will simply supply a gender if none is forthcoming, and interact with the child based on this.²⁴ We squirm at Saturday Night Live's androgynous "Pat" and speculate about people whose appearances are ambiguous. In the presence of confusing or conflicting gender cues, people show a pronounced tendency to assume maleness.²⁵ Of all of the various challenges to the social gender pattern, none seems to be more disturbing than someone who is transgendered. Aside from the visceral discomfort I believe most people feel when encountering any sort of sexual diversity, it is a special assault on the link between anatomy and gender identity, and on the inevitability of a masculine or feminine role.²⁶ The transsexual says in effect: I may have been born with male anatomy, but my thoughts, feelings and attributes are entirely female. This idea is disturbing to both men and women. To most women, it is not only an assault on traditional norms, but is also sexist. It is anathema because it asserts the very notion believed to be false — that there are characteristics and modes of feeling or being, that are distinctly, inescapably female.²⁷ To most men, a male-to-female transgenderal also represents an inconceivable surrender of manhood, in every sense of the word.²⁸ Society's discomfort with gender nonconformity of all kinds has led to unequal application of the laws when we come before the court.

Most of the legal challenges to the disparate, discriminatory treatment of gender nonconformists have fallen flat²⁹. If Dil were to rely upon American jurisprudence to secure either the right to marry or to be free of discriminatory treatment by an employer, she would be sadly disappointed.³⁰ Except in the area of family law, very few arguments on Dil's behalf would sway the courts, no matter the rubric under which they are brought.³¹ Most existing legal precedents concern sexual orientation, not gender orientation.³² In large measure, the courts have steadfastly carried out what they perceive to be the will of Congress in attempting to level the playing field between men and women, but they have done so only as male and female are defined by original, anatomical sex. Catherine MacKinnon has made the basic argument that our world is so organized from a male perspective that all of men's special needs are addressed while women's are either left unaddressed or handled as exceptions. In her eye-opening words:

Virtually every quality that distinguishes men from women is . . . affirmatively compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with one another — their wars and rulerships — defines history, their image defines god, and their genitals define sex.³³

A classic example of MacKinnon's special-needs definition of androcentrism influencing the courts is illustrated in General Electric Co. v. Gilbert, 429 U.S. 125 (1976). The court was discussing whether pregnancy could be excluded from disability insurance coverage. In order to uphold the exclusion, the court distinguished between pregnant employees and nonpregnant employees, male and female alike. The court ignored the reality that it is not pregnancy but rather the unique capacity to become pregnant that distinguishes female from male. All potentially disabling conditions that could affect males were covered, including those unique to men. But not all of those unique to women were covered. By using male physiology as the norm, the court reached the wrong decision.

It is the intellectual trap created by gender polarity, biological essentialism and legal androcentrism that creates a persistent view of gender nonconformity as being unrelated to sex. Thus it is likely that courts will continue to reach the wrong decision until a genuinely sex-neutral standard is used. The orthodox social/legal argument is that discrimination against homosexuals and transsexuals is not sex discrimination because it is not

based on the sex of the person but upon the behavior itself.³⁴ It is the equal disfavor shown to male and female homosexuals or transsexuals alike that is supposed to remove such discrimination from the category of discrimination based on sex. Yet it is not the behavior at all but the sex of the person engaging in the behavior that creates the bias. Having sex with men is a behavior permitted to women, but not to men. Wearing make-up, high heels, a dress and pearls is behavior permitted to women, but not to men. When it is the sex of the individual that controls, this is discrimination based on sex. This is not parity. It is a perpetuation of androcentrism and sexual stereotyping.³⁵ It is also exactly the argument that failed in regard to discrimination based on race in Loving v. Virginia, 388 U.S. 1 (1967). The state of Virginia was unsuccessful in arguing that because blacks and whites were equally disfavored by laws prohibiting interracial marriage, it was not discrimination based on race.³⁶ The court explicitly found that the anti-miscegenation laws constituted race discrimination because a permissible behavior (marriage) was only prohibited when persons of different races attempted to engage in it. This precisely mirrors the situation discussed above where men are not allowed to engage in behavior considered acceptable for women, such as wearing feminine attire.

Recently, in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the court noted that Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting not only from sex but from sex stereotypes as well. A woman was denied a promotion to firm partnership, and the decision was based in part on the company's perception of her as "too macho." It was suggested that she should wear more feminine attire, behave in a more ladylike manner, attend charm school. The court found this to be impermissible discrimination based on sex. The language employed by the court allows room for application to discrimination based on all aspects of our sexual identity and behavior. If discrimination based on gender nonconformity is not an example of discrimination based on sex stereotyping, then what is?³⁷

Change could germinate from several sources. First, the ability to change legislation or the common law may rest on the ability to more persuasively expose the intrinsic biases that blind all of us. Like the rest of us, the judiciary's vision is clouded by social norms that exert a profound influence on the legal decisions that determine what rights may be claimed by those who are currently dispossessed of them. If we bring fresh insight to the assumptions about sex and gender that are part and parcel of the judicial process, we may be able to replace reaction-by-reflex with a response that is more progressive, beneficial, and fundamentally fair. Education and eloquence have a powerful role to play. Storytelling will also be very helpful here because putting a human face on sterile legal principles can be transforming.³⁸

Second, care should be taken to choose a forum where judicial activism is the norm as opposed to judicial conservatism. A judicially active court will be more willing to expand protection based on sex. Should such a court choose to find a basis on which to reverse the general pattern of hostility toward the rights of gender nonconformists, both the Loving and Price Waterhouse decisions and reasoning are powerful instruments. That these cases have not yet been successfully used doesn't necessarily mean that they will never be so used, the cynical view notwithstanding.³⁹ Appealing to the basic sense of fairness of our judges is not a particularly original approach, but it is the one that I believe in the long run will obtain the best result with the least sacrifice.⁴⁰

Progress takes time. But it seems to me that we are on the verge of winning fresh and widespread victories in this battle for civil rights. It is important to remember that once Fergus discovered that Dil was not a woman, his love for her did not suddenly cease to exist despite his initial shock. Nor did we as an audience cease to care about Dil. Our continued regard for her as a whole human being meant that we were able to overcome our prejudices in dealing with her. If we can be moved enough to care about this fictional character, then why should we expect any less of ourselves in our real, personal, everyday interactions with others, and why should we expect less of our judicial system? Martin Luther King dreamed of the day when black children would be judged not by the color of their skin, but by the content of their character. So may we all be judged.

Endnotes

1. The late 400-lb transvestite actor who starred in the memorable *Pink Flamingos*. If you didn't catch that movie, you can get an idea of Divine's appearance by observing the wicked lady octopus in *The Little Mermaid*.
2. Walter Russell Mead, *Dancing the Bamboula in Old New Orleans*, GENTLEMEN'S QUARTERLY, Feb. 1993, at 168.
3. LESLIE FEINBERG, *STONE BUTCH BLUES* (1993).
4. Generally in films, an excursion into gender nonconformity is treated as comedy. *Myra Breckenridge*, *All of Me*, *Victor/Victoria*, *Some Like it Hot*, *Rocky Horror Picture Show*, *Switch*, *La Cage Aux Folles*, *Tootsie*, and *Mr. Mom* were all played for laughs. *Hotel New Hampshire* and *Yentl* had serious themes, but these centered around something other than the gender diversity itself. In a sense, this is understandable because the essence of a good joke is the unexpected twist provided by the punch line.
5. In fact, key aspects of the fictional Dil are perfectly mirrored in the case of Kirkpatrick v. Seligman & Latz, 475 F. Supp. 145 (M.D. Fla. 1979), *aff'd*, 636 F.2d 1047 (5th Cir. 1980), which concerned the case of transsexual in transition who was fired from the beauty salon where she worked for refusing to dress and act like a man. The court rejected her claims of denial of equal protection and equal immunities under 42 U.S.C. §1985(3), relying on the uniform application of dress/behavior requirements to all male employees, the lack of suspect class status for transsexuals, and customer preference.
6. Sex, gender, male, female, masculine, feminine, heterosexual, homosexual, homophile, homophobia, bisexual, gay, lesbian, butch, femme, transvestite, transsexual, transgenderal, androgyne, unisex, inversion, sexual orientation, sexual preference, sexual identity, gender bending, gender blending, gender identity, gender nonconformity, gender dysphoria, androcentrism, sexism, heterosexism and probably others that don't immediately come to mind.
7. SANDRA LIPSITZ BEM, *THE LENSES OF GENDER* 82-87 (1993). A fascinating look at gender polarization, biological essentialism and androcentrism, and how these interact to form what the author calls "lenses of gender" are the heart and soul of her book. She has not coined these terms, but has put them together in a fresh and compelling way. The subtitle to Bem's work: "Transforming the Debate on Sexual Inequality."
8. HOLLY DEVOR, *GENDER BLENDING* 41 (1989).
9. I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991).
10. BEM, *supra* note 7, at 14-19.
11. *Id.*
12. *Id.*
13. See, e.g. Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21 (1989).
14. BEM, *supra* note 7, at 30-33.
15. *Id.*
16. *Id.* at 31.
17. Holly Devor introduces her book: "Boys will be boys, and girls will not. . . . 'Boys will be boys, and girls will not' describes how sex and gender are understood: males are defined by what they are, while females are defined by what they lack by comparison to males. The male sex is seen by most people as a baseline against which the female sex is seen as an incomplete version of the male. DEVOR, *supra* note 8, at vii. Also see, Capers, *supra* note 9, at 1162. The author states, "Civilization, in order to define the self, constructs things through their differences: light/dark,

white/black, male/female are examples. Structuralists . . . point out the hierarchies implicit in this polarization approach to language. By creating opposites, society implicitly valorizes one object over another. Dark becomes both not light and somehow less than light. Black becomes both not white and somehow less than white. And female becomes both not male and somehow less than male." This is not unlike the words used in the language of most of the indigenous tribes in America, who almost universally called themselves "the people" and others, "others." Or the term "gentile" used by Jews, which means "not a Jew."

18. This seems to me to be so self-evident that a footnote is gratuitous. But for the record, see DEVOR, *supra* note 8, at 32-33. Devor points out that masculinity, "[c]an be seen to function as a minimum basic requirement for social success in mainstream society regardless of one's sex or gender identity."

19. JOANN LOULAN, *THE LESBIAN EROTIC DANCE 93* (1990). The exact quote is, "Within our community, butch has a much higher value than femme does." Much of the book consists of interviews with lesbians, and the author rightly points out that the concepts of butch and femme as expressed by her subjects reflect an "intensely sexist image."

20. *Id.* at 109. In one of the conversations recorded verbatim, two of the subjects engage in this dialogue: "We went around the room, rating ourselves, and rating each other. For those of us who were more femme, when we got a higher butch vote, we felt great. But those butches who got a femme vote—" *Uh-oh.*" "—they were freaked out." "That's about woman hatred." "Absolutely." No woman is immune from the message that male is better than female. See also DEVOR, *supra* note 8, at 131. The author is interviewing women who are frequently mistaken for men, and has this to say: "Their view of women and their lot was not an enticing one. They had absorbed the message, taught to all members of society, that women are not as good as men, and they had somehow managed to disassociate themselves from being typical women. As one woman put it, 'Let's say being mistaken for a typical female bothers me a lot more than being mistaken for a man.'"

21. Marc A. Fajer, *Can Two Real Men Eat Quiche Together?*, 46 U. Miami L. Rev. 511, 622 (1992). The power of words is inestimable. JoAnn Loulan comments that, "There's a theory in linguistics that it's tremendously difficult to transform the cultural concept of a word and give it new meaning. You have to choose a new word to change the meaning." See LOULAN, *supra* note 19, at 216. It may well turn out that we are unable to reconstruct the meanings we attach to gender.

22. Capers, *supra* note 9 at 1166; DEVOR, *supra* note 8, at 61.

23. It may be compounded by the fact that our genitalia are hidden by clothing, thus we are dependent upon other cues to identify sex. Clothing and hairstyle are critical to this. I can remember a song during the height of the Hippie days that opened, "Is it a boy or a girl?" We need and want to know.

24. DEVOR, *supra* note 8, at 26. Not only will we arbitrarily assign a gender, we reinforce early stereotyped expectations of very young children. There is a strong tendency to observe behaviors that correspond to the sex we think a child is, rather than the sex the child truly is, and to interpret activity in a sex-linked way. For example, adults shown a tape of a crying child will label the emotion expressed by the child as fear, when they believe the child to be a girl, and anger when they believe it to be a boy. This is not unlike the more favorable evaluation of adult work when it is identified as having been produced by a male than when it is identified as having been produced by a female. This superimposing of gender associations make such associations largely a self-fulfilling prophecy.

25. *Id.* at 49. This study seemed to suggest that people will see maleness when there is almost any indication of it, no matter how slight, whereas femaleness is usually seen only when there is both an absence of male cues and the presence of compelling female cues.

26. DEVOR, *supra* note 8, at 20; BEM, *supra* note 7, at 167.

27. Sandra Bem suggests that transsexualism is a social pathology — the flip side of the same process that produces highly conventional males and females. She argues that in a culture which was less gender polarized, people would have far less reason to be desperately unhappy with the particular sex they were born into. See BEM, *supra* note 7, at 111. To characterize it as a pathology, however, appears to me to deny another's reality, which is the antithesis of the loosening of gender straitjackets that Bem champions in her book.

28. Men are acutely aware of the power and privilege that can come with being male and conforming to masculine norms. BEM, *supra* note 7, at 150-151. In a purely physical sense, men are also aware of the power and privilege associated with having a penis. There is a study which I cannot locate to cite, but which I will refer to for its anecdotal value. Males and females differ sharply in their assessment of the value of various body parts and senses. Females placed loss of sight, hearing or speech above loss of a breast or sexual function. Males would prefer being blind, deaf and speechless to losing a penis or sexual function.

29. Generally, the index to our course materials provides innumerable examples of unsuccessful petitions to marry, to serve in the military, to engage in homosexual conduct, or to achieve inclusion under the protection of Title VII.

Whether the challenge is under equal protection, due process, rights of privacy or association, or sex discrimination, there is little to serve as a positive precedent. Only in child custody and visitation matters and in the sphere of inheritance laws has considerable progress been made. The drift appears to be the willingness of the courts to uphold the rights of the individual in his private affairs on a case by case basis, but an unwillingness to make sweeping changes that will affect the affairs of a large segment of society at once.

30. Under the theory that it is not sex discrimination to dismiss a transsexual employee, very few employment protections exist. See, Ulane v. Eastern Airlines, 742 F.2d 1081 (7th Cir. 1984) (Title VII does not protect transsexuals); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978) (upholding refusal of company to hire an effeminate male — no violation of Title VII) (note: it is doubtful that this sort of case will prevail in the future, given Price Waterhouse); Voyles v. Ralph K. Davies Medical Center, 403 F. Supp 456 (N.D. Cal. 1975) *aff'd mem.*, 570 F.2d 354 (1976) (no Title VII protection for transsexual; fired because of her sex change, not her sex); Grossman v. Bernards Township Board of Education, 538 F.2d 319 (3d Cir. 1976) (teacher terminated because of sex change, not sex); Sommers v. Budget Marketing, 667 F.2d 748 (8th Cir. 1982) (transsexuals not entitled to Title VII protection); Kirkpatrick v. Seligman & Latz, 475 F. Supp. 145 (M.D. Fla. 1978), *aff'd*, 636 F.2d 1047 (5th Cir. 1980) (customer preference a valid reason to fire transsexual).

The breadth of some state and local ordinances may offer protection against discrimination for transsexuals. Chapter 9.83 of the city of Santa Cruz municipal code which prohibits discrimination specifically includes transgendered individuals. Marriage may pose a problem for some transsexuals. In Richards v. United States Tennis Assoc., 400 N.Y.S.2d 267 (1977), the court looked to Renee Richards' new anatomy to permit her to compete on the women's tennis circuit. But in In re Ladrach, 513 N.E.2d 828 (Ohio Prob. 1987), the court looked at the sex listed on the birth certificate to deny a marriage license to a transsexual. In those states that do allow a change to be made to the birth certificate after transsexual surgery, this problem would presumably not exist.

31. The courts tend to use the same words when justifying a decision to permit employment discrimination, for example. The argument is that the wrongful discharge or failure to hire stemmed not from the person's sex but from the person's homosexuality or transsexuality, thus removing the action from the ambit of Title VII. See DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (homosexuals not hired or promoted were not entitled to Title VII protection because company used same criterion for both men and women); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) (plaintiff was not discriminated against because she is a woman or a man but because she is a transsexual).

32. In earlier times, it was incongruence between anatomical sex and social behavior which excited the greatest interest, not erotic behavior. Inversion, the taking on by a person of one sex of the social role of the opposite sex, was accorded much more importance than same-sex sexual behavior because, of the two, it was perceived as a greater threat to social norms. For a discussion of the history of inversion theory, see BEM, *supra* note 7. The sex itself was almost incidental. Given the exclusive modern application to men of laws barring cross-dressing, it is interesting to note that these were originally crafted with an eye toward women, lest they have access to the social advantages of being male. See, Criminal Law & Practice Committee Report, *The First International Conference on Transgender Law and Employment Policy*, 284 (1992). The advent of the 20th century, bringing a general heightening of interest in all things sexual, as well as the increasingly more powerful roles beginning to be assumed by women, shifted the focus to sexual behavior. BEM, *supra* note 7, at 88. Currently, however, some of the focus is shifting back, particularly since medical science has developed the technological ability to alter anatomy and the transgenderal community is beginning to exert a more powerful political presence.

33. Catherine MacKinnon, *Difference and Dominance: On Sex Discrimination* (1987) as quoted in BEM, *supra* note 7, at 183-4.

34. See notes 30 and 31 *supra*.

35. Samuel A. Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992).

36. *Id.* at 6. Marcossou states that the key to the Loving decision was that the court correctly reframed the question that Virginia asked, negating their contention that equally unfavorable treatment of both races disqualified it from being called race discrimination.

37. This is not to say that the courts will necessarily take advantage of the opportunity offered by the language of the Price Waterhouse decision. Samuel Marcossou takes a cynical view: "There is little risk that the principle that gender stereotyping is sex discrimination . . . would fall victim to an attempt to extend the principle to antigay stereotypes. Rather than rejecting the principle that gender stereotyping is discrimination, courts which reject the extension are more likely to see antigay discrimination as not being sexual stereotyping at all. I fully expect sexual orientation stereotyping cases to arise, and I anticipate (perhaps paradoxically) being both entertained and saddened by the judicial opinions explaining precisely why the notion that men should have sex only with women and women only with men is not a gender stereotype." *Id.* at 36, FN 136.

38. Fajer, *supra* note 21.

39. I am very much encouraged by the recent decision reached by the Hawaii Supreme Court (opinion not yet available), in which the court is reported to have found the state's refusal to issue licenses for same-sex marriages to be unconstitutional discrimination based on sex.

40. Some may argue that the Americans With Disabilities Act offers perfect protection for transgenerals, and that seeking repeal of §511 excluding transsexualism should be a prime goal. I believe it is ultimately in the better interests of all gender nonconformists to seek an end to discrimination without in the process being classified as disabled. There is a subtle psychological victory to being classified instead as a new suspect class.

In addition, the protection may be illusory. The state of Washington provides protection under a state disability antidiscrimination law, but the definition of handicapped requires not only the presence of an "abnormal condition" but also discrimination based on that condition. In Jane Doe v. Boeing, 846 P.2d 531 (Wash. 1993), the state supreme court recently ruled that a pre-surgery transsexual was fired for violating the company clothing directive, not on account of her disability. The court made much of the fact that dressing in ultra-feminine clothing was not a precondition to surgery, so long as the plaintiff lived the social role of a woman, and also was sympathetic to Boeing's allowing her to wear "unisex" clothing. To the company and the court, this was reasonable accommodation. The description of unisex clothing provided makes it clear that what passes for unisex is simply male attire with feminized names: blouses, slacks, flats. The inclusion of earrings reflects an au courant male fashion statement. The exclusion of a strand of pink pearls reveals the sexism.

The dress code itself is another example of androcentrism. It also provides a clue which may answer my initial question about Dietrich, Lemmon & Divine. Since male clothing is the norm, not gender-neutral clothing, and we favor the male over the female in virtually all respects, it is our collective perception that just about everyone looks good in it. Jack Lemmon looks ridiculous partially because feminine clothing itself is ridiculous in some ways. It is not well matched to the human frame of two legs and flat feet, thus only the very feminine look decent in feminine clothing. The gender-blending women in Devor's book confessed to feeling and looking like "men in drag" when they wore dresses. DEVOR, *supra* note 8, at 126-9. Divine confounds not only our notion of dress, but also our notion of the ideal female form, which definitely does not include a 400 lb. woman.

There is something unsettling and false in the claim that it was the violation of the dress code and not the condition that resulted in the plaintiff's termination. An equivalent would be the firing of someone who suffers from Tourette's Syndrome, a condition that can cause involuntary cursing, not for the disability but for violating the company's profanity code. On the other hand, it is in perfect keeping with the intellectual sleight of hand that claims discrimination based on sexual orientation is not discrimination based on sex.