Gender is for Nouns

Richard A. Epstein

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Richard A. Epstein, Gender is for Nouns, 41 DePaul L. Rev. 981 (1992)
Available at: https://via.library.depaul.edu/law-review/vol41/iss4/2

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
ARTICLES

GENDER IS FOR NOUNS

Richard A. Epstein*

I. SUBSTANCE, NOT TERMINOLOGY

I have chosen this somewhat provocative title to my article—*Gender Is for Nouns*—for a number of reasons, not all of which are captious. First, I thought that any title had to be preferable to that which was suggested to me by the editors of the *DePaul Law Review: Gender Discrimination and the New Civil Rights Law*. In part, my objection to the title was that it was a snore. By focusing on the features of the Civil Rights Act of 1991, most of which are concerned with matters of race, it deflects us from serious consideration of the underlying questions surrounding the use of public force in civil rights cases in the first place. So I had reason to abandon the title on the grounds that it misstated my topic. But the question still remained: What title should be adopted by way of a substitute? Here a second feature of the title bothered me: the use of the phrase *gender discrimination*. Initially, it should be clear that the phrase operates as something of a gloss on the basic statute, which when it enumerates the forbidden types of discrimination refers to "sex" and not to "gender." The question then arises whether

* James Parker Hall Distinguished Professor of Law, The University of Chicago. This paper was delivered as the Keynote Lecture at the *DePaul Law Review's* Conference on Employment Discrimination and Affirmative Action held on February 6, 1992, at the University Club in Chicago.


2. See 42 U.S.C. §§ 2000e to 2000e-17 (1988), as amended by the Civil Rights Act of 1991, Pub. L. No. 102-106, 105 Stat. 1071. Section 703(a)(1) makes it unlawful for an employer "to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). Section 703(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of . . . sex." Id. § 2000e-2(a)(2).
the shift in terminology represents only a preference for words of
two syllables instead of words of one, or whether it has some deeper
significance. This issue had already, I might add, been raised when I
was working on Forbidden Grounds,³ where I was told that the offi-
cial usage of the Harvard University Press is gender and not sex;
nonetheless, I persevered with my chosen head of sex discrimina-
tion. It is also implicit in the titles of the first three articles in this
symposium, which are addressed to the problem of gender discrimi-
nation. The change in modern usage patterns is quite complete and
hardly random. Why then the insistence on the shift?

The reasons for this shift in language are the mirror images of
those that lead me to oppose it. Speaking of gender, as opposed to
sex, discrimination carries with it a substantive as well as a termino-
logical message. Gender, when used as applied to nouns, carries
with it a somewhat arbitrary appearance. To be sure, nouns are
often classified as masculine or feminine or even as neuter, but there
is only a loose correlation between the meaning of the noun and its
gender classification. Thus, in German, die Frau, “the woman,” is
feminine, while das Fraulein, “the unmarried woman,” is neuter. In
this case, the shift in gender follows a rule of German construction
that all nouns that end in lein are neuter, wholly without regard to
their content. Similarly, the Latin word for “farmer” is agricola,
and is regarded as masculine even though it is in the first declen-
sion, which is with few exceptions feminine. (It is probably worth a
passing note that in Latin homo (third declension masculine) is the
word for “person,” and vir (second declension masculine) is the
word for “man.” “Homicide” is the killing of a person, not of a
man.) The clear implication, therefore, is that once we shift from
sex, which is not arbitrary, to gender, which may be, we have
strengthened the case for thinking gender differences irrelevant in
all social contexts. From there it is a shorter step to Title VII’s pro-
hibition against discrimination on the ground of sex.

The choice of the term gender, relative to the word sex, carries
with it still heavier baggage. In accordance with the modern usage,
the term gender carries with it the implication that we are exploring
the relationship between males and females as a social phenomenon,
and not as a biological one. The term sex, therefore, is reserved to
deal with those aspects of anatomy, physiology, and reproduction

³. Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimina-
that are explicit to sexual distinctions between the persons.4 In essence, the choice of the word gender now carries with it a substantive message that again bolsters the case for the antidiscrimination laws, in employment or anywhere else. To the extent that human activity falls into two separate domains (how watertight they are is perhaps another question), then we can justify the use of the antidiscrimination principle as refusing to allow persons to take into account biological and sexual differences where they have no legitimate role to play in the decision-making process.

The extent of this demarcation is, I think, made tolerably clear by a single sentence from the writing of my namesake, but not my fellow traveller, Cynthia Fuchs Epstein, who in her book *Deceptive Distinctions* states: "We must also ask why men and women are classified in the social order in ways unrelated to their biological differences and biological functioning—that is, by their intellectual, moral, and emotional makeup."5 The clear implication of this sentence is that there are huge portions of human conduct not determined, or even influenced, by biological origins, and these include "intellectual, moral, and emotional makeup." A further implication is that since these various elements of human behavior are "unrelated to biological differences," they must be attributable to the human forces that are responsible for socialization.

This single sentence bears even closer examination. Here it is no accident, I think, that Professor Epstein resorts to the language of impersonal forces that account for the molding of the behaviors in question. We are now told it is "the social order" that does the clas-

---


In this book, sex refers to the biological aspects of a person, such as the chromosomal, anatomical, hormonal, and physiological structure. It is an ascribed status in that a person is assigned to one sex or the other at birth. Gender refers to psychological, social, and cultural components. Unlike sex, it is accomplished in social contexts. How gender is accomplished will concern us shortly, but first, we will address the issue of sex as an "ascribed status."

*Id.*

In order to make her point unmistakable, Richardson begins her book with a discussion of those cases in which the sex line is itself muddied, as in cases where sex organs are "atrophied or ambiguous" or where major accidents (such as the loss of a penis) lead to a sex change operation. *Id.* at 5-6. These cases are, however, of no consequence in the overall social scheme of things where sex, unlike race, is a dichotomous variable.

sifying and by implication the molding as well. Yet, we are never told which persons in that order make that classification, or even whether there is a single classification that holds good for all persons. Instead, the nameless collective force becomes exactly the right kind of target for correction by various types of legal intervention. Yet this is a setting in which we should be extremely cautious about making any collective attribution of responsibility. Professor Epstein's orientation might prove correct in settings where there is a central agency in charge of making decisions that bind all its members. It is in this sense that we can say that officers act on behalf of the corporation, even when members of the board of directors or shareholders are strongly opposed to their action. But the process of social definition is the cumulation of huge numbers of independent judgments made by actors who have very different purposes and very different standards of evaluation. There is no "it," no "society" out there that imposes "its" classifications on "us." There are people who at some moment assume the role of classifier and at other moments the role of the classified. Any regularities in perception that arise by this indirect and diffuse process are far more reliable, and should be accorded greater weight, than an explicit formal pronouncement of the state or any of its agencies.

This confluence of separate pressures should weaken the claim that patterns of socialization are ones where they do something to us; rather, they should be understood primarily as situations in which we do something for each other. We should not look at the pattern of social interactions as something that stands in need of correction simply because it has produced asymmetries in social roles. Indeed, we should seek to understand what those asymmetries mean and why they may be beneficial for all concerned, instead of being exploitive of some. Mothers clearly have a greater role in the socialization of infants and young children, and it seems mistaken to assume that they adopt patterns of child rearing that are designed systematically to prejudice their daughters and to advantage their sons. Unless one wants to retreat into the wonderland of "false con-

6. Other passages confirm that she holds this view. Thus, after noting (correctly) that black/white distinctions are often problematic because there are many individuals who are part black and part white and therefore resist easy classification, she continues to draw this analogy: "Similarly, when we choose to differentiate people as male and female on the basis of their genitalia, we ought be aware that this, too, is a socially created category that may or may not be relevant to the inquiry, depending on the problem being considered." Id. at 38. The category is biologically created, and rests on far more weighty concerns than the one distinction she proposes.
GENDER IS FOR NOUNS

sciousness,” upbringing should be usually regarded as in the interests of the child, and where it is not, as in cases of neglect and abuse, the nature of the misconduct is usually apparent without resort to any conspiracy theory of child rearing.

The reason why I say, therefore, that gender is for nouns and not for persons is that I do not wish the choice of title to require me to buy in, or even hint at buying in, to that particular world view that I have just criticized. The older term, which refers to sex differences and treats them as comprehensive in their importance and their influence, better captures the position that I wish to defend here. So I choose the term that is congruent with my position. Having broken from modern convention on a point of principle, I think it becomes important to explain why I believe that the effort to confine the influence of sex differences to narrow areas of human behavior is a mistake, and then to indicate how this mistake has led to unfortunate legal decisions about the relevance of sex differences in the legal system.

II. THE PERVERSIVE INFLUENCE OF SEX DIFFERENCES

A. No Separate Realms

The first observation that I want to make about the conventional distinction between gender and sex is that by implication it forces us into the simplest model of human behavior that it is possible to conceive. Everything that is observed turns out to be dichotomous. There are two separate domains of human experience, and each of these is animated by a single principle. Consequently, the effort to import the biological to explain, for example, the emotional or psychological operates as a transgression against the dominant categories of analysis. Yet there are surely other models that have far greater power. Thus, suppose we assume that the full constellation of individual behaviors, from mating to child rearing to eating to driving, is governed in some sense by the confluence of biological and social factors. At this point, if the task is to determine the relative influence of sex differences on individual behavior, it is necessary to attach different weights to each variable for each particular form of behavior in question.

Even this simple modification of the original model allows both variables to move between zero and one with respect to all aspects of human behavior, and then forces the analyst to confront two separate questions. First, where does one draw the line separating the
categories? Second, does all child-raising activity fall into one category, or do we distinguish (as in everyday life we surely do) between those activities that are supportive of children in their time of emotional distress and those activities that are designed to teach the children athletic, musical, or cognitive skills? It is possible that men and women may relate differently to children on these various measures, and that these differences may be substantial, systematic, and hold over different cultures over long periods of time. Choosing then the relevant categories and subcategories, noting the permissible range of environmental and biological influences, is a very complex undertaking, wholly beyond my capabilities to discharge. Nevertheless, the mere recognition that this sort of undertaking has to be made is a sufficient cautionary word against banishing biological influences over substantial areas of social and cultural behavior.

B. The Biological Differences

My second observation concerns the nature of the evidence itself and how it should be evaluated. If the task here were to prove that biological differences were all that counted in the organization of human behavior and social groups, then I think that we could clearly reject the hypothesis without any complication. The simple observation conclusive for this purpose is that biological changes operate at a glacial pace relative to changes in social organization and social role. The entire theory of natural selection, even when due allowance is made for the jolt that can be induced by a favorable mutation, is one of gradual shift under the selection pressures that individual organisms face in their environments. The vast changes in social roles for men and women in the past fifty years must be attributable to some force that is not in our genes. Hence, it follows that if one were trying to examine the vast shifts in the pattern of female participation in the labor force over the past fifty years, or female levels of education during that time, no one could point to a biological change between men and women that could account for the striking differences so well known to us all.

On this point, the obvious candidates for these changes would be the correct ones. The introduction of labor-saving devices in the home, the advances of medicine and technology, the change in legal rules on contractual capacity, and thousands of other features can

7. Compare Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upholding state prohibition on
provide clues as to the needed information. Even if the natural endowments of men and women have remained constant over time, the array of the choices open to them, the payoffs available from each choice, and the probabilities of success can explain much of the difference that has taken place.

But an analysis of this sort is utterly inconsistent with the program that seeks to make social influences dominant to the exclusion of biological ones. In order for that extreme argument to work, it is not sufficient to show that there are changes in social role that are driven by changes in social mores or technological advances. It is also necessary to show that once these social and technological changes are fully taken into account, male and female social roles will, or should be, indistinguishable from one another. Alternatively, at the very least, it is necessary to show that any want of convergence in social roles illustrates the lingering effects of prior social attitudes that have yet to be ferreted out. The other explanation, however, seems far more plausible: In addition to there being vast changes in the options and alternatives available in modern society, there are still some differences in initial endowments that explain why there are important differences between men and women as groups, differences that coexist with the differences among men or women as a group. Biology, therefore, can remain powerful in a world of rapid social changes, even if those changes are driven by the social sources that have just been identified or by a thousand others.

What then are these differences? At this point, I think that it is important to point out some of them briefly, although I obviously do so only as a reporter of data gathered by other individuals. In this regard, it is important not to ignore the obvious differences in strength and attitudes that on any account must have some obvious biological foundation. Just because they are obvious does not mean that they are not important. Nonetheless, I will not dwell upon them here, for there are many other differences, including some that have come to light only recently and that may have important significance.8 One set of differences clearly has to do with the structure

---

8. See Daniel Goleman, Subtle but Intriguing Differences Found in the Brain Anatomy of Men and Women, N.Y. Times, Apr. 11, 1989, at C1. Among the anatomical differences found in the
and function of the brain, where the evidence of sex differences in structure and function seems to multiply,\(^9\) notwithstanding the drumbeat that insists that all relevant sex differences are socially constructed.

Thus consider one summary of the relevant evidence:

[W]omen favor a "communicative mode" in gaining knowledge about the world and in dealing with others. For example, from birth, female infants are more sensitive to sounds, particularly the mother's voice. As babies, females orient more to tone than males and are more startled by loud noises. They maintain enhanced hearing throughout life.

In other sensory skills, girls have been shown to do better than boys: girls have increased skin sensitivity, they are more proficient in fine motor performance, and they do better at rapid sequential movements. Girls are also thought to be at an advantage in tasks that require organizing data in sequence. Boys are different in that different stimuli attract their attention; females are more attentive to social contexts such as faces, speech patterns, and tones of voice. Female infants can speak sooner, and throughout life, women do better on a number of measures of linguistic ability. [Boys], however, show an early superiority in visual acuity.\(^10\)

These differences in behavior are tied to differences in brain structure and organization. One key element in the overall picture seems to be that of lateralization:\(^11\) The division of functions across different parts of the brain are not the same for men and for women, which in part accounts for why men, for example, have superior skills in dealing with spatial relations, and women superior

brains of men and women, of particular interest is a recent study indicating that parts of the corpus collosum, the fibers that connect the right and left hemispheres of the brain, are larger in women than in men. Because the corpus collosum ties together so many parts of the brain, a disparity in its size indicates more widespread differences in the anatomical structure of men's and women's brains.


11. Lateralization simply refers to hemispheric localization of function or activity on one side of the brain in preference to the other. See ARCHER & LLOYD, supra note 9, at 234; see also Irving Kupfermann, Hemispheric Asymmetries and the Cortical Localization of Higher Cognitive and Affective Functions, in PRINCIPLES OF NEURAL SCIENCE, supra note 9, at 673, 681-85 (finding that the brain's two hemispheres are asymmetrical and differ in their capabilities and functions, although the scope of his report did not examine the extent of lateralization in males as compared to females).
language skills. Similarly, there are greater levels of specialization in men's brains than in women's, as evidenced in part by findings that right- and left-handedness are more pronounced traits in men than in women. These findings appear to be incontrovertible, although there is a constant reminder inside the profession of the dangers of overdichotomization (dichotomania, as it is sometimes called), and a reference to the point that these differences are often matters of degree and not of kind, and that variations within each sex have to be taken into account along with the variations between the sexes.

Both the initial findings of lateralization and the qualifications of its extent have to be taken into account. Most critically, the qualifications on extent do not negate the fact of some systematic difference, which then undercuts the broader claim by Professor Epstein and others that there are areas of behavior, whether of cognition or emotion, for which social explanations act to the exclusion of the biological ones. The biological differences exist, even though they are not quite as large as one might have thought them to be—itself a finding of no particular significance unless one knows the level of the initial bias and the accuracy of the correction. One can avoid the perils of dichotomania and still insist that biological differences must be taken into account in dealing with all forms of human behavior, however far removed they may appear to be from biological roots.

It is useful to illustrate the above point with a couple of examples. First, consider the question of differences in spatial perception. Here the traditional account of its origins is quite persuasive. So long as there is any division of labor between the two sexes, it must be decided who will stay with the newborn child and who will venture

12. See Kelly, supra note 9, at 782; Jerre Levy, Lateral Specialization of the Human Brain: Behavioral Manifestation and Possible Evolutionary Basis, in BIOLOGY OF BEHAVIOR 159 (John A. Kiger, Jr., ed., 1972); Notman & Nadelson, supra note 10, at 24-25. For criticism, see ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN 44-53 (1985), where the author downplays the extent of the differences but cannot deny them altogether.
14. Epstein, supra note 5, at 55.
15. Id.
16. Archer & Lloyd, supra note 9, at 234; see also Roger W. Sperry, Some Effects of Disconnecting the Cerebral Hemispheres, 217 SCIENCE 1223, 1225 (1982) ("The left-right dichotomy in cognitive mode is an idea with which it is very easy to run wild.").
17. See Epstein, supra note 5, at 99-135.
forth to explore, to fight, and to hunt. This is true because there are clear losses to the family unit if both parents have identical tasks. In economic terms, the potential gains from specialization and trade are too large to be ignored, especially under conditions of extreme scarcity. The mere fact that the mother carries with her a supply of milk makes it clear that she is the better candidate for staying with the child, consequently leaving the male of the species to engage in a broad class of explorative activities. The nurturing instincts usually attributable to women are a set of attitudinal adaptations that reduce the cost of doing activities that help promote the survival of both her and her offspring. Although modern women operate in settings far different from those of their ancient mothers, the initial tendency still remains: If nurturing brings greater pleasure or requires lower cost for women than for men, then we should expect to see women devote a greater percentage of their resources to it than men. This specialization will endure in the aggregate and should be accepted for what it is: a healthy adaptation that works for the benefit of all concerned, and not as a sign of inferiority or disrespect.

There are offsetting adjustments in the male, for the devotion of greater mental resources to spatial arrangements at the cost of other advantages carries with it a strong reproductive payoff. The ability to give this characteristic selectively to one sex to the exclusion of the other also carries with it a strong reproductive advantage in that it is possible to leave superior endowments in all offspring. The alternative strategy, which gives the same cognitive skills and basic attitudes to all offspring, will leave both males and females at a relative disadvantage for their biologically specialized tasks, especially since there is no gain from reversing the sex roles in parenting. The other gains from specialization are still too great to be overcome. This explanation involves the interaction of social function with biological fitness. Is there any purely social explanation that can account for these differences?

Once these differences become embedded in the brain, the glacial pace of evolutionary change means that they cannot be undone in an age when infant formula is a tolerable substitute for mother's milk. If, therefore, women now are free to engage in activities that were once a male preserve, then they arguably will operate at some relative disadvantage to men. In occupational categories that are heavily dependent on spatial differences, say, for example, architecture, we should expect to see men, on balance, do somewhat better than
women in a perfect market because their natural endowments now turn out to be more suitable for the task. But if there are other occupations, such as counselling and guidance, that demand more of the nurturing and intuitive skills associated with the female roles in child rearing, then women should be at a relative advantage to men in seeking these positions. Indeed, for these purposes a weaker statement can be made: It does not matter whether women are better at all tasks than men, or vice versa, so long as the principle of comparative advantage operates in the sexual selection of positions in the job market. We should expect to see individuals of both sexes gravitate to those areas in which they have the comparative advantage and then to divide the larger social output through voluntary trade. This division of labor should be welcomed for the overall improvement in social output that it promises. The radical changes in social organization may alter the positive and negative values of certain biological traits, thereby influencing who will succeed at what occupation and to what extent. But these social changes will not obliterate the importance of critical biological differences, even if these biological differences appeared for reasons that are no longer pertinent to the modern age.

There is a second component to the discussion of lateralization that also shows the pervasive influence of sex differences on human behavior. It has been noted in the medical and biological literature that male brains tend to be more specialized than female brains (that is, there is a greater division of function by hemisphere), so that the differences between right- and left-side functions are more pronounced in males than in females.\textsuperscript{18} One piece of evidence for this division arises from the consequences of brain damage, either by disease (for example, epilepsy) or by trauma (for example, a blow to the head). The medical evidence suggests that females generally are better able to make compensating adjustments in their behavior when subject to injury. They are, for example, better able to recoup their capacities of speech when these have been impaired, often by switching hemispheres.\textsuperscript{19}

\textsuperscript{18} See, e.g., Levy, supra note 12, at 174 (concluding that the spatial-perceptive deficit found in women “is a sex-linked, genetically determined incapacity which possibly results from hemispheres less well laterally specialized than those of males”).

\textsuperscript{19} See Kelly, supra note 9, at 782 (reporting that the idea of the female brain being functionally less asymmetrical than the male brain is supported by the observation that “[l]anguage functions appear to transfer more readily to the right hemisphere in females than males after damage to the left hemisphere in childhood”).
The key question that one has to ask is whether this is just an odd observation or whether it carries with it any clue on biological theory. I believe that it is the latter. The greater specialization of function by hemispheres in men is not a random occurrence. A sociobiologist should be stunned, for example, if the empirical data came out the other way and showed that specialization was greater in women than in men. The higher specialization in men has both an upside and a downside. Where there is some injury to the brain, the female has the greater probability of recovery and hence, a correspondingly greater probability of reproductive fitness. Why then should not the male brain be organized in the same way in order to take advantage of the same downside protection to the brain?

The answer (and here I make the argument on my own, although for all I know of the basic literature others may have made it before) is related to the different methods of reproductive success for males and females, which long antedate modern social conditions and, indeed, long antedate the emergence of human beings themselves. There are systematic reasons to believe in the biological basis for differences in the preferences for risk between males and females. The male strategy is dictated by the low investment in any individual sperm and the physical possibility of impregnating large numbers of females at the same time. This simple biology, therefore, makes it possible for a small number of males to supply all the genetic material in the next generation. With females, there is much less occasion for rivalrous behavior because each female can carry one, or at most a few, offspring to term. They are not in competition for males at the same level of intensity, although there is surely some degree of competition for needed resources, such as food and water, and, by the same token, gains from cooperation with other females as well. When all the possibilities are taken into account, the female possibilities for reproduction show a lower variation in output.

Let us now assume that members of each sex wish to maximize, in rigorous biological terms, their inclusive fitness. Here I shall confine my attention to mammals, where the female carries the off-

20. The views here are associated with Robert L. Trivers, Parental Investment and Sexual Selection, in Sexual Selection and the Descent of Man 136 (Bernard Campbell ed., 1972). For a more recent explication and criticism, see Archer & Lloyd, supra note 9, at 54-61.

spring in the womb until term. The optimal female strategy is to ensure a high probability of impregnation. There is less of a need to be first in the queue because some highly fit male will be available and no level of aggression can increase the number of offspring that she can carry to term. On the male side, competition is far keener, so that being highly fit carries with it enormous rewards, while fitting into the middle of the pack carries with it far smaller rewards—indeed, it could easily amount to a zero payoff. This difference in payoff structure, in my view, drives the different responses to the specialization in brain function. Thus, consider the effect a demotion in the queue from one to ten has on a male and a female. For the female, the cost is relatively small because she is still able to reproduce. The optimal strategy, therefore, is to spread out resources over both the healthy and the damaged state, and this entails having brain functions with a certain level of duplication in function. For the male the same reduction in rank order could be devastating. There will be no payoff in the lower state. If this is the case, then his strategy for reproductive fitness will be different from hers. He will try to maximize the probability of finishing first some small fraction of the time. Once the level of performance sinks below a certain point, then from a reproductive point of view few resources should be invested in that state of affairs.

In this setting, the more specialized brain functions in males is just another effort to concentrate all resources in the highest states of success. The greater recuperative power of females reflects the opposite strategy. However, given these differences in initial endowments, both strategies reflect the biological imperative to maximize outcomes. In a modern age, where reproduction counts for less in the personal utility function than it did earlier (the institutionalization of monogamy in this context can be regarded as a female triumph, or perhaps one of weaker males), it may well mean that the male biological endowments have depreciated relative to the female,

22. With birds, for example, where the young develop in eggs, both males and females have equal access to provide care, whether in the form of warmth before birth, food afterwards, or protection at any time. The stronger symmetry in roles suggests that sexual dimorphisms in some birds at least will be far less pronounced than they are in mammals, and that is indeed the case.

23. There are some instructive parallels in other settings. Janet Guthrie was perhaps the only woman who ventured into the competitive world of automobile racing. Of her it was said (I believe by Al Unser) that she drove to finish but never to win. Those who do win have to go to the edge, and if they miscalculate are likely not to finish. Guthrie's strategy (if Unser is correct) is the extension of biological strategies to other areas.
although it is hard to tell.

C. Biological Fixity and Social Malleability

The third difference that follows from the willingness to treat large portions of human behavior as though it falls within the social sphere is the relative amenability of that behavior to change, either through law or through social mores. The point here is relevant because any effort to revamp sex roles in any area of human endeavor must take into account both the benefits and the costs of inducing the shifts. If features of human behavior are regarded as biological, then the cost of change becomes higher, so that the quantity of change that should ideally be demanded through either the political or social process will be correspondingly reduced. If, however, these differences are socially constructed, then they could be socially re-constructed as well, at a lower cost. This lower cost is one that society itself can bear. But once the influences of biology and socialization criss-cross in ill-defined and ill-understood patterns, then the case for caution on matters of collective intervention becomes stronger. On the one side, it may well be that these arrangements respond to the deep-seated needs of all persons, so that they look less arbitrary than is sometimes understood. Hence, the benefits of the existing arrangements are larger than is normally supposed, and the gains from change somewhat less. Similarly, the costs of change increase on balance as well, if only because no one can be confident that the assigned targets of social intervention (even if they be classified as gains) can be achieved. On these matters at least, the recognition of complexity is humbling to any program of conscious social intervention or restructuring.

In making this argument about the level and degree of change, I do not wish to be understood as saying that whatever patterns of behavior that one finds in life should be regarded as immune from social criticism and reformation solely because they are at root “natural” or biological. All forms of aggression and cheating come quite naturally to many people who are actuated by narrow self-interest, but no one thinks, I trust, that the desire to perform certain acts (murder, rape, theft) is sufficient warrant for doing them. The judgment of whether certain acts are, or should be, allowable is in the end always social, no matter what one’s view of human nature. In the case of the use of force, the basic judgment is, at bottom, that the net social losses from the unbridled use of force far exceed the
total gains, and by an amount that justifies the expenditure of considerable resources to quell these forms of asocial conduct. Indeed, it is very clear that the prohibition against the use of force has, if anything, a disproportionate impact in favor of women relative to men, given their respective levels of overall strength. Yet, it does not seem wise to protest against the advance of civilization on the ground that it has a disparate impact on grounds of sex.

Other forms of sexual specialization, whether within the family or in the workplace, do not have the same untoward consequences and should not be greeted with the same suspicion by the legal system. Where differences in taste and temperaments lead to a specialization in family and workplace roles by sex, the gains from trade stand in sharp contrast to the losses attributable to the use of force. In these cases the response to natural difference produces social gains that will be lost if efforts are made to override the sorting that otherwise takes place on a voluntary basis. Biological tendencies, therefore, can justify patterns of voluntary sorting and of market behavior, even if they cannot justify the infliction of force on other persons.

III. IMPLICATIONS FOR EMPLOYMENT MARKETS

There are certain implications of this material for employment markets and, accordingly, for civil rights law. In this context there are two points that I would like to single out for special attention. The first of these points discusses the level of significance that should be attached to the differences in earnings and in employment patterns between men and women. The second point is more focused and discusses the question of “gender norming” in the State Department.

A. Wage Differentials

The biological theories of sex differences have clear implications for the question of salary differentials in employment markets. If one finds that males are organized to operate by high-risk/high-return strategies relative to females, then we should expect to see a greater dispersion in market outcomes for men than for women. And of course we do. The evidence here cannot, however, be gleaned

25. For a fuller discussion, see id. ch. 2.
solely by looking at the standard market differential wages between men and women, where female wages have hovered at about sixty-five percent of male wages. At the very least, this figure has to be corrected to take into account the higher imputed income of women resulting from the greater value of their services around the home.

For these purposes, however, a second correction must be made, one that addresses the risk/return question directly. Those numbers only take into account the earnings of persons who have made it into the employment market. Thus, the important question of who has negotiated successfully a prior round of major obstacles (avoiding injury and death, staying out of jail, and the like) to reach the job market in the first place is ignored. The appropriate measure of the relative success of men and women has to take into account the behavior of both cohorts from birth; some figure has to be assigned for the wages of persons who do not enter the labor market at all. This could be designated as the zero-wage outcome. It is not clear, moreover, that a zero wage is sufficient to capture the situation, since investments in human capital are not recovered when persons are unable to enter the labor market. But even if the zero-wage figure is adopted, then the patterns of earnings conform with the results predicted under the biological theories: There may well be similar median wages for men and for women, depending on weight attached to workers who do not enter the workforce, but the variance in outcomes for men will be greater than it is for women. This conclusion should hold regardless of the shifts in technology and demand.

B. Different Employment Patterns

The differential job patterns in labor markets also merit special attention. The evidence seems fairly clear even today that the difference in occupational choices between men and women is quite large, far larger than those associated with race. In most discussions to-


27. See Victor R. Fuchs, Women's Quest for Economic Equality 32-35 (1988). Fuchs' conclusion is based on the Duncan Index, which measures occupational segregation by adding the total differences between the percentage of all men and the percentage of all women (or any other two measurable groups) in different occupations and dividing by two. The index demonstrates what percentage of women (or men) would have to change occupations in order to eliminate sex differences in the distributions. Fuchs reports that based on comparisons in 1980 of year-round,
day, that difference in occupational choices, like the difference in wages, is sufficient to trigger condemnation of the operation of the system, and to call for still greater regulation of labor markets. The argument is simplicity itself: Illicit discrimination is the source of the difference in occupational patterns, for which there is no alternative explanation. The needed response, therefore, is strict and aggressive enforcement of Title VII in order to offset both the conscious and unconscious biases in the workplace. Sexism and sexist attitudes are the culprit.

Missing from this standard condemnation is an evaluation of the obvious response: If there are important differences in initial individual endowments, then these should express themselves in any well-ordered work force. If women are better at some tasks than men, and men better at some tasks than women, we should expect that the search for gains from trade will lead to specialized patterns of employment. Even if men and women fall into the same broad occupational categories—say lawyers and doctors—a closer look is likely to reveal major differences in the subspecialties that they pursue. Hence, there are more female pediatricians and more male neurosurgeons, more male contingent-fee lawyers and (relatively) more female pension lawyers.

The point here has been recognized in some of the cases, of which perhaps the most famous is the massive disparate impact test case that the Equal Employment Opportunity Commission ("EEOC") recently lost against Sears, Roebuck. The case involved charges, based on a disparate impact theory, that a relatively low number

full-time wage earners in 503 different occupations, the women/men index was 57%, while the white women/black women index was 28% and the white men/black men index was 33%. _Id._ at 33-34. This means that in order to eliminate sex segregation in the work force and achieve an equal sex distribution across occupations, 57% of all women (or men) workers would have to change occupations. This figure marks only a 5% decrease in occupational sex segregation from similar studies conducted in 1960. _Id._ at 34.

28. AMERICAN MEDICAL ASSOCIATION, PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE UNITED STATES 48-49 (1990). Of the 98,446 female physicians in 1990, 14,854 (15.8%) were pediatricians and 126 (0.1%) were neurosurgeons, while of the 502,343 male physicians in 1990, 24,603 (4.9%) were pediatricians and 7613 (1.5%) were neurosurgeons. _Id._

29. I offer these comparisons of lawyers without hard data.


31. In a disparate impact case, a plaintiff need not establish that an employer acted with discriminatory intent. Rather, it is sufficient for the plaintiff to establish a prima facie case by showing that the consequences of an employer's facially neutral selection criteria were to exclude those protected by Title VII at a disproportionate rate. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). As the _Griggs_ opinion stated, "[G]ood intent or absence of discriminatory intent
of women in commissioned sales positions was evidence of discrimination by the firm. Sears responded by claiming that the employees themselves were responsible for the selection bias, in part because women were more attracted to the noncommission jobs than men. The court agreed with Sears. In part there may have been some biological basis for the job separation, if the differential levels of risk aversion are driven by biology. And for these purposes, it makes no difference whether a combination of biological and social factors (for example, the desire to spend more time with family is probably a mixture of both) contributes to the patterns exhibited in the employment market.

Although the Sears decision has been vehemently attacked in the academic literature and has not been followed by all courts, it does represent an island of good sense in a sea of judicial adventurism. The disparate employment patterns so commonplace today are consistent with the proposition of the preferences of workers. They offer no evidence of discrimination, much less invidious discrimination. Quite the opposite, if there is a rigid equality of men and women in certain occupational categories, then we should draw, if anything, the inference that the powerful hand of the state is responsible for maintaining the rigid system of proportionality. Treating unlike cases alike is not consistent with any social norm of equality. There is, however, usually little need to draw inferences of discrimination from any lockstep employment pattern. The explicit evidence of the discrimination is easily available to anyone who scratches the surface of labor markets. It is only, therefore, in the sense that women are a "protected" class that the modern setting is said to justify the discrimination that is so easy to detect.

does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capacity." Id. The defendant employer then has the burden of showing that the selection criterion is a business necessity, thereby justifying its use. Id.

34. See EEOC v. General Tel. Co. of Northwest, Inc., 885 F.2d 575, 581 (9th Cir. 1989) ("We reject the approach taken by the Sears majority which places a very heavy—and possibly insurmountable—burden on the plaintiff with respect to establishing the probativeness of proffered statistical data."), cert. denied, 111 S. Ct. 370 (1990).
The question is whether the state should seek to interfere with the pattern of job sorting by sex that is likely to take place in employment markets. In this regard, it is sometimes said that the protection is strictly necessary to avoid the sense of "caste" that is created by the differences in occupational patterns. But caste itself is a system of formal classification that creates legal barriers to entry for certain classes of people. Whatever the problems in job markets today, formal limitations on contractual capacity of the sort that were common in the nineteenth century are no part of the problem. The issue is not whether women have full contractual capacity, but the way in which they choose to turn that capacity to their own self-advantage. If anything, the insistence that women are a protected class under the statute introduces the same kinds of formal caste distinctions that the supporters of the employment discrimination laws claim they seek to abolish.

This misguided exercise in social engineering, moreover, comes only at some positive cost to the efficiency of the system as a whole. It is not the case, as some supposed at the passage of the Civil Rights Act of 1964, that we can eat our cake and have it too. The hard question that one has to face is what is the economic price that must be paid to achieve the extensive structural changes that are so often proposed. On this matter there is the usual empirical difference between those who believe in programs of redistribution along any lines and those who do not. The latter think that the efficiency losses to those programs—whether in civil rights, foreign competition, farming, or anything else—are very high and swamp any os-

35. See David A. Strauss, Biology, Difference, and Gender Discrimination, 41 DePaul L. Rev. 1007, 1017 (1992); see also Kathleen Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1497-99 (1989) (discussing how some Supreme Court decisions regarding constitutional rights tend to create, and ultimately maintain, a "caste" system). Sullivan concludes, in reviewing Harris v. McRae, 448 U.S. 297 (1980), that allowing subsidization of medical expenses incurred during childbirth but not abortions has created a "caste" system between those dependent on the government for aid and those who are not.

36. For discussion, see Richard A. Epstein, Two Conceptions of Civil Rights, 8 Soc. Phil. & Pol'y Rev. 37 (1990).

37. Many supporters of the 1964 Act believed that the regulatory impact of Title VII on employment markets would not be burdensome but, instead, beneficial. Because the Act prohibited invidious discrimination in employment decisions, its proponents believed that employers would turn naturally to merit in making decisions. Senator Humphrey represented this point of view: "In Title VII we seek to prevent discriminatory hiring practices. We seek to give people an opportunity to be heard on the basis of merit, and to release the tremendous talents of the American people, rather than to keep their talents buried under prejudice or discrimination." 110 Cong. Rec. 6549 (1964) (statement of Sen. Humphrey).
tensible gains, 38 while the former think that the adverse impact of redistribution on production is low, in large measure because systems of market allocations are regarded with suspicion wholly apart from any question of sex discrimination. 39

In my view, given what we know about the biological differences between men and women, there is ample reason to believe that the reductions in output from any preconceived norm of equality will be very substantial, and these costs will be borne by men and women alike. In many cases, the productivity losses may be sufficiently hidden and indirect, so that they will be apparent only to employers and coworkers, but not amenable to the usual kind of statistical evidence that is required to satisfy the national planners at the EEOC. In addition to the matter of job sorting by preferences and inclination, two other issues—differential costs and sex norming—are worth some brief discussion.

1. The Problem of Differential Costs

The initial discussions over the reach of Title VII were seriously incomplete in their analysis of the potential application of the statute. To be sure, the statute forbade any explicit form of discrimination between the sexes, subject only to the exception for bona fide employment qualifications. 40 The drafters of the Civil Rights Act of 1964 were also aware that disparate treatment cases were caught by the Act, and were (although events proved them bad prophets) generally of the view that differences in wages or occupational patterns, without more, did not establish a statutory violation. 41 This tripar-

---


40. A bona fide occupational qualification ("BFOQ") is a complete defense to a Title VII discrimination claim. Section 703(e)(1) sets forth this affirmative defense:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify or refer for employment any individual, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.


41. See, for example, the comments of Senators Clark and Case:

There is no requirement in Title VII that employers abandon bona fide occupational qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of
tite distinction into formal discrimination, disparate treatment, and disparate impact cases leaves unaccounted one important class of cases: those in which the discrimination in question could be justified by a difference in the cost of hiring men and women, if such justification were allowed.

Thus, suppose that there is a given job that women can perform as well as men, save for only one difference. Their rate of injury on the job is higher than that of men, which in turn increases the premiums that must be paid to cover their workers’ compensation. For the sake of illustration, assume that the monthly wage for both men and women is $1000, but the difference in workers’ compensation premiums is $150. At this point the question is whether that difference in associated cost can be taken into account by the employer. If the matter were simply one of economic discrimination, then the answer to the question is easy. Some adjustment should be made to account for the differential costs. If the only difference between men and women was the $150 premium, then the equilibrium wage for women should be $850, such that the total bill for hiring men and women is $1000. If this is the case, then an employer is indifferent between the two sources of labor. But the explicit accounting of the insurance premium will reduce the number of women who will apply for the job, which in turn is a good thing under the traditional analysis, given their higher rate of injury. In effect, the employer and the employee take into account the differential injury rates by making suitable wage adjustments. The differential injury rate leads to a sorting equilibrium and to the asymmetrical patterns of employment so commonly observed.

The actual situation is likely, however, to prove more complicated than this. Any differential accident rate between male and female workers is not likely to be captured in full by a $150 compensation adjustment. Rather, these insurance costs are likely to represent a lower bound for the difference. The employer also has to bear other costs: Some time must be taken from the job in order to move an injured worker into a place of safety; emergency crews may have to

other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance. 110 CONG. REC. 7213 (1964).

42. This example presupposes that the differences in accident rates could be reflected in the insurance rates charged by the worker compensation carrier, who for these purposes I will assume is not covered by Title VII.
be brought onto the site; additional workers will have to be held in reserve; and the time for the completion of projects will be lengthened. It is, therefore, no simple matter for a firm to quantify the dislocations brought about by differences in this one variable. In an unregulated market, the employer may well decide that it is just too costly to hire women for these positions at all. The downward wage adjustments would have to be so great that no women would be willing to take the job at all.

This employer response does not count as a form of unwelcome employment discrimination in any economic sense. The difference in the costs of carrying male and female workers justifies the response. The critical role of these cost differentials inside the market, however, places the employment discrimination laws on the horns of a dilemma. On the one hand, the legal system could allow parties to use cost differences to justify differential treatment. At this point, every employer could offer a thousand cost differences to blunt the force of the antidiscrimination principle, thereby causing it to become a dead letter—which is just as it ought to be. Nonetheless, given the objectives of the statute, the courts have been steadfast in their adherence to the opposite position: cost differences are ignored, period. 43 The price of preserving the statute against a death of a thousand cuts is to build into labor markets a permanent set of allocative errors. By forcing employers to ignore costs, the law systematically forces them to adopt inefficient solutions whose costs show up on the social ledger. The antidiscrimination law is a disguised in-kind subsidy that like all subsides distorts employment decisions. Let there be no mistake about it: The misallocation of resources does not disappear by diverting the discussion to fine-spun issues of caste or similar issues.

2. The "Gender Norming" of Tests

The mischief that is wrought by the employment discrimination laws is not confined to situations of unacknowledged differences in work preferences or collateral costs. It also infects other areas as well. The problem of test "norming" has been the subject of exten-
sive controversy and has received some attention under the Civil Rights Act of 1991, largely in connection with race, though it has generated some concerns in sex discrimination cases as well. The episode on gender norming at the State Department illustrates some of the difficulties encountered in this area. The traditional State Department examinations were a battery of tests in four areas thought to be related to careers in the foreign service: English, general background, functional field test, and foreign language. The overall results on these tests exhibited a persistent male bias, in the sense that a larger percentage of the candidates at the high end of the distribution were men, not women (a phenomenon that could result even where the medians are the same for the two sexes if the variances are greater for males than for females). Because high scores on these tests functioned as cutoffs for entrance into the Foreign Service, they were attacked under a disparate impact formula. Before the matter reached its final judicial resolution, a secret consent decree containing two separate features was entered. First, the questions on which women did better relative to men were retained for future examinations, whereas those in which the converse was true were jettisoned. Second, the entry qualification was made to turn on the one test (English) in which the women applicants did better than the men.

Since the entire issue was resolved by a consent decree, it became a matter of public knowledge only when it was revealed in *The New Republic*.

The question is, What does one think about the results? First, it is clearly wrong with respect to the means that are chosen. Selecting questions for the way in which they impact on the strength of sex is unsound (one does not know how to control for random variation), so it is improbable that the strategy will succeed. But if it does work the outcome is indefensible as a matter of social policy. Neutrality done with a peek to the outcome is precisely the same kind of phenomenon that the 1964 Act was designed to catch when it spoke of

---

46. The descriptions in this account are based on James Workman, *Gender Norming: Quotas in the State Department*, NEW REPUBLIC, July 1, 1991, at 16.
47. Id. at 17.
48. Id.
49. Id.
the prohibition against professionally developed tests "used" in order to advance some discriminatory goal. With the government this obligation of fair treatment for all comers is persistent even if private employers, who have no fiduciary obligations, should be free to choose as they see fit.

But there are worse results as well. The shift in the emphasis of the test means that we do more than shift the ratio of men to women who pass. It also means that we make important shifts in the identity of the persons in each class who do pass the test. Thus, there will be fewer women and men applicants from the natural and physical sciences, from the political science area, and more from English, art history, and literature. Even if one favors affirmative action for the usual reasons, the twisted course of litigation has led to inferior results. If one presumes that the State Department knew what it was doing the first time, then it had to sacrifice its operational goals the second time around. The better course of action is to be explicit about the level of affirmative action that is desired, and then to continue with the same battery of tests and have differential pass scores for men and women to reach any desired quota. It is possible, therefore, to implement intelligent and foolish forms of affirmative action, and while I might not recommend either, I will nonetheless condemn one form more severely than the other. The secretive and opportunistic pattern of policy making—litigation followed by settlement—meant that several key tests were knocked out before the decision was made to incorporate explicit sex-based preferences. But there is no reason to do norming off the wrong test base. We will have a better Foreign Service, norming or no norming, by examining for a more comprehensive set of skills than just English and grammar.

50. 42 U.S.C. § 2000e-2(h) (1988) ("[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of . . . sex . . . .""); see also Epstein, supra note 3, at 286-92.

51. Of course this approach is forbidden by the 1991 Act. Section 106 provides:

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin. Civil Rights Act of 1991, Pub. L. No. 102-166, § 106, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(l) (1988 & Supp. III 1991)).
IV. Conclusion

In conclusion, there is a certain irony about ending an article whose theme is "Gender Is for Nouns" with a discussion of the role of grammar tests in the selection of positions for the Foreign Service. But there is a moral to be drawn from this extended journey from high theory to operational detail. In their inception, the civil rights laws were billed as a mild and moderate interference with the operation of the market, laws whose net effect was to eliminate prejudice and ill-will from the operation of the economic system. Yet their expansionist mode in operation has insinuated them into every corner of labor markets, where their influence has been far more harmful than beneficial. Today, the civil rights laws feed the forms of arbitrary discrimination and inflated rhetoric that we as a nation can well do without. The time has come for a fundamental reexamination of the foundations of our civil rights laws. Indeed, the time has come for their speedy and total repeal.