Sharon Bottoms lost custody of her two-year-old son, Tyler, in part because she had taught him to call her female partner "dada." Michael Hardwick was arrested for having oral sex with a man rather than a woman. Jane Doe, who was born anatomically male, was fired from Boeing for wearing "excessively feminine attire"—a pearl necklace. In each case, these actions were unsuccessfully challenged in court. The law coerces lesbians, gay men, bisexuals, transsexuals, transvestites, and other gender hybrids to stay within the narrow gender roles assigned to their anatomical sex. The price for their hybrid status can be loss of custody, discharge from employment, and even imprisonment. Nonetheless, gender hybrids persist in challenging the relationship between genes and gender.

I. The Gender Hybrid Categories

The categorization system of homosexual, transsexual, and transvestite is as important to the affected class (as a means of self-identity) as to the society at large (as a means of oppression). But, as the following story illuminates, categorization can be elusive. Marty Phillip, an inmate who was a pre-operative
transsexual, was denied estrogen and other treatment by prison authorities.\textsuperscript{4} She unsuccessfully challenged her lack of medical treatment while in prison. Before incarceration, she had adopted a female name (despite retaining male genitalia) and was in a relationship with a man which she characterized as heterosexual. Because she was not receiving estrogen therapy, many of the female characteristics previously attained through treatment had been reversed.\textsuperscript{5} She considered herself to be a heterosexual, pre-operative transsexual—not a homosexual, not a male, and not a transvestite. One could, however, have described her as a homosexual, male transvestite who was also a pre-operative male-to-female transsexual.

Transsexuals usually do not want to be considered to be homosexuals; transvestites frequently do not want to be considered to be transsexuals; and homosexuals often do not want to be considered transsexuals or transvestites.\textsuperscript{6} Many male-to-female cross-dressers (be they transsexuals or transvestites) are sexually attracted to men. If the individual is a transvestite, then he is usually classified as a homosexual (or more commonly a "drag queen"). By contrast, if the individual is a pre-operative transsexual then the individual may identify as a heterosexual who is attracted to men but is trapped in a man’s body.

Commentators typically try to distinguish neatly between transvestites and transsexuals by saying that both individuals may “cross-dress” but that the transvestite does not desire to become anatomically the opposite sex.\textsuperscript{7} In fact, the distinction between the transvestite and the transsexual is not clear. After a period of cross-dressing, a transvestite may decide that he or she is actually a transsexual and seek surgery. But then, the question arises whether the individual who identified as a transvestite was really a transsexual all along.\textsuperscript{8} Annie Woodhouse defines the distinction between the transvestite and the transsex-
ual as follows (using the male-to-female cross-dresser as her example):

Perhaps a more easily recognizable point of departure would be to consider the transvestite as a person who identifies himself as a man-who-dresses-as-a-woman. In contrast, the transsexual will identify himself as a woman who has the misfortune of a male body; the solution being, in his terms, hormone therapy and sex reassignment surgery. In referring to the importance of changing genital sex, April Ashley, a post-operative transsexual, comments that as a biological male, “my genitals were quite alien to me.” Typically, the transvestite will display the opposite attitude, enjoying the best of both worlds.9

Another way that transvestites and transsexuals are often distinguished is that a transvestite usually cross-dresses occasionally whereas a transsexual is a full-time cross-dresser. But this distinction becomes blurred in the case of the full-time cross-dresser who has not undergone sex reassignment surgery (and might not desire such surgery).10 Woodhouse explains the distinction, in such cases, as follows: “In many respects the differences between the transvestite and the so-called transsexual lie with their own perceptions and definitions of self: whether they consider themselves ‘real women’ or whether they see cross-dressing as an end in itself which allows partial entry into the world of femininity.” 11

The classification system becomes even more complicated when we include hermaphrodites. By operating at birth on the hermaphrodite, we assign that person to one pole of the bipolar spectrum rather than allowing the person to live as a transgendered person. Instead of allowing a third, fourth, and even fifth sex to develop (given the three types of hermaphrodites),12 we engage in surgery before the age of consent to eliminate each of these alternative genders to fix an individual purely in the male or female category. Thus, hermaphrodites become an invisible
aspect of the male and female poles. Some civil rights activists are worried about a similar kind of erasure of identity through the adoption of biracial children (e.g., children born to a white mother and black father) by white parents. They worry that these children will be transformed into purely “white” children by the erasure of their black heritage. The erasure of bi-categories and identities can therefore happen through biology (i.e., surgery for hermaphrodites) or culture (i.e., adoption and child-rearing patterns).

Post-operative transsexuals also have an awkward place on the gender spectrum. Whether they fit on a pole depends on whether they “pass.” The post-operative transsexual who does not pass is left in the indeterminate middle category (for example, with respect to sex-segregated bathrooms) with neither men nor women wanting to claim him or her as their own.

The term “androgyne” does not inherently present a new category but, instead, a less negative way to describe some of the other categories. The word androgyne derives from the Greek andro, “male,” and gyne, “female.” It historically described individuals who were in possession of both sets of sexual organs—a hermaphrodite. Today, however, androgyne is usually understood to be a cultural blending of gender, not a physical combination of sexual organs, and is even considered to be “chic.” Thus, we simultaneously use words with negative connotations—transsexual, transvestite, and hermaphrodite—to describe individuals who cross gender lines, while we also recognize (at least in some quarters) a new gender ideal in appearance, androgyne, for popular musicians such as Michael Jackson. (Although feminists who challenge gender roles are often maligned as “male hating dykes,” suggesting that our tolerance for gender-crossing may extend to fashion but not politics.) The existence of the “androgyne” category reflects a
modest attempt to move beyond sharp gendered divisions in appearance (at least where biological modifications have not occurred) while we also retain punitive treatment for the other transgendered categories.

Finally, the “bisexual transsexual” reveals the bipolar assumptions underlying many of these categories. A person who is born anatomically male can support his request for a sex change operation by stating that he has an exclusive interest in men as sexual partners. “This interest in the ‘correct sex’ is what the medical profession has usually required (among other things) as proof of transsexual status and a prerequisite for genital surgery.”¹⁷ The “true” transsexual moves to exclusive heterosexuality as a sexual orientation. The transsexual bisexual, however, shows the false assumptions underlying this framework. Gender and sexual orientation have no inherent interconnection.¹⁸

Exploring the “bi” within gender therefore shows an enormous range of hybrid categories which are virtually impossible to define but which are usually rejected and scorned by society. Because we believe that biology is destiny, we are shocked and dismayed at attempts to play with “mother nature” or, more modestly, to question the gender roles assigned to each biological sex. Society does its best to repress the proliferation of these hybrids. They abound nonetheless.

II. Gay Men, Lesbians, and Bisexuals

A. Family Law

In the last chapter, we saw that gay men, lesbians, and bisexuals are often denied custody of children because of their attraction to people of the same sex. They also are denied custody when they challenge the gender roles assigned to their biological sex.
Inappropriate Role Models: Who's the Mommy and Who's the Daddy?

In the early 1990s, I appeared on a TV show to discuss gay and lesbian issues with a conservative, fundamentalist minister. Our discussion soon turned to whether a lesbian should be able to adopt the biological child of her partner, so that the child would have two legally recognized parents of the same biological sex. I made what I thought was the rather obvious observation that it was better for a child to have two loving parents of the same sex than only one parent. Nonetheless, the minister disagreed with me, saying the child would be harmed in that situation because there would not be a proper male and female role model for the child. His statement was the clearest expression of the relationship between homophobia and heterosexism that I have heard. His belief that gender roles should flow directly from biological sex shaped his belief system about homosexuals.

Courts have, unfortunately, also adopted his reasoning. In 1995, the Virginia Supreme Court ruled that Sharon Bottoms was not a fit mother for her two-year-old son Tyler because of her “active lesbianism.” The state Supreme Court affirmed the trial court decision and overturned the opinion of the court of appeals. Custody of Tyler was transferred to Sharon’s mother. The Virginia Supreme Court’s opinion reflected “gender policing.” Sharon Bottoms was not a fit mother, in part, because she had the poor taste to teach her son to call her female partner, April Wade, “da-da.” This name purportedly confused him about the difference between women and men.

If April were “Adam,” April would most likely have been a positive factor in Sharon’s custody battle. For example, in Ferris
v. Underwood, a Virginia Court of Appeals found that a positive factor in favor of a biological mother who sought custody in a battle with the child’s grandmother was that the mother had remarried a man who “was willing to provide financial and physical support within his limitations.” His “limitations” were that he was blind and earned a modest income. Sharon and April were not legally married but only because marriage between same-sex couples is not possible in the state of Virginia. They had gotten matching tattoos with three sets of initials intertwined: Sharon, April, and Tyler, before the child custody dispute began. In the Ferris case, the mother was allowed to regain custody of her child, partly on the basis of her marriage to a man, despite the fact that the grandmother had had primary custody of the child for a lengthy time period and a sister who was a prostitute frequently visited the mother’s home. The court of appeals affirmed the trial court decision to re-establish custody with the biological mother noting that this result has the “effect of re-establishing for [the child] the proper roles of her mother and her grandmother.” Sharon could not fit the proper role of mother because she lived with a woman rather than a man.

Another reason that Sharon lost her case was that she was too assertive, thereby not conforming to appropriate gender stereotypes for women. As we will see in the military cases, the label “lesbian” is often attached to independent and assertive women. Sharon’s mother only contested custody when Sharon decided to rely less on her mother for child care. Sharon had gone into therapy about the child abuse that she had suffered from her mother’s long-term boyfriend and had finally developed the strength to begin to turn away from her mother. In response to Sharon’s new assertiveness, the mother sued for
custody. The lesbian label became the means through which the mother could retaliate against Sharon's increasing self-esteem and assertiveness.

Role model discussions often come to the forefront in cases involving gender hybrids. In a 1992 New York decision, the state court ruled that a father was not entitled to overnight visitation with his biological child because of the father's history of "cross-dressing." The father's cross-dressing precluded him from being an appropriate "role model" for an "impressionable" five-year-old son. Cross-dressing, of course, is not illegal and causes no harm to others. Yet, it was a sufficiently dramatic deviation from expected gender norms to preclude significant visitation with a child. Usually, men who seek custody of male children are given a presumption of fitness because they are thought to be especially good role models for a male child. Men who cross-dress do not get to take advantage of that presumption when seeking custody or visitation of their male children because of the stereotype that they are perverted pedophiles. No father is better than a father who wears dresses or necklaces.

Presumption of Bad Mothering

Another gender theme that emerges from the cases involving lesbians and child custody is that lesbians, in contrast to heterosexual women, are not considered to be presumptively good mothers. Heterosexual women historically have been granted the benefit of custody in cases involving young children under the "tender years" presumption; lesbians, by contrast, have sometimes had a reverse tender years presumption applied to them. A Pennsylvania case explicitly states the rule that many courts implicitly follow: "We submit the law is and should be that, where there is a custody dispute between members of a
traditional family environment and one of homosexual composition, the presumption of regularity applies to the traditional relationship and the burden of proving no adverse effect of the homosexual relationship falls on the person advocating it." \textsuperscript{31} 
In other words, lesbians and gay men who are biological parents do not get the presumption of fitness that is accorded to heterosexuals who are biological parents.

The \textit{Bottoms v. Bottoms} case reflects this problem. \textsuperscript{32} In a case such as \textit{Bottoms}, involving a custody dispute between a parent and a nonparent, the law presumes that the child’s best interests would be served when in the custody of the biological parent. (The father had voluntarily relinquished custody to the mother. A grandmother who seeks custody of a grandchild has the same status as any other nonparent under Virginia law.) Thus, in order for the court to award custody to the grandmother, it had to conclude that Sharon Bottoms was unfit.

Sharon Bottoms, however, was never granted the standard presumption of fitness. Under Virginia law, to rebut the parental presumption of fitness, a third party must prove by \textit{clear and convincing evidence} that the child will be \textit{seriously harmed} if he or she remains in the parent’s custody. (It is not enough for the evidence to demonstrate that the “best interests” of the child would be served by living with the grandmother.) Such evidence may not be merely “surmise and conjecture.” \textsuperscript{33} Moreover, as recently as 1982, Virginia law had expressed a preference for custody being given to the mother when the child was of “tender years.” \textsuperscript{34} (Tyler was two at the time this dispute erupted.)

The evidence of future harm in the \textit{Bottoms} case was based entirely on surmise and conjecture, and could hardly be described as serious. The \textit{Bottoms} case contained no evidence that could come close to meeting the high standards set by the
courts—there was no evidence of physical abuse or emotional abandonment which is the standard evidence considered in such circumstances. The only evidence about future harm emphasized by the trial court related to her “active lesbianism”:

We have previously said that living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the “social condemnation” attached to such an arrangement, which will inevitably afflict the child’s relationships with its “peers and with the community at large.”

That finding, however, was very speculative and did not relate to immediate future harm. There was no evidence of any harm having actually occurred to the child by his exposure to his mother’s “active lesbianism.” The lesbian co-partner, in fact, appears to have been a very positive household factor because she supported the family financially and helped raise the child. The only negative evidence against April was that she had slapped the boy once. (She also reportedly cried for an hour afterward and regretted the action.)

In cases involving heterosexuals, Virginia courts have granted custody to men despite evidence that they inflicted physical injury upon their spouse. For example, a Virginia court concluded that a child’s grandparents were not entitled to custody “merely” because the child’s stepfather, who resided with the child’s mother, had killed the child’s natural father. The court refused to presume that the child would be harmed by living with his father’s murderer.

In most disputes between grandmothers and mothers, the biological mother has voluntarily relinquished childrearing to the grandmother for a considerable length of time. After the mother rehabilitates herself, she seeks return of her child over the grandmother’s objections. In such cases, the mother typi-
cally prevails due to the strong presumption of maternal fitness despite the fact that the child’s primary relationship is with the grandmother.\textsuperscript{39} Although Kay Bottoms apparently did spend a lot of time with Tyler in his first two years, Sharon never relinquished childrearing to her mother. Heterosexual women who have engaged in inappropriate behavior toward their children are granted a presumption of fitness in the context of rehabilitation; Sharon had engaged in no inappropriate behavior, had no need to rehabilitate herself at all, yet could not obtain any presumption of fitness.

Even if the maternal presumption could be rebutted in the \textit{Bottoms} case, custody should not transfer automatically to the third party-grandmother. The court is supposed to make a further, separate determination as to whether the best interests of the child require a transfer of custody to the third party. No such finding occurred in this case. In fact, a strong case could be made against Kay Bottoms’s fitness as a parent if you accept the case against Sharon, herself. Kay, of course, raised Sharon. Moreover, Sharon testified that she had been the victim of child abuse at the hands of Kay’s long-term boyfriend. Kay had a record of raising one person who the court concluded was an unfit parent. Why should we believe that she would do a better job raising Sharon’s son? Sharon, on the other hand, had no childrearing record, except that of her son. If one were to judge either’s suitability as a parent, it would seem that there is more evidence of the grandmother’s unfitness than the mother’s.

Finally, one should realize that the \textit{Bottoms} case is not purely a “lesbian” custody case. Sharon’s sexual behavior better fit that of a bisexual than a lesbian. Sharon had been married to a man and reportedly had several boyfriends before meeting April. Her brother Kenneth criticized Sharon by saying, “She isn’t even a lesbian.”\textsuperscript{40} In Kenneth’s mind, one apparently is
not a “true lesbian” if one has recently been divorced and is raising a son. It is doubtful that Kenneth thought she was a “bisexual” so, presumably, he thought she was a heterosexual masquerading as a lesbian for publicity. Why, then, one must wonder, did he agree with his mother that Sharon was not fit to raise her son? Crossing bipolar categories seemed to bother Kenneth; the judges were too discrete to explain whether the boundary-crossing bothered them. Like the judges in family law cases involving bisexuals that we examined in the last chapter, they may be blaming Sharon for not “choosing” to express her heterosexual side.

In sum, the Bottoms case brings together many themes relating to bipolar injustice. Sharon was not considered to be a “real woman and mother” for the purposes of applying standard presumptions in favor of custody for biological mothers. Her “active lesbianism” took her outside the norm of womanhood. She was not considered to be sufficiently maternal because she attempted to challenge her own mother’s assertion of authority over her child. Finally, Sharon’s partner was not considered to be a positive factor like opposite-sex partners who provide financial and emotional support to a child. Instead, she was criticized for not providing the child with appropriate gender role models. Rules against “lesbianism” (applied against a woman whose experiences would seem to categorize her as a bisexual rather than as a lesbian) were used to help perpetuate gender norms. In the court’s view, it was better for the child to be raised by an unmarried grandmother than by a same-sex couple that could provide him with both a mother and a “da da.” “Da das” are only a positive factor when they are male. No father is better than a lesbian father.
B. The Military

After Mary Beth Harrison rebuffed a male crew member’s sexual advances, he publicly shouted profanities and accusations that she was a lesbian. When she filed a complaint against this harassment, she was discharged for being a lesbian although she maintained that she was not and had never engaged in lesbian activity. Rather than receive a fair hearing, she was tried and presumed guilty. Despite her record of outstanding job performance and the lack of evidence of lesbian sexual activity, she was discharged for being a lesbian. Other women have been discharged for the “crime” of putting their arm around the shoulders of a weeping female colleague.

Women are discharged from the military at a rate seven to ten times that of men for supposedly being a homosexual despite the fact that virtually no women are ever “caught” in the act. These lesbian purges reflect attempts to keep women in their proper gender role—out of the military. These purges also reflect lesbian baiting as a form of sexual harassment.

The 1980s were characterized by a wave of investigations of women in the military for alleged lesbianism. As the recession caused more men to enlist in the military, the military responded by placing a cap on the number of new female recruits and by seeking to discharge the women who had already enlisted. Some women in the military were threatened with jail sentences or the loss of custody of their children if they did not admit to being lesbian.

The ban on gays in the military did not require the military to have any evidence that an individual has engaged in same-sex sexual activity or even propositioned someone for such activity. All the military needed to show was that the individual
who was discharged under the regulation was believed to be a "homosexual." Reputation evidence was sufficient.

The ban on homosexuals in the military therefore serves the gendered purpose both of keeping women out of the military who engage in same-sex sexual activity and of barring those who refuse to acquiesce to men's sexual advances. These women are, in a gendered sense, not "proper women."

C. Sodomy Laws

Georgia's anti-sodomy law states: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." 44 This language does not refer to the sexual orientation or gender of the parties involved. Nonetheless, Georgia, like most states with such rules, uses this statute primarily to arrest men who are engaging in anal or oral sex with another man. 45 Michael Hardwick, for example, was arrested for having oral sex with another man in the privacy of his own bedroom. In Bowers v. Hardwick, 46 the Supreme Court upheld the application of Georgia's sodomy statute only to "homosexuals" despite the neutral language of the state statute. Had Michael Hardwick's partner been a woman, he could have been engaging in similar sexual activity but not been subject to prosecution.

The question that such cases raise is, why is the gender of one's sexual partner so important to society? Similarly, why do we define sexual orientation on the basis of the gender of one's partner? Why is gender-specific enforcement of sexual activity statutes permitted, and even encouraged, when we have constitutional rules against gender-based policy making? Kate
Gender

Bornstein provocatively engages these issues: "Sexual preference could be based on genital preference. . . . Preference could also be based on the kind of sex acts one prefers, and, in fact, elaborate systems exist to distinguish just that, and to announce it to the world at large."\footnote{47} In the \textit{Bowers} case, the state of Georgia did define illegal activity on the basis of sexual acts, not gender-specific genital preference, yet the prosecutors and courts interpreted the statute to be gender-specific. In other words, courts and society go out of their way to disapprove of homosexuality irrespective of what language has been codified by the legislature.

The courts have consistently refused to view sexual orientation-related discrimination as gender-based even when the answer to the hypothetical question: "Would a person of the opposite sex have been treated differently?" is clearly yes.\footnote{48} In fact, the state of Georgia's defense relied upon the fact that a person of the opposite sex would have been treated differently. Georgia understood that it could not constitutionally proscribe sodomy practiced by married heterosexuals in the privacy of their bedroom. Thus, they successfully had a heterosexual couple, the "Does," dismissed from the lawsuit by arguing that the Does, as a heterosexual married couple, had no cognizable fear of prosecution. The Does did not have "standing" to challenge the Georgia statute because, despite the statute's gender-neutral language, the state admitted that it only prosecuted people who were engaging in sexual activity with people of the same sex. Georgia managed to turn constitutional equality doctrine on its head by defending a statute by reading into it an implicit gender-based rule. They succeeded in this effort because the courts conveniently rule that discrimination is not sex-based when it relates to sexual-orientation. Although this rule is linguistically
incoherent, it is widely accepted. Sexual orientation cases such as Bowers therefore cleverly hide the gendered aspects of sexual orientation rules.

The Hawaii Supreme Court has understood the connection between rules challenged in such cases as Bowers and gender differentiation. In Baehr v. Lewin, the plaintiffs challenged the Hawaii Marriage Law which precluded people of the same sex from marrying. The state tried to defend the rule by arguing that it appropriately precluded homosexuals from being married. The Court, however, refused to accept this analysis of the statute's effect. Noting that opposite-sex individuals who seek to marry do not have to proclaim themselves as "heterosexual" in order to get a marriage license, the court also pointed out that same-sex individuals who seek to marry need not consider themselves to be "homosexual." When two people of the same sex seek to marry, we only know that they are of the same gender. We do not know their sexual orientation. In the Court's words: "'Homosexual' and 'same-sex' marriages are not synonymous; by the same token, a 'heterosexual' same-sex marriage is, in theory, not oxymoronic. A 'homosexual' person is defined as '[o]ne sexually attracted to another of the same sex. . . .' Parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals."

Because the plaintiffs, who wanted to marry someone of the same sex, did not allege their sexual orientation in the pleadings, the court found that it was the defendants, not the plaintiffs, who sought to place the question of homosexuality in issue. In other words, unlike the United States Supreme Court, the Hawaii Supreme Court understood that purported homosexual classifications are actually gender-based classifications, a powerful and unprecedented acknowledgment of how attempts
to constrain homosexuals are also attempts to restrict people based on gender. If Michael Hardwick were a woman, he would not have been subject to prosecution.

In sum, discrimination on the basis of sexual orientation reflects, in part, the desire of law and society to force all people to conform to appropriate gender norms. When gay men or lesbians seek to raise children, norms about gendered role models break down and rules about the need for “traditional families” are imposed. Military women are accused of being lesbians in order to exclude them from military life. And when two men or two women have oral sex, the activity becomes “unlawful sodomy” although people of the opposite sex routinely engage in such behavior. Activity becomes tainted when gender barriers are not respected.

The group that most starkly challenges gender barriers, however, are transsexuals. To them, society imposes some of its most strongly voiced hatred and mistreatment. Their story is next.

III. Transsexuals

Although transsexuals are often misunderstood as people who crave one gender category, and thereby mutilate their bodies to acquire it, many transsexuals, in fact, have a discomfort with all gender labels. Kate Bornstein, a “woman” who was born biologically male, recounts:

I’m supposed to be writing about how to be a girl. I don’t know how to be a girl. And I sure don’t know how to be a boy. And after thirty-seven years of trying to be male and over eight years of trying to be female, I’ve come to the conclusion that neither is really worth all the trouble. . . . I’m sitting here tapping this out on my computer, and I’m thinking about who might be reading this; and I know that some of
you really believe you are women. I want to get down on my knees in front of you, I want to get down on my knees, and I want to look up into your eyes and I want to say tell me! Tell me what it's like!  

Bornstein explains that: “It was the absence of a feeling, rather than its presence, that convinced me to change my gender.” Changing her gender required her to change much more than her physical attributes. She had to learn new rules of etiquette, change her first name, learn new styles of communication, and change her sexual orientation since changing her gender did not change whom she found attractive. For example, as part of learning to pass as a woman, she had to learn to avoid eye contact when talking down the street, because looking someone in the eye is a male cue. Because most of us have only lived our lives as one gender—male or female—we have not had to dissect all the ways we adapt our behavior to conform to our biological sex. The experiences of transsexuals can give us insight into the subtle aspects of our gender construction that we take for granted. Sandra Bem, for example, may attempt to structure her life without resort to gender but having lived her entire life labeled a “woman,” she has not had to consider in detail the ways in which gender has subtly constructed her existence. Transsexuals, who have inhabited both gender worlds, can provide us with that insight.

Society, however, does its best to make it difficult for transsexuals to offer us those lessons. As we saw in the previous discussion, a man who cross-dresses (but probably would not be considered a transsexual) is precluded from spending much time with his son for fear that he would be a bad “role model.” We hide “gender outlaws” for fear that they might influence others to question their socially constructed gender identity.
A. Employment

Jane Doe was discharged by the Boeing Company for wearing "excessively" feminine attire in violation of company directives—a strand of pink pearls. This attire was unacceptable because Doe was an anatomical male who was awaiting genital sex reassignment surgery. She had already begun hormone treatments and electrolysis treatments, and legally changed her name from a masculine to a feminine name. In order to qualify for sex reassignment surgery, her physician had informed her that she would have to live full time, for one year, in the social role of a female. That social role included female attire. Doe's employer had agreed to accommodate this requirement so long as she did not wear "obviously feminine clothing such as dresses, skirts, or frilly blouses" and did not use the women's restroom. The pants outfit that Doe wore on November 4, 1985, was deemed acceptable; similar attire the next day with the addition of a strand of pink pearls was not. Doe challenged her discharge under Washington state disability discrimination law, and lost. Even assuming her gender dysphoria (i.e., transsexualism) was a handicap, the court found that Boeing had no duty to reasonably accommodate her desire to dress more femininely. "Boeing has a legitimate business purpose in defining what is acceptable attire and in balancing the needs of its work force as a whole with those of Doe." Boeing could not and need not tolerate a person who was anatomically male wearing a strand of pearls while working as an engineer.

Similar cases have been brought under Title VII of the Civil Right Act of 1964 (which proscribes gender discrimination in employment) with the same results. Karen Frances Ulane was a licensed pilot for Eastern Airlines. Unlike Doe, Ulane took a
leave of absence while she underwent sex reassignment surgery. Eastern was not aware of her transsexuality, hormone treatments or psychiatric counseling until she attempted to return to work after her surgery. Ulane was not permitted to return to work, and was discharged. The trial court found in favor of Ulane but the Sixth Circuit Court of Appeals reversed, finding that Eastern discriminated against Ulane because she was a transsexual, not because she was a female.

Audra Sommers was dismissed from her job as a clerical worker for Budget Marketing, three days after being hired, because “she misrepresented herself as an anatomical female when she applied for the job.” After being told she could not use the restrooms, she was fired. She filed suit under Title VII in federal court and lost in both the trial court and Eighth Circuit. She also filed suit under state anti-discrimination law on the grounds of gender and disability discrimination. She lost on both grounds.

Reagan Kelly Kirkpatrick informed her supervisors at the beauty salon where she was employed that she was preparing to undergo a sex reassignment process from male to female. Like Doe, she needed to live as a social female before undergoing surgery. When she began to wear female attire to work, she was fired. Kirkpatrick alleged gender discrimination in federal court and lost in both the trial court and Fifth Circuit.

Ramona Holloway was Head Multilith Operator at Arthur Andersen. She informed her supervisor, at the time of her promotion, that she was undergoing treatment in preparation for sex reassignment surgery. She was terminated after a company official suggested she would be happier working at a new job where her transsexualism would be unknown. She brought suit under Title VII in federal court and lost in both the trial court and Ninth Circuit.
In each of these cases, the courts failed to take seriously the simple argument that the employer had imposed conditions on their employment because of their "sex" in violation of Title VII. (Title VII states "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . conditions . . . of employment, because of such individual's . . . sex.") Jane Doe, an anatomical male, was not allowed to wear pearls; women, of course, were allowed to wear pearls. In each of the other cases, the employer insisted that the individual maintain an outward appearance in conformance with the employer's perception of his or her sex. Because the employer perceived these employees to be male, they were to wear male and not female clothing. By recasting the act of discrimination as "transsexual discrimination" rather than "sex discrimination," the courts created a circular argument. Under the courts' logic, plaintiffs were not discriminated against because of animus toward their biological sex but only because the employer did not want them to change their biological sex. Neither men nor women would have been allowed to change their biological sex, therefore the employer was even-handed in its practices.

But, as we will see in chapter 7, Title VII does not require an employer to discriminate against every woman in order for the woman targeted by sex discrimination to have a cause of action. Title VII also contains no requirement that an individual be discriminated against solely because of sex. Sex need only be a motivating factor for the challenged action. In the cases involving transsexuals, the employer targeted the employee for discharge because the employee, at the time of discharge, considered herself to be a woman. The employer did not have animus generally against women, but did have animus against women who were born as anatomical males. Although the employer's
animus against this group of women can also be described as animus against transsexuals, the two categories are not separable. The word, transsexual, itself refers to one's sex. To say that one is discriminated against on the basis of transsexuality is therefore to admit that one has been discriminated against on the basis of sex. They are interrelated concepts.

Comparison with other kinds of cases can make the illogic of these courts' reasoning apparent. Some employers have, for example, discriminated against women who had young children. They defended their actions by saying that they did not have animus against women generally; they simply did not want to hire women who had young children and therefore might be absent from work. The Supreme Court has characterized these as "sex plus" cases—the employer used sex as a criterion along with another criterion. Emphasizing that Title VII does not have a requirement that the discrimination be "solely on the basis of" an illegal criterion, the Court found for the female plaintiffs. Similarly, in sexual harassment cases, employers rarely target every woman for sexual advances or derogatory comments. It is no defense for an employer to say that it only targeted women that it found attractive or unattractive. Yet that is exactly what is happening in the transsexual cases. The employer is only targeting women or men who, for sex-based reasons, it finds unattractive. That is sex discrimination plain and simple. The courts have to manipulate the language of Title VII to avoid reaching this category of hybrids.

Most significantly, the U.S. Supreme Court has rejected that illogic in the race context. In Loving v. Virginia, it rejected Virginia's argument that an anti-miscegenation statute did not constitute race discrimination because it equally applied to whites and blacks. Noting that the purpose of the statute was to promote white supremacy, the Court found for the petitioner. A
broad examination of rules against cross-dressing demonstrates that they help maintain male supremacy.

The dress code cases do not involve only transsexuals. They also involve men and women who do not wish to dress in conformance with social expectations for their sex but have no interest in changing their biological sex. Courts have steadfastly refused to permit Title VII to protect individuals who face discrimination for failing to dress in accordance with gender norms. Often, the courts characterize this issue as too trivial for statutory protection. Sandra Bem's story about her "cross-dressing" son, however, reveals the pervasive and pernicious nature of our appearance rules for gender policing:

[My son, Jeremy,] naively decided to wear barrettes to nursery school. Several times that day, another little boy insisted that Jeremy must be a girl because "only girls wear barrettes." After repeatedly insisting that "wearing barrettes doesn't matter; being a boy means having a penis and testicles," Jeremy finally pulled down his pants to make his point more convincingly. The other boy was not impressed. He simply said, "Everybody has a penis; only girls wear barrettes." The story may be "cute" when recounted in a day-care center but could have profound implications when replicated at the workplace if, say, a manager fired a "male" worker for wearing pearls at the workplace. As Katharine Bartlett has argued, "Prejudgments about what is trivial and what is important without regard to the specific relationship between a rule and its cultural context take for granted the very habits Title VII should be used to scrutinize, and thereby undermine the Act." Title VII should recognize discrimination on the basis of appearance and clothing as covered by the statute. A rule that requires women to wear skirts and men to wear pants forces individuals to conform to rigid gendered standards. As uncomfortable as we may be with "cross-dressing," we need to recog-
nize that rules against cross-dressing are basic to gender policing. Our discomfort reflects the need for legal protection.

Appearance rules reinforce gender norms in at least two ways. First, they promote bipolar understandings of appropriate attire for men and women. Men must wear a suit with pants and a tie. Women must wear a suit with a skirt and pantyhose. Men must not wear makeup, should shave their face but not their legs; women must wear makeup and shave their legs. These bipolar styles of dressing exaggerate the natural sex differences between men and women. Men’s and women’s legs, for example, are physically quite similar yet pantyhose and shaving rules construct them to look artificially different. The importance of reinforcing gender norms is profound in our society yet rarely receives legal protection. For example, New York City rules used to preclude a man and a woman from getting married unless the woman wore a skirt or dress, and the man wore a jacket and tie or turtleneck. A court refused to enjoin the rule concluding that it was not of sufficient importance for federal intervention. “The symbolism of abandoning the traditional skirt or dress at one’s wedding ceremony was deemed trivial by the court.” In this context, gender rules help construct the institution of heterosexual marriage, reflecting the interrelation between gender and sexual orientation.

Second, appearance rules help perpetuate the objectification and sexual harassment of women at the workplace. In many cases involving appearance regulations, the rules do far more than exaggerate gender difference. They also require women to display themselves in ways that men might find sexually objectifying. The best example of that phenomenon is the case, EEOC v. Sage Realty Co. Plaintiff Margaret Hasselman was required to wear extremely revealing outfits as a lobby atten-
dant. Her mandated attire was so sexually provocative that she was subjected to sexual propositions, and lewd comments and gestures. Hasselman ultimately prevailed on a sexual harassment theory, making the court understand the connection between mandated appearances rules and sexual discrimination.

Unfortunately, the *Sage Realty* theory has not been extended to appearance cases in general. Men have lost cases in which they challenged a requirement to wear a tie or keep their hair short. The mere fact that an employer imposes different rules for men’s and women’s appearance is not enough to constitute liability under Title VII. One must also show that the rules for women are demeaning or, as in *Sage Realty*, constitute sexual harassment. In other words, *demeaning* or *sexualized* appearance rules are unlawful gender discrimination even in such a case as Hasselman’s where there is no evidence in the record concerning male attire. (There were no male lobby attendants.) *Nonsexualized*, but gender-differentiated, appearance rules do not constitute unlawful gender discrimination where one cannot prove they are demeaning. (This thesis will be further developed in chapter 7.) Unfortunately, courts often do not use Title VII of the Civil Rights Act to rid the workplace of gender or race differentiation. They only are comfortable using Title VII for the benefit of a particular type of plaintiff, such as Hasselman, who does not more broadly challenge rules with respect to gender or race differentiation. Such protection does not reach transsexuals.

Title VII prohibits “discrimination on the basis of sex in terms and conditions of employment.” Explicit differentiation is purportedly illegal. But gender hybrids rarely can take advantage of that explicit prohibition.
B. Bathrooms

One awkward barrier for transsexuals that is reflected in many of these cases is the lack of acceptable restrooms, because public bathrooms are sex-segregated. In several of these cases, the employer discharged the employee because of complaints from other employees about plaintiff using their restroom. Patricia Williams tells a story about "S" who was a post-operative transsexual at an unidentified California law school, but who could not get either the male or female students to allow her to use their bathroom.\textsuperscript{79} The Dean also refused to allow the student to use his private bathroom out of fear that he would be accused of preferential treatment. As Williams says, "Into the middle of that struggle, S. was coming to me because others had defined her as 'nobody.' "\textsuperscript{80}

Sex-segregated bathrooms do not pose problems only for transsexuals. They create gender differentiation for all men and women. At my own institution, for example, we have a similar male and female bathroom for faculty and staff (with several private toilet areas), except that the male bathroom also has a shower room. When I joined the faculty and expressed a desire to have access to that shower area, the university was kind enough to make a "woman in shower" sign for me that I could put over the door to the man's bathroom to convert it temporarily into a "woman's space." That solution satisfied my needs without breaking down the rigid gender barriers. No one, of course, suggested that we simply designate each bathroom as sex-neutral with individuals who want privacy in the shower having the option of putting up a "person in shower" sign when they wanted to temporarily close off one of the two bathrooms to the public.

Gender-segregated bathrooms are a bedrock principle under
the law. In the seminal law review article on the proposed federal Equal Rights Amendment, the authors state that we must permit separate “toilet facilities in public buildings where separation carries no implication of inferiority for either sex.” Unfortunately, they do not define “inferiority.” Does the impact on transsexuals who are rejected from both bathrooms constitute sufficient inferiority? What about the impact on women who typically have to wait in longer lines at public events than men because of an inadequate supply of women’s bathrooms? (Plumbing codes as recently as the mid-1980s required more men’s restrooms than women’s in public buildings because of the assumption that more men attended sporting events and conventions than women; a woman was recently arrested for using the men’s bathroom at a public event.) Gender differentiation in bathrooms promotes transsexual discrimination as well as long lines for women at public places. Those are sufficient reasons to question the common acceptance of sex-segregated bathrooms. Segregation always carries a meaning; that meaning has largely gone unexamined in the context of sex-segregated bathrooms.

When I was in college, each year we had a “bathroom vote” whereby we voted whether to make the community bathrooms on each of the dorm floors single-sex or co-ed. Each floor got to vote separately so that there would not have to be uniformity on all floors. All of the toilets had stalls, and each of the showers had a privacy area for changing. Majority ruled each year, and, typically, all but a couple of bathrooms were voted to be “co-ed.” This vote allowed each of us to use the bathroom closest to our dorm rooms rather than to travel to the closest one for the designated sex.

This regime of bathroom allocation quickly came to seem “normal.” The only problem that I can remember with this
arrangement was when an older male acquaintance was once visiting me before we were to go out for dinner. He said he needed to use the bathroom before we went to dinner and wanted to know where was the “men’s room.” I explained that there weren’t any “men’s rooms” but that a unisex bathroom was down the hall. He blushed and said he would wait until we got to the restaurant.

This story is amusing because men are socialized to be comfortable with using urinals that offer no privacy between men. Had this man used the community bathroom, he would have had the benefit of an enclosed cubicle. He apparently preferred a urinal in a “men’s room” to a private cubicle in a co-ed bathroom. Our socialization with regard to our sense of privacy reinforces gender differentiation while actually providing little privacy.

In a perfect world, we should move to the model of community bathrooms with enclosed cubicles and private showering areas. That would eliminate the long lines in front of women’s restrooms as compared with the relatively short lines in front of men’s restrooms. It would eliminate such incidents as the one Williams described at a California law school, caused initially by the fact that bathrooms are sex designated. If bathrooms were not sex designated, then transsexuals would not have difficulty finding an appropriate bathroom.

Realistically, however, I understand that many people’s sense of privacy would be offended by that restructuring. A more modest solution is free-standing unisex cubicles. In airports, it is common for there to be single-standing stalls that are designated for people who use wheelchairs or who need to change a baby’s diaper. These single stalls have helped solve the problem of people who use wheelchairs having opposite-sex attendants or men needing to change the diaper of a young child. It is
time to make such a model more universally available so that transsexuals, among others, have the option of a single stall for their and other people’s privacy. I am not suggesting that institutions should only rely on single stalls. Clearly, that would be expensive and architecturally infeasible in many situations. But one single stall on each floor or area of an institution would be feasible and could assist with problems of people who use wheelchairs, parents of young children, and transsexuals. If we dispose of our bipolar lenses and consider how different groups of people are similarly situated, we could see how single toileting areas could solve many problems at once.

IV. Ameliorative Treatment

Ameliorative treatment for transsexuals, transvestites, and hermaphrodites is rare. The most positive steps that have been taken include a failure to continue to coerce individuals to maintain a gender identity that they have abandoned. Thus, for example, courts often allow transsexuals to change their names from an obviously male name to an obviously female name, although courts also sometimes refuse to allow transsexuals to have their birth certificates changed to match their sexual identity. One of the most positive legal recognitions of a transsexual occurred in a divorce case where the ex-husband tried to avoid support and maintenance payments by arguing that his wife, a male to female transsexual, was really a man, so that the marriage was void. Ruling in favor of the transsexual wife, the court said that the “transsexual is not committing a fraud upon the public. In actuality she is doing her utmost to remove any false facade.” Of course, however, the case was predicated on the bipolar assumption, which the court described as “almost universal,” that “a lawful marriage requires
the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female.” 87 The court therefore had to place the wife in a rigidly bipolar framework in order to conduct the appropriate legal analysis; in no way does the court’s decision undermine the polarized conception of sex that underlies our marriage laws. Nonetheless, other courts have been less liberal in tolerating the desired gender status of a postoperative transsexual who sought to take advantage of the institution of marriage. 88

Although “affirmative action” for transsexuals, transvestites, and hermaphrodites may seem implausible, one might argue that our tolerance for “corrective surgery” for transsexuals and hermaphrodites is an expression of ameliorative treatment. Transsexualism or “gender dysphoria,” for example, is considered to be such a serious problem that surgery is covered under Medicaid. 89 Some argue that such treatment is clearly ameliorative because, without surgery, many individuals would commit suicide. 90

But transsexuals only obtain favorable legal treatment in response to horrific fact patterns. For example, transsexuals in prison argue that it would be “cruel and unusual punishment” or “deliberate indifference” for them to be denied estrogen therapy or surgery. 91 Lawyers have to describe their situation in extraordinary terms to meet this exceedingly high standard. The American Psychiatric Association has recently concluded that not all transsexuals need be classified as having a personality disorder. 92 Yet, transsexuals have been taught that they virtually have to commit suicide in order to receive public assistance. 93 Judges must be convinced that the choice is between suicide or estrogen therapy. Little else would meet the stringently high standard. Our legal standards therefore reinforce a
stark, bipolar model, because the courts are only presented with suicidal transsexuals.

Given the dramatic stories of suicidal behavior that are required to obtain public assistance for transsexuals, it is hard to describe the granting of public assistance as ameliorative treatment. Saving an individual from suicide does little to place him or her on the road to a happy and successful life. We have much further to go in our treatment of transsexuals before we could describe our treatment of them as truly benign. A postoperative transsexual still faces enormous hardships and barriers in a society that cannot accept his or her transgendered status.

As for hermaphrodites, it is very difficult to consider the surgery that is routinely provided at birth as ameliorative. This coerced treatment has caused Anne Fausto-Sterling to ask:

Why should we care if there are people whose biological equipment enables them to have sex “naturally” with both men and women? The answers seem to lie in a need to maintain clear distinctions between the sexes. Society mandates the control of intersexual bodies because they blur and bridge the great divide; they challenge traditional beliefs about sexual difference. Hermaphrodites have unruly bodies. They do not fall into a binary classification; only a surgical shoehorn can put them there.

Hermaphrodites are usually required to have surgery when they are infants, long before the age of consent. The decision to have surgery is virtually automatic rather than reflecting whether there was any medical or even psychological reason for surgery. If we, as a society, were not so horrified at the existence of hermaphrodites, we would allow surgery decisions to be made by an informed adult rather than by a parent.

Hermaphrodites and transsexuals reflect two different kinds
of hybrid categories which we "cure" with surgery to the sex organs. Hermaphrodites reflect a mixing of biological sexual traits which we are not able to tolerate. Transsexuals reflect a mixing of gendered traits which we "cure" by changing the biological sex to match the gender. In both cases, we "solve" the problem by engaging in surgery on the biological sex organs. In neither case do we try to "solve" the problem by changing conventional understandings of sex and gender. It makes one wonder who is "sick"—hermaphrodites, transsexuals, or "able-bodied" society?

Because of the failure of Title VII to reach discrimination claims brought by transsexuals or people who dress outside gender norms for appearance, some cities have passed ordinances prohibiting such discrimination. These ordinances, however, usually have little teeth. At most, they usually can impose a modest fine and often have cumbersome and time-consuming enforcement mechanisms. These ordinances should also be unnecessary because Title VII already prohibits sex discrimination. It is time to remove the moral code from Title VII and let it reach out fully to protect gender hybrids who face explicit sex discrimination.

Rules promoting gender differentiation are everywhere. The way I cross my knees as I type these words has been constructed by the gender police. The best "informers" on the scope of gender policing in our society are transsexuals who have lived in both gendered worlds. Not surprisingly, law and society impose harsh treatment on transsexuals to preclude us from moving beyond our stereotypical conceptions of gender. In order for the gender police to be less effective, we must be more attentive to gender differentiation in our lives. We must also
insist that the courts take seriously the statement by Congress that sex discrimination or differentiation is illegal at the workplace. The fact that such enforcement also would benefit some transsexuals should not be an excuse to ignore the clear statutory mandate of Title VII.