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INTERSEX AND INTRASEX DEBATES: BUILDING ALLIANCES TO CHALLENGE SEX DISCRIMINATION

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I. INTRODUCTION

During the 1990s, a number of intersex activists formed organizations to challenge the dominant treatment protocol for intersex infants. These organizations believed that the medical community's approach to treating intersex conditions often led to irreparable physical and emotional harm and infringed on the basic human rights of intersex infants. Even as relative newcomers to the social justice movement, intersex activist organizations have managed to educate society quickly and effectively about the concerns of intersex persons. During the last ten years, intersex issues have been discussed in medical, legal, psychological and historical academic journals. In addition, the issue has been highlighted in a number of recent fiction and nonfiction books as well as numerous movies and television shows. The intersex movement's rapid success in bringing to mainstream media a subject that was hidden from the public consciousness before the 1990s has been accompanied by an equally rapid maturation process of the movement itself.

Historically, as other social justice movements developed, they were hampered by disagreements among groups and individuals who shared common goals. Similar and potentially divisive debates are beginning to appear within the intersex movement. Until recently, the fight for intersex rights had been limited to disputes between physicians and activists who believed that doctors inappropriately failed to prioritize the rights of their patient, the intersex infant. The focus of some of the recent rhetoric has shifted, however, and groups that share the common goal of eliminating sex and gender discrimination have begun to engage in occasionally acrimonious disputes.

* Professor of Law, Thomas Jefferson School of Law. This essay is based on the keynote address that Professor Greenberg delivered at the Intersex Advocacy, Education and the Law Symposium at Benjamin N. Cardozo School of Law in February 2005. Professor Greenberg is an internationally recognized expert on the legal issues related to transgenderism and intersexuality. Her path-breaking work on gender-identity has been cited by a number of state and federal courts, as well as courts in other countries, and has been quoted in more than 100 articles and books. Her current project focuses on the constitutional implications of sex determination rulings, including full faith and credit, substantive due process, equal protection and the right to travel. I would like to thank Marybeth Herald and Ellen Waldman for their helpful comments on earlier drafts of this essay. I also want to express my gratitude to the Cardozo Law School and the Cardozo Journal of Law & Gender for hosting this conference, and especially Julie Zando-Dennis for bringing together such a diverse group of people to begin this critical dialogue.

The current medical, legal and activist literature indicates that two potentially divisive issues relating to intersex persons may be emerging. An "intrasex debate" is developing within the intersex activist movement and "intersex disagreements" are growing between intersex rights activists and other groups seeking to end sex and gender discrimination, namely feminists and lesbian, gay, bisexual and transgender (LGBT) organizations.

Part II of this essay explores the nature of both tensions to determine whether alliances can be built that have the potential to more effectively achieve the goals of the intersex movement. Part III compares the disagreements relating to the treatment of intersexuality that have begun to develop to disputes that have plagued other social justice movements. This paper concludes that intersex activists need to build and nurture alliances with other groups seeking an end to sex and gender discrimination. It proposes that groups seeking an end to discrimination based upon gender nonconformity form coalitions around this unifying goal to help these groups avoid the divisiveness that has plagued other social justice movements.

II. THE NATURE OF THE DEBATES

A. *The Intrasex Debate*

Intersex patients' rights advocates agree that the treatment protocol that has dominated since the 1950s, with its emphasis on secrecy, shame and half-truths, needs to end immediately. They disagree, however, about the appropriate replacement model. Some believe that a complete moratorium on all intersex surgeries that are not medically necessary should be instituted until studies prove that these surgeries are beneficial. Others, however, believe that each birth of an intersex infant is *sui generis* and that parents are uniquely qualified to determine the appropriate treatment that will be in the best interests of the intersex child. This latter group believes that surgeries should be allowed to continue, but under stricter informed consent standards that would enhance the likelihood that parents will prioritize the best interests of their intersex child. Proponents of the enhanced informed consent approach believe it will better protect the interests of intersex children than a complete moratorium because no comprehensive study conclusively proves that infant intersex surgery is necessarily more harmful under all circumstances.

Until the mid-1990s, physicians treating intersex infants followed a protocol developed during the 1950s. According to this model, the birth of an intersex infant was considered a medical and social emergency that required immediate attention.¹ Three beliefs about the emotional and psychological development of children controlled the treatment decision.

¹ See Alice Domurat Dreger, "Ambiguous Sex"—or Ambivalent Medicine? *Ethical Issues in the Treatment of Intersexuality*, 28 HASTINGS CENTER REP. 24, 27 (1998); SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED (1998); AMERICAN ACADEMY OF PEDIATRICS, *Evaluation of the Newborn with*

First, physicians believed that a child growing up with “atypical” genitalia would suffer severe psychological trauma. Therefore, physicians performed surgery within a short time after the infant’s birth to alter the appearance of the genitalia to fit the norm established by the medical community.² Doctors assumed that boys forced to grow up with a penis that was too small or girls allowed to grow up with a clitoris that was too large were destined to suffer severe psychological distress.

Second, the scientific community believed that gender identity was completely malleable. In other words, they believed that children were not born with an innate sense of gender and gender identity development was determined by the gender of rearing. As long as the assigned gender matched the appearance of the genitalia, doctors believed that the appropriate gender identity would develop.³ At the time this protocol developed, technology had not developed a method to surgically create a functional penis. Therefore, an XY infant born with a penis that doctors believed would be inadequate for intercourse in adulthood typically would have his genitalia surgically altered to a female appearance and would be raised as a girl.⁴

Finally, physicians believed that healthy gender identity formation required that children be raised without any ambiguity about their gender. Therefore, physicians often told parents half-truths about the nature of their child’s condition so that the parents would not unintentionally signal to their child that they were uncertain about the child’s gender. In addition, parents were instructed to hide the truth from friends and relatives and to lie to their children about the nature of their condition. At this time, physicians believed that they were uniquely qualified to determine the best interests of the parents and child. By disclosing selective information to the parents, physicians controlled the treatment decision.⁵

Beginning in the 1990s, this treatment protocol came under heavy attack for two reasons. First, intersex adults who had been treated under this protocol began to state publicly that they had been psychologically and physically harmed.⁶ They asserted that genital surgery often resulted in a loss of reproductive capacity, a loss or diminishment of erotic response, genital pain and discomfort, infections,

Developmental Anomalies of the External Genitalia, 106 PEDIATRICS 138 (2000) (stating that the birth of a child with ambiguous genitalia constitutes a social emergency).

² ANNE FAUSTO-STERLING, *SEXING THE BODY* 59 (2000). Acceptable genitalia for girls included a clitoris less than one centimeter in length. *Id.* Acceptable genitalia for boys included a phallus of at least three centimeters. *Id.*

³ See, e.g., John Money, *Hermaphroditism: Recommendations Concerning Case Management*, 4 J. CLIN. ENDOCRINOLOGY & METABOLISM 547 (1956); John Money, Joan G. Hampson & John L. Hampson, *An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism*, 97 BULL. JOHNS HOPKINS HOSP. 301 (1955).

⁴ See, e.g., Dreger, *Ambiguous Sex*, *supra* note 1, at 27-28; KESSLER, *supra* note 1; Alice D. Dreger, *A History of Intersexuality: From the Age of Gonads to the Age of Consent*, 9 J. CLIN. ETHICS 345 (1998).

⁵ See, e.g., Dreger, *Ambiguous Sex*, *supra* note 1, at 27; KESSLER, *supra* note 1.

⁶ See, e.g., Cheryl Chase, *Surgical Progress is Not the Answer to Intersexuality*, 9 J. CLIN. ETHICS 385 (1998).

scarring, urinary incontinence and genitalia that were not cosmetically acceptable.⁷ In addition to these physical complications, they asserted that the dominant model exacerbated an intersex person's sense of shame by reinforcing cultural norms of sexual abnormality.⁸ At the same time, a number of researchers began to question the assumptions underlying the dominant model. A number of reports indicated that gender identity was not completely malleable, and surgical alteration should not be undertaken based on the assumption that a child's adult gender identity would conform to the gender assigned by the physicians at birth.⁹

Based upon these concerns, some intersex activists and researchers have called for a complete moratorium on all infant intersex surgeries—except those that are medically necessary—until retrospective studies prove that the benefits of such surgeries clearly outweigh the potential risks.¹⁰ Supporters of a complete moratorium challenge the assumption that downplaying or hiding the existence of an intersex condition will allow the child and her family to lead a “normal” life. Additionally, they criticize the dominant model for its focus on alleviating the parents' anxiety about giving birth to an intersex child by surgically altering the child's genitalia to fit societal norms. Instead, moratorium supporters believe that parents should be given appropriate counseling and support, and the decision about whether to undergo surgery should be left solely to the intersex child, when he or she reaches the appropriate age.¹¹

Others interested in protecting the rights of intersex infants have called for a compromise position between the traditional model and a complete moratorium.¹² This group believes that the dominant model defers too much to the treating physicians. They believe that doctors should not have such significant control over potentially life-altering decisions—decisions that may affect reproductive ability

⁷ See ISNA's Recommendations for Treatment, at <http://www.isna.org/library/recommendations.html> (last visited Jan. 5, 2006).

⁸ *Id.*

⁹ See, e.g., Bruce Wilson & William G. Reiner, *Management of Intersex: A Shifting Paradigm*, 9 J. CLIN. ETHICS 360 (1998); Kenneth Kipnis & Milton Diamond, *Pediatric Ethics in the Surgical Assignment of Sex*, 9 J. CLIN. ETHICS 398 (1998); Milton Diamond & Kenneth Sigmundson, *Management of Intersexuality: Guidelines for Dealing with Persons with Ambiguous Genitalia*, 151 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 1046 (1997).

¹⁰ See, e.g., Wilson & Reiner, *supra* note 9; Kipnis & Diamond, *supra* note 9; Diamond & Sigmundson, *supra* note 9; Cheryl Chase, “Cultural Practice” or “Reconstructive Surgery”? *Genital Cutting, the Intersex Movement, and Medical Double Standards*, in GENITAL CUTTING & TRANSNATIONAL SISTERHOOD 126, 140-42 (Stanlie M. James & Claire C. Robertson eds., 2002); Alyssa Connell Lareau, *Who Decides? Genital-Normalizing Surgery on Intersexed Infants*, 92 GEORGETOWN L.J. 129 (2003); Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & LAW 1 (2000).

¹¹ See, e.g., Wilson & Reiner, *supra* note 9; Kipnis & Diamond, *supra* note 9; Diamond & Sigmundson, *supra* note 9; Chase, *Cultural Practice*, *supra* note 10; Lareau, *supra* note 10; Beh & Diamond, *supra* note 10.

¹² See, e.g., Jorge Daaboul & Joel Frader, *Ethics and the Management of the Patient with Intersex: A Middle Way*, 14 J. PEDIATRIC ENDOCRINOLOGY & METABOLISM 1575 (2000); S.F. Ahmed et al., *Intersex and Gender Assignment: The Third Way?*, 89 ARCHIVES OF DISEASE IN CHILDHOOD 847 (2004).

and sexual satisfaction, and may lead to physical and emotional complications.¹³ Those advocating for a compromise position oppose a moratorium because no studies have indicated that an intersex child who grows up with “non-conforming” genitalia will suffer less psychological harm than a child who has been surgically altered.¹⁴ This group argues that fully educated parents are in the best position to assess their child’s best interests. Therefore, they believe that parents should have a right to decide, as long as that decision is based upon an enhanced form of informed consent that ensures the best interests of the child are the sole concern.¹⁵

B. *The Intersex Debates*

In addition to differences of opinion within intersex activist organizations, disputes have developed between intersex activists and other groups who seek to eliminate sex and gender discrimination. Some intersex activists are questioning whether to join forces with LGBT organizations and create LGBTI groups. Also, some feminists have rejected intersex activists’ requests to be included in their movement to end the practice of female genital cutting (FGC), as it is practiced in a number of African cultures,

Some intersex activists are ambivalent about accepting invitations from LGBT organizations to join forces.¹⁶ Although LGBT organizations typically welcome the inclusion of intersex members, some intersex activists are hesitant to join forces with LGBT groups for a number of reasons.¹⁷ First, some intersex activists fear that LGBTI organizations may create the appearance of a connection between intersex conditions and homosexuality. These activists are concerned that parents may be more likely to opt for “gender normalizing” surgery to help ensure that their children do not become homosexuals.¹⁸ In addition, some intersex activists are concerned because the most pressing concerns of each group are not identical and they fear that intersex issues that are not shared by the LGBT communities will actually be less visible in the event that the groups combine.¹⁹ Finally, some activists fear that the addition of the “I” will be merely symbolic because intersex concerns will not be an important priority in organizations where LGBT members far outnumber intersex members.²⁰

The second “intersex dispute” involves feminist organizations that have resisted intersex activists’ requests to include intersex genital surgery as part of the

¹³ Daaboul & Frader, *supra* note 12; Ahmed et.al., *supra* note 12.

¹⁴ Daaboul & Frader, *supra* note 12; Ahmed et.al., *supra* note 12.

¹⁵ Daaboul & Frader, *supra* note 12; Ahmed et.al., *supra* note 12.

¹⁶ See, e.g., INTERSEX INITIATIVE PORTLAND, INTRODUCTION TO INTERSEX ACTIVISM: A GUIDE FOR ALLIES (2d ed. 2003), available at <http://www.intersexinitiative.org/publications/pdf/intersex-activism2.pdf>.

¹⁷ See, e.g., *id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

organizations' agenda to end FGC.²¹ Western feminists have fought against FGC for more than twenty-five years for a number of reasons.²² The practice results in pain, physical complications, and psychological harm. It often impairs sexual pleasure and violates the right to autonomy because it is often performed without proper consent. Most importantly, it is medically unnecessary and only serves to reinforce male cultural norms and patriarchal power.²³ Anti-FGC feminists have succeeded in getting the practice banned or condemned by the U.S. Congress,²⁴ state legislatures,²⁵ the U.N.,²⁶ and a number of other countries.²⁷

Although the reasons for opposing genital surgery on intersex infants are similar to the reasons some feminists oppose FGC, anti-FGC feminists have failed to include surgeries on intersex infants on their agendas. Surgeries on intersex infants and FGC often result in almost identical physical harms, including a loss or diminishment of erotic response, genital pain and discomfort, infections, scarring, urinary incontinence, and genitalia that are not cosmetically acceptable. In addition, they are both medically unnecessary and are performed without the informed consent of the intersex patient.

Most importantly, just as FGC is used to reinforce gender norms, one of the goals of intersex surgeries is to reinforce heterosexism and cultural norms of appropriate gender roles. The traditional protocol for the surgical treatment of intersex infants is based upon stereotypes regarding appropriate male and female sexual activity and reproductive capacity. A major priority for children who will be raised as males is to ensure that they will be capable of engaging in heterosexual intercourse in adulthood. Thus, doctors have turned XY infants into girls if they believed that the XY child's phallus was "inadequate." This surgery was performed even if it destroyed the child's ability to reproduce. In other words, for males, penetration of a vagina was prioritized above the ability to procreate.²⁸

XX infants have been treated differently. Typically, an XX infant with a phallus larger than a typical clitoris, who is capable of bearing children, has had her reproductive capacity maintained. At the same time, however, her clitoris has been surgically reduced, even if such reduction may cause a loss or impairment of sexual pleasure. In addition, an XX infant born with a vagina incapable of accommodating a penis typically undergoes surgery to construct a vaginal canal so that she will be capable of engaging in heterosexual intercourse.²⁹ In other words,

²¹ See, e.g., Chase, *Cultural Practice*, *supra* note 10, at 140-42. FGC is sometimes called female genital mutilation (FGM), female circumcision, or female genital surgery.

²² Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 HARV. C.R.-C.L. L. REV. 71, 72 (2005).

²³ See *id.* at 81-85.

²⁴ See Criminalization of Female Genital Mutilation Act, Pub. L. No. 104-208, § 645, 110 Stat. 3009, 3009-708 (1996) (codified as amended at 18 U.S.C. § 116).

²⁵ See Ehrenreich & Barr, *supra* note 22, at 72 n.6.

²⁶ See G.A. Res. 57/189, U.N. Doc. A/RES/57/189 (Feb. 12, 2003), 7th Sess., at 2-3.

²⁷ See Ehrenreich & Barr, *supra* note 22, at 73 n.22.

²⁸ Dreger, *Ambiguous Sex*, *supra* note 1, at 28.

²⁹ FAUSTO-STERLING, *supra* note 2.

the traditional protocol is based on the belief that it is more important for men to be able to engage in penetrative sex than to be able to reproduce and more important for women to be able to bear children and be penetrated by a man, even if their ability to enjoy sex is impaired or destroyed.

Intersex activists believe that anti-FGC feminists should recognize the parallels between the harmful practices of FGC and genital surgery performed on intersex infants. They have asked anti-FGC feminist groups to help them convince legislatures to include infant intersex genital surgeries within the ban on FGC.³⁰ Despite the similarities between the surgeries, their negative physical and psychological effects, and the patriarchal heterosexist norms that support both practices, anti-FGC feminists have chosen to exclude intersex concerns from their agenda.³¹ Thus far, western feminist organizations that oppose FGC have refused to criticize western doctors who perform surgery on intersex infants. Although intersex activist organizations have attempted to form an alliance with anti-FGC feminists, these overtures typically have been rejected.

III. ECHOES OF THE PAST

Unfortunately, dissension within social justice movements is not a new phenomenon.³² Disagreements among individuals and groups working to end sex and gender discrimination abound and date back to the start of these movements. For example, early feminists failed to recognize their movement's failure to address the concerns of poor women, women of color, and lesbians.³³ Similarly, the early gay movement did not grasp the connections between homophobia, racism, and sexism.³⁴

Some groups seeking sex and gender equality continue to engage in exclusionary policies. For example, although the feminist movement now includes

³⁰ Chase, *Cultural Practice*, *supra* note 10.

³¹ Ehrenreich & Barr, *supra* note 22, at 104; Chase, *Cultural Practice*, *supra* note 10.

³² A thorough discussion of the dissension among different identity groups, and the causes and effects is beyond the scope of this article and has been developed in a number of excellent articles that are too numerous to list. See, e.g., Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support between Subordinating Systems*, 71 UMKC L. REV. 251 (2002) (maintaining that the elimination of a subordinating system requires an attack on the "entire edifice of interlocking oppressions"); Victor C. Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship and Anti-Subordination*, 50 VILL. L. REV. 823 (2005) (explaining that the focus on self-interest makes minority coalition building difficult to create and sustain); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Interconnectivities*, 5 S. CAL. REV. L & WOMEN'S STUD. 25 (1995) (calling for interconnectivity as a strategy); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999) (discussing the failure of anti-racist scholarship to address the relationship between racial oppression and other forms of subordination); Richard Delgado, *Linking Arms: Recent Books on Interracial Coalitions as an Avenue of Social Reform*, 88 CORNELL L. REV. 855 (2003) (explaining how the goal of assimilation has contributed to minority coalition problems).

³³ See, e.g., KARLA JAY, *TALES OF THE LAVENDER MENACE: A MEMOIR OF LIBERATION* 137-38 (2000); LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS* 212 (1991) (discussing NOW's rejection of lesbians for fear of the "lavender menace").

³⁴ See, e.g., Darren Lenard Hutchinson, *Identity Crisis: Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 285-88 (1991).

the concerns of lesbians, some feminists still fail to fully understand and embrace the common concerns that they share with transsex women. In the early 1990s, the Michigan Womyn's Music Festival (MWMF), one of the largest annual social gatherings of women, forcefully ejected a male-to-female transsex attendee when she identified herself in a workshop as a transgender woman. MWMF then added to its website its "womyn-born-womyn" policy. Although MWMF has deleted this reference in its current materials and no longer evicts trans-women from the festival, it still has failed to embrace trans-women or fully include them in their celebration of the "diversity" of women.³⁵

Similarly, it was only within the last few years that LGBT groups fully welcomed transsex persons into their organizations and actively pursued the protection of transgender rights.³⁶ Until recently, the Human Rights Campaign (HRC) rejected the repeated requests of transsex people to be included in HRC's lobbying efforts to convince Congress to pass the Employment Nondiscrimination Act (ENDA). As originally proposed, ENDA would only ban discrimination based upon sexual orientation and not gender identity.³⁷ Some gays and lesbians maintained that the exclusion was pragmatic. They asserted that Congress and the public were more open to protecting the rights of gays and lesbians and including transsex persons would lead to the defeat of ENDA. Therefore, some LGBT groups claimed that a temporary delay in advocating for the rights of transsex persons would be better for both groups.

Similar problems have plagued groups fighting to establish rights for other minorities. Publications in the popular press³⁸ and academic journals³⁹ analyzing the causes and cures for the failure of the left and subordinated minority groups to advance liberal and progressive goals are proliferating. Liberals and progressives are now acknowledging that advancement of the civil rights of minority groups requires supporters to recognize the critical need to build and maintain coalitions with other subordinated groups. In addition, these groups need to think about how

³⁵ See Nan Alamilla Boyd, *Bodies in Motion: Lesbian and Transsexual Histories*, in *A QUEER WORLD: THE CENTER FOR LESBIAN AND GAY STUDIES READER* 134, 143-45 (Martin Duberman ed., 1997) (discussing exclusion of transsex women from Michigan Womyn's Music Festival).

³⁶ See, e.g., Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 416 n.141 (2001) (discussing "the social and legal privileging of men and masculine norms through the systems of sex and sex orientation inequality, which work in tandem to maintain rigid sex and gender role differentiation"); Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309 (2005) (stating "[b]roader failures of the 'gay agenda' to include and prioritize the experiences of people of color, people with disabilities, women, the poor and immigrants have been continually critiqued by theorists and activists who produce intersectional and multi-issue queer and trans analysis and activism.").

³⁷ Elizabeth Birch, HUMAN RIGHTS CAMPAIGN, Op-Ed., *The Transgender Community and ENDA*, June 16, 2003, available at ILL. GENDER ADVOCATES, July 2003, at 4-5, http://genderadvocates.org/newsletters/LGA_03-07.pdf (last visited Jan. 8, 2006); Lisa Mottet, NATIONAL GAY & LESBIAN TASK FORCE, *Partial Equality?* (Summer 2003), available at <http://www.thetaskforce.org/reslibrary/partialreq.cfm> (last visited Jan. 8, 2006).

³⁸ See, e.g., GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! (2004).

³⁹ See *supra* note 32.

to reframe their arguments to build these coalitions and persuade others. As social movements work to attain equality, efforts must be made to broaden the understanding of the manner in which systems of oppression operate.⁴⁰ Advancing or preferring the civil rights of one group while marginalizing or ignoring the rights of other subordinated groups reinforces systems of oppression.⁴¹

While some gays and lesbians may have sincerely believed that temporarily excluding transsex persons from ENDA coverage would eventually lead to greater protection for both groups, such an approach is more likely to lead to greater subordination of sexual minorities. Similarly, when anti-FGC feminists refuse to challenge the practices of western doctors performing genital surgery on intersex infants, or when women's groups embrace only womyn-born-womyn, they unintentionally reinforce oppressive practices that in the end disadvantage all who suffer from sex discrimination.⁴² Liberal groups seeking equality for traditionally marginalized people must focus on their commonalities to effectively combat the well-financed and seemingly more cohesive right-wing organizations.⁴³ Subordinated groups must form political alliances based upon their common goals, explore their shared forms of oppression, and work to build a unifying theory that can protect their sometimes seemingly diverse concerns.⁴⁴

IV. BUILDING ALLIANCES AROUND NONCONFORMITY

Forming alliances among organizations working to gain sex and gender equality will be difficult, given the history of conflict among these groups and their seemingly diverse and multi-faceted goals. These alliances are critical, however, to effectively challenge and dismantle sex discrimination systems that harm women and sexual minorities. Women and sexual minorities must gain a better understanding of the complex and subordinating nature of sex discrimination and form alliances to more effectively combat discriminatory practices.

Forming alliances based upon the common goal of combating discrimination against people who fail to conform to sex and gender norms may provide a unifying theme for building these coalitions. Recent Title VII actions illustrate the potential for a gender nonconformity theory to provide a unifying theoretical approach. During the past forty years, Title VII sex discrimination doctrine has developed from its simplistic roots barring only differential treatment of similarly-situated men and women. In the early sex discrimination cases, courts narrowly construed prohibitions on discrimination "because of sex" to exclude other forms of

⁴⁰ A thorough discussion of how systems of oppression—such as sexism, racism, and homophobia—tend to be connected and mutually reinforcing is beyond the scope of this article. For an excellent discussion of this phenomenon and liberal organizations' failure to appreciate the mechanisms by which oppressive systems work, see Ehrenreich, *Subordination and Symbiosis*, *supra* note 32, at 280-83.

⁴¹ *Id.* at 258-62.

⁴² *Id.* at 272.

⁴³ *Id.* at 255.

⁴⁴ Valdes, *supra* note 32.

sex-related discriminatory conduct. Thus, sex discrimination did not include “sexual orientation” discrimination,⁴⁵ “sexual identity” discrimination,⁴⁶ or gender role discrimination.⁴⁷ This narrow view of sex discrimination was not challenged by early feminists.

As sex discrimination law developed, legal scholars began to criticize the courts’ narrow interpretation and argued for a more encompassing, nuanced understanding of sex discrimination.⁴⁸ They asserted that sex discrimination doctrine often inappropriately conflated the distinct concepts of sex, gender, sexual orientation, gender identity, and gender role behavior.⁴⁹ Conflation of these concepts leads to the erroneous assumption that biological men (sex) have masculine traits (gender), desire sex with women (sexual orientation), think of themselves as males (gender identity), and meet the ideal male norm of breadwinner (gender role performance); while biological women (sex) have feminine traits (gender), desire sex with men (sexual orientation), think of themselves as female (gender identity), and focus primarily on their care-giving responsibilities (gender role performance). Courts that conflated these distinct concepts presumed that sex discrimination was limited to situations in which all

⁴⁵ See, e.g., *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 330-31 (9th Cir. 1979); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 36-37 (2d Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085-86 (7th Cir. 2000).

⁴⁶ See, e.g., *Holloway v. Arthur Anderson and Co.*, 566 F.2d 659, 663-64 (9th Cir. 1977); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Ca. 1975), *aff’d mem.*, 570 F.2d 354 (9th Cir. 1978); *Powell v. Read’s, Inc.*, 436 F. Supp. 369, 370-71 (D. Md. 1977); *Grossman v. Bernards Township Bd. of Educ.*, 1975 WL 302, at *1 (D. N.J. Sept. 10, 1975); *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 285-86 (E.D. Pa. 1993); *Doe v. U.S. Postal Serv.*, 1985 WL 9446, at *1 (D. D.C. June 12, 1985); *Terry v. EEOC*, 1980 WL 334, at *1 (E.D. Wis. Dec. 10, 1980).

⁴⁷ See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77 (2003) (citing *Chi v. Age Group, Ltd.*, 1996 WL 627580, at *2 (S.D.N.Y. Oct. 29, 1996)); *Martinez v. NBC*, 49 F. Supp. 2d 305, 309-11 (S.D.N.Y. 1999); *Fuller v. GTE Corp.*, 926 F. Supp. 653, 656 (M.D. Tenn. 1996); *Bass v. Chem. Banking Corp.*, 1996 WL 374151, at *1 (S.D.N.Y. July 2, 1996); *Piantanida v. Wyman Center, Inc.*, 927 F. Supp. 1226 (E.D. Mo. 1996). Gender role discrimination refers to persons who challenge traditional gender roles. For example, women who want to be breadwinners and men who prefer to be caregivers challenge societal norms of appropriate gender roles.

⁴⁸ See, e.g., Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL L. REV. 3, 20 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999); Julie A. Greenberg, *The Gender Nonconformity Theory: A Comprehensive Approach to Break Down the Maternal Wall and End Discrimination Against Gender Benders*, 26 T. JEFFERSON L. REV. 37, 43-44 (2003).

⁴⁹ Sex refers to biological sex attributes, such as chromosomes and genitalia while gender refers to characteristics typically associated with masculinity or femininity, such as dress, tone of voice, hobbies, and personality traits. Greenberg, *Defining Male*, *supra* note 48, at 271. Sexual orientation is determined by the sex of the desired object of one’s affections. Gender identity refers to a person’s self identity, in other words, whether the person thinks of himself or herself as a male or a female. Gender role behavior refers to the societal and familial position that the person occupies, such as caregiver or breadwinner. Greenberg, *Gender Nonconformity*, *supra* note 48, at 43.

men or all women were subjected to the discriminatory conduct. If, however, the discrimination was limited to people based on their failure to conform to the conflated stereotype, it did not constitute sex discrimination because the courts did not differentiate between these various sex attributes.⁵⁰ In other words, if only effeminate males and not all males were treated differently, the courts did not consider such conduct discrimination “because of sex” because not all men suffered the harm.⁵¹

Millions of people fail to conform to this stereotyped conflation because they have incongruent characteristics. The incongruence may be related to anatomical or biological sex (intersex persons), sexual attraction (gays and lesbians), gender identity (transsex persons), gender behavior (effeminate men and masculine women), or gender role (male caregivers and female breadwinners). Although the inappropriate conflation of these attributes formerly resulted in courts denying protection to gays and lesbians, effeminate men, transsex persons, and women and men who alleged gender role discrimination, recently some courts have begun to understand why discrimination against sex and gender nonconformists violates Title VII and other statutes barring sex discrimination.⁵²

The gender nonconformity theory was first accepted in 1989 by the United States Supreme Court in *Price Waterhouse v. Hopkins*.⁵³ In *Hopkins*, the employer denied partnership to Ms. Hopkins not because she was a biological woman, but because she failed to act as a “feminine” woman should behave. The partners implied that her failure to conform to stereotypes of femininity blocked her path to partnership. Specifically, Hopkins was told that she overcompensated for being a woman and was “too macho.”⁵⁴ She was advised to stop using profanity, to take a class at charm school and to “walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.”⁵⁵ The Supreme Court ruled that discrimination against a woman because she failed to conform to gender stereotypes of femininity constituted sex discrimination under Title VII.

The Court’s acceptance of sex stereotyping as a form of impermissible sex discrimination reflects a more sophisticated understanding of the harms of sex-based discriminatory conduct. The holding also provides a theoretical basis that can enable seemingly diverse groups to present a unified challenge to all discriminatory practices that harm women and sexual minorities. Based on the *Hopkins* opinion, all individuals who suffer discrimination because they fail to conform to sex-related stereotypes should be able to prove that they have suffered impermissible sex discrimination.

⁵⁰ See Case, *supra* note 48.

⁵¹ See, e.g., *DeSantis*, 608 F.2d at 327; *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978) (holding that discrimination because of effeminacy does not fall within the purview of Title VII).

⁵² See discussion *infra* notes 57-59.

⁵³ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁵⁴ *Id.* at 235.

⁵⁵ *Id.*

Indeed, during the past few years, a number of groups that were consistently excluded from Title VII coverage before *Hopkins*, have been allowed to state a cause of action if their claim is appropriately framed as gender nonconformity or sex stereotyping discrimination. For example, some courts have allowed recovery to new mothers who suffer an adverse employment decision because their employers believe that they will fail to conform to the norm of the ideal worker.⁵⁶ Similarly, some courts have also granted recovery to men who suffer discrimination because they failed to conform to the norm of a male “breadwinner” when they sought time off for family care responsibilities.⁵⁷ Furthermore, gays, lesbians, and transsex persons, who before *Hopkins* consistently lost every Title VII case, are now successfully convincing many courts that they are victims of sex discrimination when they are harassed or otherwise discriminated against because they fail to conform to sex and gender norms.⁵⁸

The ability of this theoretical approach to unify groups seeking an end to discrimination against women and sexual minorities is illustrated in the following series of diagrams. The first figure illustrates the original conception of sex discrimination. Sex discrimination was limited to circumstances where men and women were treated differently.

ORIGINAL UNDERSTANDING OF SEX DISCRIMINATION

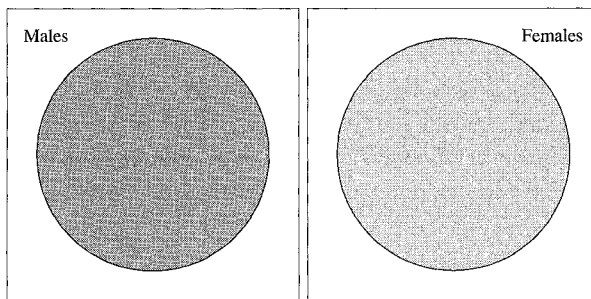


Figure 1

⁵⁶ See, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044-45 (7th Cir. 1999).

⁵⁷ See, e.g., *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001).

⁵⁸ See, e.g., *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), cert denied, 538 U.S. 922 (2003); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park West Bank & Trust*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081 (D. Minn. 2000); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000); *Doe by Doe v. City of Belleville*, 199 F.3d 563 (7th Cir. 1997), vacated 523 U.S. 1001 (1998); *Samborski v. West Valley Nuclear Servs.*, 1999 WL 1293351 (W.D.N.Y. Nov. 24, 1999); *Schmedding v. Tnemec Co. Inc.*, 187 F.3d 862 (8th Cir. 1999) (allowing people who were or who were perceived as being homosexual or transsexual to state a sex discrimination cause of action based upon a gender nonconformity theory).

The second figure illustrates the way in which society and legal institutions often inappropriately conflate the distinct concepts of sex, gender, sexual orientation, sexual identity, and gender role behavior. Under this inappropriate conflation, courts conclude that sex discrimination does not exist if men or women who fail to conform to societal sex and gender norms suffer from discrimination because of their nonconformity. The inappropriate conflation does not allow recovery, for example, if the discriminatory conduct is limited to only masculine women, women with large phalluses, women who want to have sex with other women, XY women, or women who prefer to occupy traditional male roles. Because the discrimination in these cases is limited to only some women, courts traditionally concluded that the discrimination could not be “because of sex.”

THE STEREOTYPE

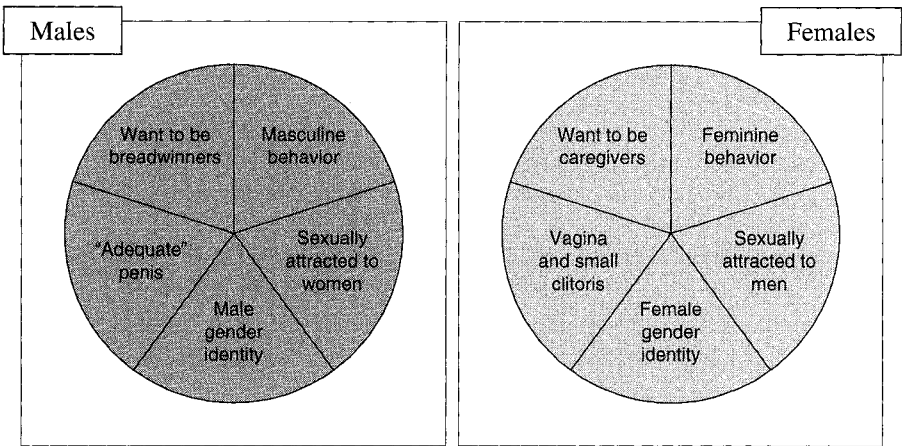


Figure 2

The third figure illustrates the situation in *Hopkins*. Ms. Hopkins was denied partnership not because she was a woman, but because she was a woman who failed to display feminine attributes. In *Hopkins*, the U.S. Supreme Court held that impermissible sex discrimination occurs when women suffer an adverse employment decision because they are considered too masculine based on stereotyped norms of femininity.

GENDER NONCONFORMITY
EFFEMINATE MEN AND MASCULINE WOMEN

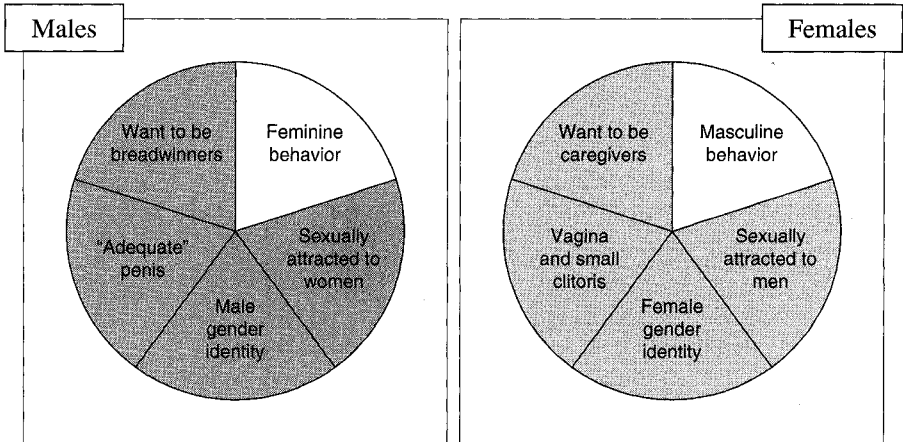


Figure 3

As indicated by recent court decisions, the *Hopkins* gender nonconformity theory should be equally available to gays and lesbians (figure 4),⁵⁹ transsex persons (figure 5),⁶⁰ men and women who fail to conform to the traditional breadwinner/caregiver stereotypes (figure 6),⁶¹ and intersex persons subjected to sex conforming surgery (figure 7).

⁵⁹ See, e.g. *Nichols*, 256 F. 3d 864; *Rene*, 305 F.3d 1061, *cert denied*, 538 U.S. 922; *Centola*, 183 F. Supp. 2d 403; *Montgomery*, 109 F. Supp. 2d 1081; *Ray*, 107 F. Supp. 2d 1165; *Doe by Doe*, 199 F.3d 563, *vacated* 523 U.S. 1001; *Samborski*, 1999 WL 1293351; *Schmedding*, 187 F.3d 862 (allowing people who were or who were perceived as being homosexual to state a sex discrimination cause of action based upon a gender nonconformity theory).

⁶⁰ See, e.g. *Rosa*, 214 F.3d 213; *Schwenk*, 204 F.3d 1187; *Smith*, 378 F.3d 566 (allowing transsex persons to state a sex discrimination cause of action based upon a gender nonconformity theory).

⁶¹ See, e.g. *Back*, 365 F.3d 107, 120; *Santiago-Ramos*, 217 F.3d 46, 57; *Sheehan*, 173 F.3d 1039, 1044-45; *Knussman*, 272 F.3d 625 (allowing mothers and fathers to state a cause of action based upon a gender nonconformity theory).

SEXUAL ORIENTATION NONCONFORMITY
GAYS AND LESBIANS

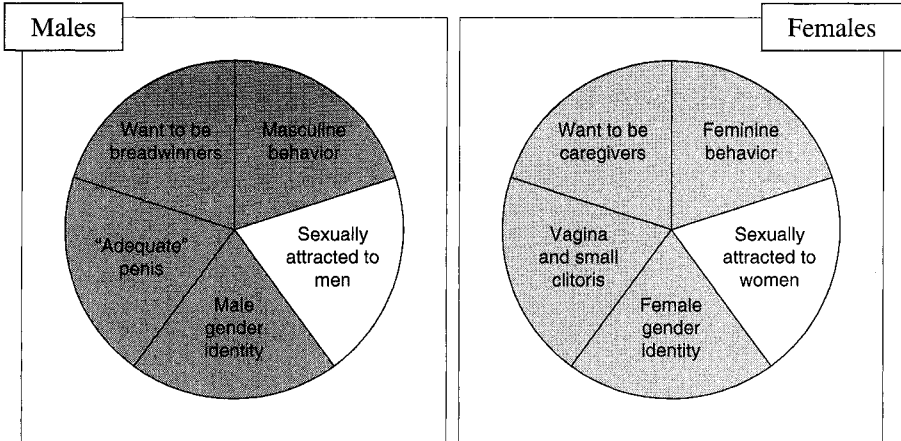


Figure 4

GENDER IDENTITY NONCONFORMITY
TRANSSEX PERSONS

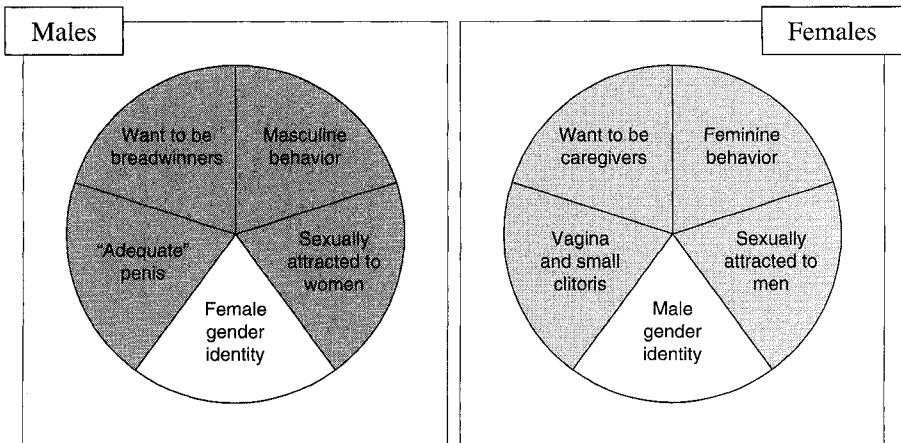


Figure 5

GENDER ROLE NONCONFORMITY
MALE CAREGIVERS AND FEMALE BREADWINNERS

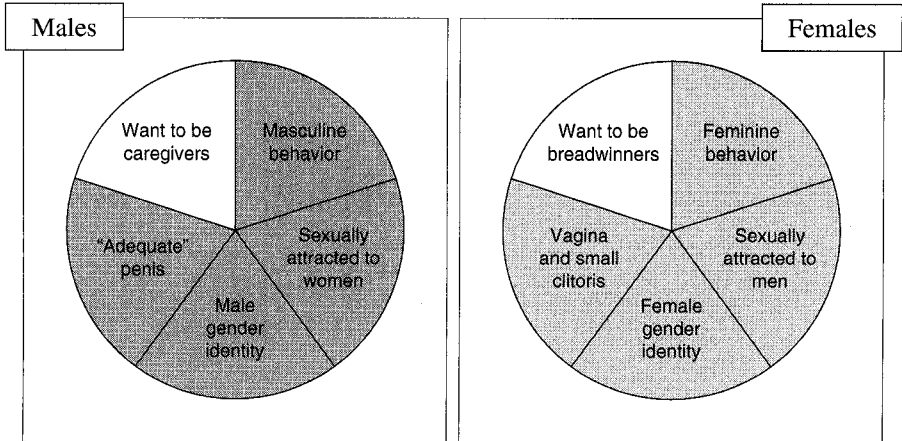


Figure 6

BIOLOGICAL SEX NONCONFORMITY
INTERSEX PERSONS

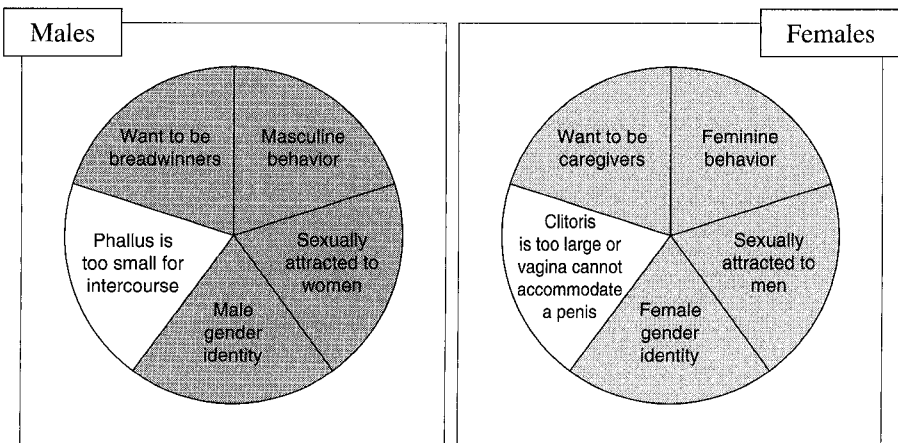


Figure 7

Figure 8 illustrates reality. Millions of men and women do not have all male or all female characteristics. Discrimination against people because of their failure to display all congruent features is a form of impermissible sex discrimination. It should be irrelevant whether the incongruity relates to gender, as it did in *Hopkins*, or another sex-related characteristic, such as sexual attraction, gender identity, gender role behavior, or biological attributes.

THE REALITY
MILLIONS OF PEOPLE DO NOT CONFORM
TO THE STEREOTYPE BECAUSE OF INCONGRUENT
SEX OR GENDER ATTRIBUTES

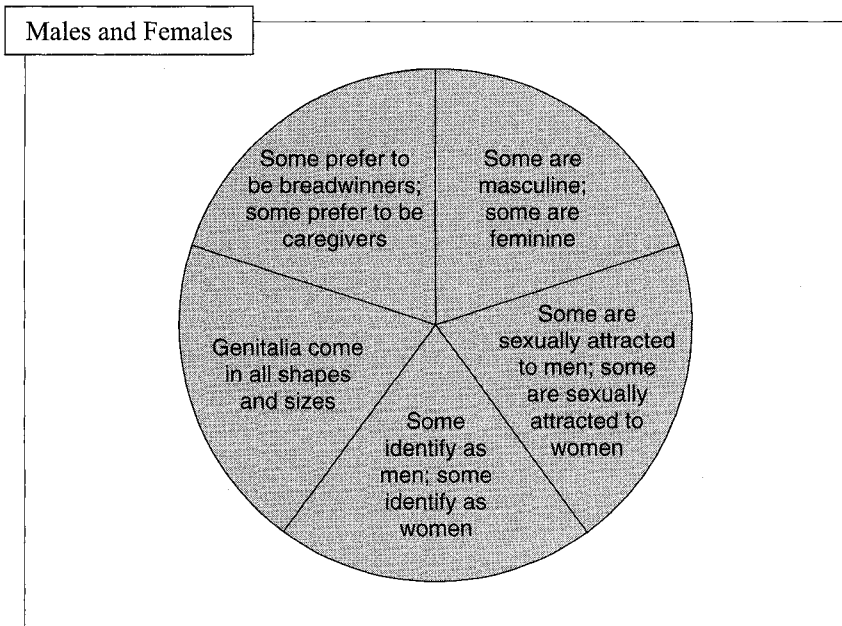


Figure 8

Groups fighting for gender equality have made significant strides in opening educational and job opportunities to both sexes. In addition, society has become more accepting of less restrictive gender boundaries. Despite these advances, however, gender inequality is still pervasive. To effectively combat sex and gender discrimination, courts and civil rights groups must recognize the commonalities shared by sex and gender nonconformists. Feminists, gays and lesbians, transsex persons, intersex persons, and men and women wanting to cross traditional gender roles can more effectively combat discriminatory practices if they recognize that

allowing discrimination against any of these groups to go unchallenged may eventually lead to greater discrimination against all these groups.

IV. CONCLUSION

Whenever people seek to alter long-standing presumptions, especially those related to sex and gender, it is difficult to determine the most effective action at any particular time. It is clear, however, that combating all forms of sex discrimination will require diverse organizations to join forces and gain a better awareness of the shared harms they suffer as sexual minorities. When groups such as masculine women, effeminate men, homosexuals, transsex persons, male caregivers, and female breadwinners are subjected to discriminatory actions, the underlying basis for the discrimination is due to their failure to conform to sex-related stereotypes. Similarly, when intersex children are subjected to surgery based upon the assumption that all men will prioritize the ability to penetrate over their ability to procreate, and all women will prioritize the appearance of their genitalia over their ability to engage in satisfactory sex, they are being subjected to gender nonconformity discrimination.

Unfortunately, many groups fighting to end discrimination fail to understand that the refusal to embrace the causes of other sexual minorities reinforces the belief that sex stereotyping is acceptable. For example, a rape crisis clinic recently refused to accept Ms. Nixon, a male-to-female transsex person, as a volunteer because she was not considered a “real woman.”⁶² When Ms. Nixon filed a law suit claiming discrimination, feminists argued that the lawsuit was “indicative of aggressive male behavior.”⁶³ In an interview about the legal action, one activist, opined that although transsex persons have joined forces with the gay and lesbian movement, the union was never a natural fit because it was about “who we are, not whom we are sleeping with.”⁶⁴

Civil rights activists need to understand that the fight is not just about who we are, whom we sleep with, how we behave, or what role in society we choose to occupy. Rather, it is about the ability to do all these actions free from discrimination. Ignoring the subordination of any individual group because of its failure to conform to acceptable gender and sex stereotypes will ultimately lead to the subordination of all who do not fit neatly into the male-female binary norm. Feminists, intersex activists, and GLBT organizations must combine their efforts to work towards the common goal of ending discrimination based upon stereotypes about appropriate sex and gender roles.

⁶² Jane Armstrong, *The Body Within: The Body Without*, GLOBE & MAIL, June 12, 2004, at F1, available at 2004 WLNR 18425455.

⁶³ *Id.*

⁶⁴ *Id.*