

PREGNANT “PERSONS”:  
THE LINGUISTIC DEFANGING OF  
WOMEN’S ISSUES AND THE LEGAL  
DANGER OF “BRAIN-SEX” LANGUAGE

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*“Women have had the power of naming stolen from us.”<sup>1</sup>*

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*“Linguistic imbalances are worthy of study because they bring into sharper focus real-world imbalances and inequities.”<sup>2</sup>*

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<sup>1</sup> MARY DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN’S LIBERATION* 8 (New paperback ed. 1985).

<sup>2</sup> ROBIN TOLMACH LAKOFF, *LANGUAGE AND WOMAN’S PLACE: TEXT AND COMMENTARIES* 69 (Mary Bucholtz ed., rev. and expanded ed. 2004).

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#### INTRODUCTION

In *Geduldig v. Aiello*, the Supreme Court of the United States held that pregnancy discrimination is not discrimination against women.<sup>3</sup> Differential treatment based on pregnancy, the Court said, merely distinguishes between a group consisting of pregnant women and a group consisting of “nonpregnant persons.”<sup>4</sup> The Court noted a “lack of identity between the excluded disability and gender as such.”<sup>5</sup> Thus was discrimination based on pregnancy—one of the quintessential differences in the capacities of female and male bodies—rendered something other than sex discrimination.

Such precedent is dangerous. Without gendered language, it is impossible to articulate that the group of “nonpregnant persons” consists itself of two distinct groups: men, who cannot become pregnant, and women, who can. As a result of the Court’s opinion, and that in similar cases such as *General Electric Co. v. Gilbert*,<sup>6</sup> only the latter group faced the danger of being linguistically erased as a distinct class and, in this erasure, stood at risk of pregnancy discrimination without recourse to constitutional protections.<sup>7</sup> Fortunately, the error

<sup>3</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2012)).

<sup>4</sup> *Id.* at 496 n.20.

<sup>5</sup> *Id.*

<sup>6</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

<sup>7</sup> For these concerns and others shared by Congress, see S. COMM. ON LABOR AND HUMAN RES., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 (1980), <https://babel.hathitrust.org/cgi/pt?id=pur1.32754076789159> [<https://perma.cc/3SX9-58VR>].

was swiftly reversed.<sup>8</sup> Congress itself overturned the *Geduldig* decision via the Pregnancy Discrimination Act of 1978.<sup>9</sup>

Linguistic erasure cannot diminish, let alone extinguish, the real, physical consequences of being female-bodied in a system of legalized misogyny.<sup>10</sup> “Language, of course, did not create the patriarchy, but language is a powerful method of inscribing the possible, shaping how and what we think, and justifying the status quo.”<sup>11</sup> The *Geduldig* decision did just that, using linguistic erasure to justify and legalize the sex-based misogyny of its age.

This erasure is ongoing. It is not a relic of some sexist linguistic past. The category “woman” has been ignored or subsumed into larger identity movements and academic categories. For example, all over the United States, “women’s studies” programs have been renamed in favor of the more neutral category of “gender studies.”<sup>12</sup> Even Harvard’s *Journal of Law and Gender* was founded as the “Harvard Women’s Law Journal.”<sup>13</sup>

This linguistic muddying is troubling. While it is true “that members of a particular race, class, gender, and sexual orientation have different experiences”

<sup>8</sup> 42 U.S.C. § 2000e(k) (2012).

<sup>9</sup> Today, the Act reads in relevant part: “The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of *pregnancy, childbirth, or related medical conditions*; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.” *Id.* (emphasis added).

<sup>10</sup> When I refer to legal discrimination against women, I refer specifically to the long history of legalized misogyny: that is, the hatred (Greek root “miso”) of women/females (Greek root “gyne,” coming from the ancient meaning of “begetter,” or one who gives birth). *Misogyny*, ONLINE ETYMOLOGY DICTIONARY, [http://www.etymonline.com/index.php?term=misogyny&allowed\\_in\\_frame=0](http://www.etymonline.com/index.php?term=misogyny&allowed_in_frame=0) [<https://perma.cc/R4LU-29RK>] (last visited Mar. 20, 2017); see also Thelma Charen, *Gynecology: An Etymological Note*, 59 BULL. MED. LIBR. ASS’N. 585, 585 (1971), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC197651/?page=1> [<https://perma.cc/5ZA5-REPS>].

<sup>11</sup> John A. McCarroll, *Male Privilege Redefined, Not Negated*, VOICE MALE MAG., <http://voicemalemagazine.org/summer-2014/male-privilege-redefined-not-negated> [<https://perma.cc/53DQ-5M8B>] (last visited Mar. 22, 2017).

<sup>12</sup> See, e.g., DOING GENDER IN MEDIA, ART AND CULTURE 1 (Rosemarie Buikema & Iris van der Tuin eds., 2007); Annette Schad-Seifert, *Samurai and Sarariiman: The Discourse on Masculinity in Modern Japan*, in CAN JAPAN GLOBALIZE? 200 (Arne Holzhausen ed., 2001); *Women’s Studies*, UNIV. OF AUCKLAND, <http://www.arts.auckland.ac.nz/en/about/subjects-and-courses/womens-studies.html?> [<https://perma.cc/GQG4-PS3S>] (last visited Mar. 22, 2017).

<sup>13</sup> *About JLG*, HARV. J. L. & GENDER, <http://harvardjlg.com> [<https://perma.cc/8JHA-32KR>] (last visited Mar. 22, 2017). But this is not an all-encompassing trend—fortunately. For example, UCLA retains both a women’s journal and a journal on gender identity. *Law Reviews & Journals*, UCLA LAW, <https://law.ucla.edu/student-life/law-reviews-and-journals> [<https://perma.cc/A9XH-PGH7>] (last visited Mar. 22, 2017).

that intersect with the reality of being female,<sup>14</sup> third wave feminism is misguided in its attempts to divorce feminist concerns and the language of womanhood from the reality of femaleness. Woman-specific language allows the law to describe sex-based protections—and without it, the law risks a lack of clarity that could result in the same kind of legalized misogyny that the Supreme Court promulgated just forty years ago.<sup>15</sup> Thus, this Note will discuss why the broad category of “gender” does not adequately cover what are still very much women’s issues—and why the term “woman” is still a legal necessity.

Legal feminists<sup>16</sup> argue for a legal system that will “avoid [the] use of gender-biased language, and retain gendered language when appropriate.”<sup>17</sup> There are undeniable legal consequences of living in a female body, and these are as real now as they were in *Geduldig*’s decade. Thus, women-specific language must be used in legal discussions of sex-based discrimination, including when remedying historical discrimination (such as creating equal pay legislation and ensuring women’s access to healthcare).<sup>18</sup> Such class-based language is necessary in feminist struggle. All persons born female, regardless of what other demographic categories to which we may belong, endure the material reality of being born female—with the biological, legal, and historical legacy attached to it. The concepts of “‘women as sex class’, and ‘women-centred analysis and political concerns’ . . . arose out of consciousness-raising in the 1960s and 1970s.”<sup>19</sup> Not only legal feminists, but all of us who advocate for the protection of women’s bodily autonomy must have the language to name the problem—a problem that is all too often, in the words of the popular Internet adage, “a government so small it fits inside [a woman’s] uterus.”<sup>20</sup>

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<sup>14</sup> Kathleen Kelly Janus, *Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory*, 20 DUKE J. GENDER L. & POL’Y 255, 268 (2013).

<sup>15</sup> See *Geduldig v. Aiello*, 417 U.S. 484 (1974), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2012)).

<sup>16</sup> For a brief overview of legal feminism, see Joanne Conaghan, *Reassessing the Feminist Theoretical Project in Law*, 27 J.L. & SOC’Y 351 (2000).

<sup>17</sup> Karen J. Sneddon, *Not Your Mother’s Will: Gender, Language, and Wills*, 98 MARQ. L. REV. 1535, 1539 (2015).

<sup>18</sup> I was tempted to adopt the phrase “sex-based oppression,” which is customary radical feminist usage, in this Note. However, misogyny is a matter of degree. We should distinguish between the misogyny experienced by women in the West, and that experienced by girls in countries where, for example, forced marriage and female genital mutilation are the norm. So, I have elected to use the less charged term “discrimination” where I am referring to the everyday legal and cultural sexism encountered in the developed world, while retaining the term “oppression” where it should be emphasized.

<sup>19</sup> See, e.g., Jeannie Wright et al., *The “F” Word: The Challenge of Feminism and the Practice of Counselling Twenty Years On*, 28 N.Z. J. OF COUNSELLING 87, 93 (2008).

<sup>20</sup> *A Government So Small It Fits Inside My Uterus*, WOMEN’S RTS. NEWS (Jan. 20, 2015) [www.viralwomen.com/post/womens\\_march\\_on\\_nashville\\_a\\_government\\_so\\_small\\_it\\_fits\\_inside\\_my\\_uterus](http://www.viralwomen.com/post/womens_march_on_nashville_a_government_so_small_it_fits_inside_my_uterus) [<https://perma.cc/SU4B-VJNL>].

However, legal language must *not* speak of sex or gender in a way that relies on stereotypical notions of masculinity and femininity, including alleged “inherent” differences in women’s and men’s brains. Cautioning against this kind of language use, early feminists like Charlotte Perkins Gilman articulated that “[t]here is no female mind. The brain is not an organ of sex. As well speak of a female liver.”<sup>21</sup> This language was useful in the late nineteenth century because it was this so-called “female mind” that held women back in the legal—and almost every other—sphere.<sup>22</sup> Gilman’s analogy is useful today because while differences in personality, expression, ability, and taste can certainly impact the ways in which women are disadvantaged,<sup>23</sup> the origins of sex discrimination are just that: biological sex. This Note explores how and why sex-based discrimination is still a rampant force—and how and why, in the fight against it, those advocating for the equal rights and treatment of all populations must have access to precise language.

Essentially, the law—and the reader—must distinguish between real versus specious sex differences. This is a fine line. Aware that a “true” distillation of the two concepts calls for a scientific, cultural, and philosophic conversation well beyond its scope, this Note focuses on the verifiable sex differences that *legally* disadvantage women: those based in biology, as exemplified in the *Geduldig* decision. In other words, the language of the law should acknowledge and constitutionally protect real, biological sex differences precisely because they are real: because they are based in the body—the only plane of reality that the law can effectively govern—and because they have historically imposed, and continue today to impose, material consequences on women. At the same time, the law should refuse to participate in the ages-old practice of stereotyping and disenfranchising the female sex based on assumed mental capacities. As this Note will examine, such stereotyping has long been based on the unscientific, unverifiable concept of “brain sex,” and has been used almost exclusively to exclude women from full participation in social and political life.<sup>24</sup>

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<sup>21</sup> CHARLOTTE PERKINS GILMAN, *WOMEN AND ECONOMICS* 149 (U.C. Press 1998) (1898).

<sup>22</sup> *See, e.g., infra* Parts I, II.

<sup>23</sup> *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989), for ways in which women have been legally discriminated against for *not* performing stereotypical femininity, and *Weinstock v. Columbia Univ.*, 224 F.3d 33, 39 (2d Cir. 2000), for ways in which they can be discriminated against *for* performing it.

<sup>24</sup> Such a distinction might be analogized to racial differences and the necessity of constitutional protection based on race. That is, there are real racial differences based in material reality—ancestry, skin color, etc.—that cannot be changed within one individual, differences that disadvantage people of color in the Anglo-American legal system. There are also specious racial differences based in the world of stereotype and pseudo-science, for example supposed differences in brain structure that white supremacists once did and might continue to use to claim that people of color have or lack certain inherent abilities. *See, e.g.,* Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a Social Problem Is Real*, 60 *AM. PSYCHOLOGIST* 16 (2005). The law should absolutely acknowledge the real differences, both to prevent further discrimination and to compensate for past discrimination.

In addition to returning to some of the root language of feminism, this Note's proposed legal framework is not dissimilar from that articulated by Justice Ruth Bader Ginsburg:

Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.<sup>25</sup>

The law must afford dignity to marginalized people. To that end, *all* historically disadvantaged groups—women, people of color, lesbians, gay men, bisexual people, transgender individuals, the disabled, the poor—must be able not only to speak in solidarity with one another, but also to speak about their issues with linguistic specificity. To do otherwise gives lawmakers the chance to bury issues in a tangle of unspecific, convoluted language—as in the blatantly sexist *Geduldig* decision.<sup>26</sup>

Part I of this Note discusses the historical use of the word "woman" in Anglo-American law, and why at times its absence and its distracting euphemisms have created problems for women's legal status. Part II offers a short survey of how legalized discrimination against women has been based on female biology. Historically, this biology included not only an "inferior" body but a consequently inferior "female brain." This Part also details the postmodern return of "brain-sex" language and the legal danger this concept has always imposed. Part III relies on this history to describe the legal consequences of living in a female body—with its assumed "female brain"—in the political climate of the early 21st century. This reality deserves specific language to acknowledge it—language feminists can use in the fight against the negative effects of that reality. The harassment suffered by modern feminists who attempt to name the problem of sex-based discrimination also lends support to the argument that censoring the word "woman" is inappropriate in feminist discourse, particularly in the context of legal feminism, which must acknowledge the history of sex-based discrimination in order to be effective. Part IV offers an international perspective of when it is appropriate, and even necessary, to use woman-specific language. The term "woman" is important for accurate discourse across diverse cultures and language. For example, the key international treaty on women's position in society can only operate effectively if woman-specific

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But it would be a grave injustice to even consider the specious. Because this is such an imperfect analogy, I mention it here for a contextual comparison, only.

<sup>25</sup> *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (citations omitted).

<sup>26</sup> Justice Anthony Kennedy noted the problem of linguistic non-specificity in his concurring opinion in a recent affirmative action case, highlighting how—given history and a racist status quo—Justice John Roberts' assertion that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" is "not sufficient." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007).

language is used, and is uniformly understood by all. Finally, Part V offers suggestions for continuing legal feminist discourse in the climate of postmodern identity.

## I. THE HISTORY OF THE WORD “WOMAN” IN THE LAW: CONSTITUTION TO COVERTURE TO CREDIT

### A. *The Founding’s Missing Women*

Male-centric language dominates Anglo-American law; together with legal history, this reveals “widely held views about women’s proper place.”<sup>27</sup> That place has only recently included higher education and legal participation. Given the cyclical nature of women’s rights,<sup>28</sup> it is foolish to think that sexist thinking could not reassert itself into modern law—especially when, through “scientifically” validated neurosexism, the process has already begun.<sup>29</sup>

The Declaration of Independence purports equality for “all men.”<sup>30</sup> And the Founders undoubtedly meant men, not women—despite Abigail Adams’s remonstrations to her husband to “remember the Ladies.”<sup>31</sup> In fact, just as this Note argues, Adams cautioned over two centuries ago that “[i]f perticular [sic] care and attention is not paid to the Ladies [sic],” the law will not acknowledge them, except to subject them to differential treatment and to make women’s husbands “head and master.”<sup>32</sup> In his response, John Adams wrote that any acknowledgement of women in the law would surely “subject [men] to the Despotism of the Peticcoat [sic]”—a response not dissimilar from that of many of today’s anti-feminists.<sup>33</sup>

<sup>27</sup> *Virginia*, 518 U.S. at 537.

<sup>28</sup> See generally JANE F. GARDNER, *WOMEN IN ROMAN LAW AND SOCIETY* (1986). For discussions of societies in which women once held prominent legal and social roles, see generally Caitlin Christine Maya Larson, *Viking Social Structure and Gender Roles in Scandinavia Based on Burials and Grave Goods* (2012) (unpublished B.S. thesis, University of Wisconsin-La Crosse), <https://core.ac.uk/download/pdf/10597635.pdf> [<https://perma.cc/Q663-8U4F>].

<sup>29</sup> See *infra* Part II.

<sup>30</sup> Black men and other men of color, of course, were also excluded by the Founders, and by many other officials and ordinary citizens since.

<sup>31</sup> Letter from Abigail Adams to John Adams (Mar. 31, 1776), <http://history.hanover.edu/courses/excerpts/165adams-rtl.html> [<https://perma.cc/LV7R-R46R>] (last visited Mar. 22, 2017). Given her position, it is not unthinkable that Adams objected to the Declaration’s specifying that Americans had “oppos[ed] with *manly* firmness” the English king’s tyrannies. THE DECLARATION OF INDEPENDENCE para. 7 (U.S. 1776) (emphasis added).

<sup>32</sup> Letter from Abigail Adams, *supra* note 31; *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981).

<sup>33</sup> Letter from John Adams to Abigail Adams (Apr. 14, 1776), <http://history.hanover.edu/courses/excerpts/165adams-rtl.html> [<https://perma.cc/LV7R-R46R>] (last visited Mar. 22, 2017).

As legal feminist Catherine MacKinnon explains, “constitutions have been almost exclusively man-made, and it shows.”<sup>34</sup> The original text of the U.S. Constitution uses the allegedly neutral term “person,” but it makes liberal use of male pronouns.<sup>35</sup> Even the Nineteenth Amendment, which enshrined into law the result of women’s decades-long fight to gain the right to vote, does not include the term “woman.”<sup>36</sup> And indeed, although the phrase “the right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex” led to the vote for women, it did not lead to the expansion of any other rights for early twentieth century American women. The Nineteenth Amendment has been suggested and rejected as a source for the advancement of woman’s rights—a fact that speaks to the limited use of language that does not specifically address women in the context of women’s liberation.<sup>37</sup>

The refusal to address women’s legal status at the founding permitted many legal abuses against women. For example, coverture defined married women first as entities entirely joined with their husbands—and thus unable to exercise their own legal or economic rights—and then, in a “corrupt[ion]” of the doctrine, as entities explicitly owned by their husbands.<sup>38</sup> The last vestige of this English common law doctrine, the so-called “marital rape exemption,” was only overturned in the United States in the 1970s.<sup>39</sup>

### B. Sexist Legal Language

Ironically, in historical instances where legal language did not leave women out, it specifically disadvantaged them. Many stereotypical, sexist expectations of women have been given legal precedence over the course of American legal history.<sup>40</sup> For example, Myra Colby Bradwell, and all of her sex, were

<sup>34</sup> Catharine A MacKinnon, *Gender in Constitutions*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 397 (Michel Rosenfeld & András Sajó eds., 2012).

<sup>35</sup> See generally U.S. CONST.

<sup>36</sup> U.S. CONST. amend. XIX.

<sup>37</sup> Sarah B. Lawskey, Note, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 Yale L.J. 783, 790 n.40 (describing that the Supreme Court’s “broad vision of the Nineteenth Amendment” has not been put “to further use”); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 553 (1923) (noting “the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences [“the ancient inequality of the sexes”] have now come almost, if not quite, to the vanishing point”).

<sup>38</sup> Suzanne McGee & Heidi Moore, *Women’s Rights and Their Money: A Timeline from Cleopatra to Lilly Ledbetter*, THE GUARDIAN (Aug. 11, 2014), <http://www.theguardian.com/money/us-money-blog/2014/aug/11/women-rights-money-timeline-history> [https://perma.cc/9KGD-LKPX].

<sup>39</sup> See Claudia Zaher, *When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 474 (2002).

<sup>40</sup> See, e.g., *Ex parte Virginia*, 100 U.S. 339, 365 (1879) (Field, J., dissenting) (comparing women to children in saying that Virginia’s exclusion of them as jurors does not “impair[]

deemed by nature unfit for the legal profession by Illinois in 1872.<sup>41</sup> The Supreme Court would not address this sexist precedent, nor any other discriminatory sex-based distinction, until *Reed v. Reed* in 1971—a full century after the *Bradwell* decision.<sup>42</sup>

Women’s “natural” meekness placed other legal burdens on them; for example, in negligence actions, they were held to a higher legal standard on that basis.<sup>43</sup> Judge Cooley stated in 1880: “a woman’s natural timidity and inexperience with dangers inclines her to be more cautious; and if we naturally and reasonably look for greater caution in the woman than in the man, any rule of law that demands less must be unphilosophical and unreasonable.”<sup>44</sup> This meant that “when the actor is a woman, an instruction that she is bound to observe the conduct of a woman of common and ordinary prudence, cannot be held legally erroneous because of being thus special.”<sup>45</sup> This legal precedent is based on sex stereotypes. Women, viewed as “naturally” timid, are disadvantaged legally by being held to a higher standard than her male counterparts. Not insignificantly, this Michigan precedent *has never been overruled*. Even today, women and men are held to different negligence standards based on stereotypes about the sexes’ inborn personalities.<sup>46</sup> Frustratingly, many jurors likely evaluate “reasonableness” based upon stereotypes of women and men; that is, they may ignore real versus specious sex differences. Thus, even today’s legal frameworks offer significant opportunity for over-use of stereotype.

### C. Legal Euphemisms for “Woman”

Frustratingly, where the word “women” should be used in the law, euphemistic language often substitutes. This may be the case because, as some linguists posit, the very word “woman” has developed a negative connotation.<sup>47</sup>

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their rights as citizens”); *Minor v. Happersett*, 88 U.S. 162, 178 (1874) (holding without even a brief equal protection analysis “that the constitutions and laws of the several States which commit [the right of suffrage] to men alone are not necessarily void”); *Bradwell v. State*, 83 U.S. 130, 133 (1872) (holding that women may be prohibited from practicing law); *Jackson v. Phillips*, 96 Mass. 539, 571 (1867) (allowing a decedent’s charitable gift to the abolitionist cause but refusing to allow the gift for the cause of advocating for women’s rights, under the guise that the latter has “no precedent”); *Mich. Cent. R.R. Co. v. Hasseneyer*, 12 N.W. 155, 157 (Mich. 1882) (holding that women may be held to a higher standard of caution due to “natural timidity”); *Dyett v. N. Am. Coal Co.*, 20 Wend. 570, 573 (N.Y. 1838) (using the term “feme sole”—“single woman”—in relation to the legal doctrine by which married and single women were treated differently under the law).

<sup>41</sup> See generally *Bradwell*, 83 U.S. 130.

<sup>42</sup> See generally *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>43</sup> *Hasseneyer*, 12 N.W. at 157.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

<sup>47</sup> Omi Morgenstern Leissner, *The Problem That Has No Name*, 4 CARDOZO WOMEN’S L.J. 321, 373 (1998).

There is a certain “avoidance of the use of the word ‘woman’” that may be caused by the “sexual” or “embarrassing” connotations of the word.<sup>48</sup> There is no denying that the word has both. After all, there is no more potent symbol of sex on the Las Vegas Strip than the six-foot trucks plastered with nearly-naked women. And at the same time, there is no more culturally embarrassing and shameful bodily function than that of menstruation.<sup>49</sup>

One common legal euphemism is the word “mother,” found often in pregnancy-related legislation and jurisprudence.<sup>50</sup> How inappropriate, in the context of abortion, to discuss whether the procedure is “necessary to preserve the life or health of *the mother*”—language that presupposed that the woman in question *is* a mother, rather than a woman deciding upon a medical procedure.<sup>51</sup> Those concerned with the equality of women urge that “[l]egislation, whether state or federal, should use ‘woman’ . . . rather than ‘mother.’”<sup>52</sup> This renders the “mother” an actual human being rather than the mere embodiment of a social or bodily function.<sup>53</sup> In such cases, the word “women” should be used to specify and humanize women in the language of the law.

#### D. Uses of “Woman” to Close the Legal Gap

Despite the historical use of the term “woman” to legally undermine the female sex, precedent shows that the specific term also has great power to instill protections.<sup>54</sup> Legal history indicates that “not all use of gendered language is inappropriate,” and in fact can be helpful—but that “deliberate choices need to be made to avoid perpetuating gender stereotypes.”<sup>55</sup>

For example, by 1900, each state had passed its version of the Married Woman’s Property Act, allowing married women some economic rights within marriage.<sup>56</sup> Understanding that such rights were by no means guaranteed to women, single or married, California passed a law in 1862 that explicitly “guaranteed that a woman who made deposits in her own name was entitled to

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<sup>48</sup> *Id.*

<sup>49</sup> See generally Tomi-Ann Roberts et al., “Feminine Protection”: *The Effects of Menstruation on Attitudes Towards Women*, 26 PSYCHOL. WOMEN Q. 131 (2002).

<sup>50</sup> See Lara M. Gardner, *A Step Toward True Equality in the Workplace: Requiring Employer Accommodation for Breastfeeding Women*, 17 WIS. WOMEN’S L.J. 259, 288 (2002).

<sup>51</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 912 (1992) (emphasis added).

<sup>52</sup> Gardner, *supra* note 50, at 288.

<sup>53</sup> By contrast, men are less often referred to as “the father” in cases concerning, for example, vasectomy, unless the man actually is the father of a child that has already been born. See, e.g., *Dehn v. Edgecombe*, 865 A.2d 603, 606 (Md. 2005) (using the word “father” as a verb, only); *Speck v. Finegold*, 408 A.2d 496, 505 (Pa. 1979) (using the word “father” to describe a man who received a vasectomy but then had a child); *Hays v. Hall*, 488 S.W.2d 412, 413 (Tex. 1972) (lacking even a reference to the word “father”).

<sup>54</sup> *Sneddon*, *supra* note 17, at 1554.

<sup>55</sup> *Id.* at 1537.

<sup>56</sup> *Id.* at 1549.

keep control of the money.”<sup>57</sup> Specifying rights by sex would not have been necessary had lawmakers not understood, even 150 years ago, that there are certain legal realities suggested by the word “woman”—and more dangerously, that without clarifying women as the subject of certain laws, the public may assume that the law concerns men, only.

The Married Woman’s Property Acts specifically named women in order to remedy past discrimination, suggesting that nineteenth and twentieth century lawmakers—from legal “proto”-feminists to the radical second wavers—successfully used the word “woman” to explicitly challenge the patriarchal system of Anglo-American common law that kept women legally subordinate to the men in their lives.<sup>58</sup> This type of linguistic specificity, while perhaps seeming sexist to our modern sensibilities that assume “equality” is the norm, was necessary to undermine the misogynistic connotations and expectations attached to the word “woman.” These attachments, while significantly diminished since these early American laws, have nonetheless survived into the year 2017.<sup>59</sup>

Even in the mid-twentieth century, protections under Lyndon B Johnson’s 1965 “affirmative action benefits [were not] expanded to cover women” until they did so explicitly in 1967.<sup>60</sup> In what is perhaps one of the most shocking of coverture’s lingering effects on contemporary young women, until the Equal Credit Opportunity Act of 1974,<sup>61</sup> “banks required single, widowed or divorced women to bring a man along to cosign any credit application.”<sup>62</sup> Banks could also severely “discount the value of [women’s] wages when considering how much credit to grant,” a practice that obviously disadvantaged women financially when compared with men.<sup>63</sup> Such insidiously sexist practices were acceptable in the United States as recently as forty years ago. And it was not until 2014 that, after forty-five years of inaction, the U.S. Department of Labor “updat[ed] its sex discrimination guidelines for federal contractors . . . to reduce

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<sup>57</sup> McGee & Moore, *supra* note 38.

<sup>58</sup> Sneddon, *supra* note 17, at 1549; *see also* McGee & Moore, *supra* note 38.

<sup>59</sup> *See infra* Part III.

<sup>60</sup> Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967) (specifying that “[i]t is desirable that the equal employment opportunity programs provided for in Executive Order No. 11246 expressly embrace discrimination on account of sex”); McGee & Moore, *supra* note 38.

<sup>61</sup> 15 U.S.C. § 1691(a) (“It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age . . . .”) (emphasis added).

<sup>62</sup> McGee & Moore, *supra* note 38.

<sup>63</sup> *Id.*

bias against women.”<sup>64</sup> This belies the anti-feminist assumption that the U.S. is a nation where, legally, sex does not matter.

Similarly, it is unlikely that the contemporary wage gap between women and men will be remedied until woman-specific legislation is passed, forbidding anything other than equal pay for women who do equal work.<sup>65</sup> After all, “[c]urrent United States Supreme Court rulings, that sex discrimination need only be judged with intermediate scrutiny, encourage judges’ personal opinions of appropriate sex roles to inform their decisions and are inadequate to eradicate sex stereotypes in law.”<sup>66</sup> Once the law specifically acknowledges that employers are forbidden to pay women lesser wages than similarly situated men, society will question why it took the nation so long to remedy the discrepancy—similar to how modern sensibilities find the sexist pre-1970s banking practices archaic.

The question remains: will such specificity be allowed? Or are legal feminists too cautious, now, to use the word “women” even in legislation that will help cure the remaining areas of unquestioned, legally permitted discrimination against women?

## II. THE ROOTS OF THE LEGAL SYSTEM’S MISOGYNY AND NEUROSEXISM

Why has legal discrimination against women thrived for so many centuries? Upon what basis did lawmakers decide to treat women and men differently?

Misogyny—including the legalized misogyny that prevented women, for example, from voting and from owning property—is rooted in the body.<sup>67</sup> The attitude may be broken down like this: women (are supposed to) give birth. Therefore, a woman’s natural role is in the home, taking care of her children (and husband, and parents, and guests, ad nauseum). Thus, she need not, for example, own property or engage in political or social endeavors. In this line of thought, woman’s capacity for pregnancy (whether the *individual* woman’s

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<sup>64</sup> Jana Kasperkevic, *New US Guidelines Look to Extend Protections for Female Federal Workers*, THE GUARDIAN (Jan. 29, 2015), <http://www.theguardian.com/money/2015/jan/29/new-guidelines-protections-female-federal-workers> [https://perma.cc/79L5-5BT9].

<sup>65</sup> For a discussion of the wage gap in the U.S. in the early twenty-first century, see *50 Years & Counting: The Unfinished Business of Achieving Fair Pay*, NAT’L WOMEN’S LAW CTR. (June 10, 2013), <http://nwlc.org/resources/50-years-counting-unfinished-business-achieving-fair-pay> [https://perma.cc/NX7M-B74G].

<sup>66</sup> Catherine Jean Archibald, *De-Clothing Sex-Based Classifications—Same-Sex Marriage Is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1, 8 (2009).

<sup>67</sup> See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women art. 5, Dec. 18, 1979, 1249 U.N.T.S. 17 [hereinafter CEDAW] (citing “prejudices . . . based on the idea of the inferiority or the superiority of either of the sexes”); ANDREA DWORKIN, WOMAN HATING (1974).

procreative ability is intact or not) and the resulting position of motherhood is what makes her ill-suited for full legal inclusion.

This sex-based oppression has occurred in every historical age, and our current era is no different. And its counterpart, equally insidious, is the idea that it is justified not only by women's anatomical differences, but also by women's very brains.

A. *Affirming Physical Reality and Debunking Brain Sex*

The demeaning of women's abilities beyond the sphere of the home, and the resulting, purposeful legal disadvantage, is based on the fear and mistrust of women's bodies.<sup>68</sup> The feminist movement has spent well over a century disproving the myth that women are biologically unsuitable (whether by our anatomy or by the nature of our "female brains") for social, political, religious, military, academic, or scientific life.<sup>69</sup> Part of the feminist fight has been demonstrating that female anatomy—and in particular, the capacity to become pregnant—does not create such steep differences in IQ, in ability, in personality, or in any other measurable area that it makes women inherently unsuitable for any area of private or public life.<sup>70</sup> Rather, feminists have argued, these differences are socially created, and thus any inequalities must have a social remedy.<sup>71</sup> Many scientists agree and pose the question: society "train[s] boys and girls in really different ways . . . . How much are we hard-wiring their brains through this learning?"<sup>72</sup>

The myth of the quintessential "female brain" is the other side of the coin in sex-based discrimination. In denying women a full place as citizens, judges and lawmakers have relied for centuries on misogynistic assumptions about the female's physical and mental strength. The long assumption that "males are designed to advance civilization, females to nurture it . . . male brains, on aver-

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<sup>68</sup> For an account of the biblical and Greek mythological distrust of women and our female bodies, see MARILYN YALOM, *A HISTORY OF THE WIFE* 1–44 (2001). In Western culture, in particular, "Eve's creation from Adam's rib has fueled the age-old argument that women is intrinsically inferior to man." *Id.* at 3. For a takedown of the historical, "scientific" proof that women are inferior, see generally LONDA SCHIEBINGER, *NATURE'S BODY: GENDER IN THE MAKING OF MODERN SCIENCE* (Rutgers Univ. Press 2d ed. 2004) (1993). See generally NANCY TUANA, *THE LESS NOBLE SEX* (1993).

<sup>69</sup> See, e.g., Sharon Begley, *He, Once a She, Offers Own View on Science Spat*, WALL ST. J. (July 13, 2006), <http://www.wsj.com/articles/SB115274744775305134#articleTabs%3Darticle> [<https://perma.cc/SWE6-KJHX>].

<sup>70</sup> Bobbi J. Carothers & Harry T. Reis, *Men and Women Are from Earth: Examining the Latent Structure of Gender*, 104 J. PERSONALITY & SOC. PSYCHOL. 385, 403 (2013); see also *infra* Part II.B.

<sup>71</sup> See *infra* Part II.B.

<sup>72</sup> Lise Eliot, *Sex, Brain, and Culture: The Science and Pseudoscience of Gender Difference*, at 36:06, YouTube (Jan. 29, 2015), <https://www.youtube.com/watch?v=t81VjopMhas> [<https://perma.cc/6AXW-CUWZ>].

age, to understand the world, female brains to understand people” has held back women’s advancement in society since this nation’s founding, and before.<sup>73</sup> Indeed, “neurological explanations and justifications for the status quo are as old as brain science itself, and are continuously renewed.”<sup>74</sup> Even when a sexist scientific hypothesis is disproven, “another one is there to take its place . . . . For feminists, this means that every generation has to take up a fight that is both new, and old.”<sup>75</sup>

Despite what some postmodernism thinkers claim, “modern medical science”<sup>76</sup> does not disavow the reality of sexual dimorphism. Bodies, with very rare exceptions,<sup>77</sup> are sexed. And it is the female sex that has suffered—in many spheres including the legal—due to the capacity to give birth.<sup>78</sup> This legal disparity survives—for example, in the push by judges who vowed in all other areas to uphold *stare decisis* but who then vowed to “overturn” the precedent of women’s right to abortion.<sup>79</sup> And yet, postmodern legal scholars attempt to separate sex from legal discrimination, for example by writing about transgender people as “the poster children for the new sex discrimination”<sup>80</sup>—suggesting that “plain old” sex discrimination is somehow a worry of the past. Part IV, *infra*, demonstrates that this is not so.<sup>81</sup>

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<sup>73</sup> Cordelia Fine, *How the New Neurosexism Helps Sustain the Status Quo*, at 18:04, YOUTUBE (Nov. 11, 2011), <https://www.youtube.com/watch?v=ZgE8p6n9Z7o> [<https://perma.cc/6WEX-W924>].

<sup>74</sup> *Id.* at 14:25.

<sup>75</sup> *Id.* at 14:41.

<sup>76</sup> See M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 VT. L. REV. 943, 980 (2015).

<sup>77</sup> Thorough research estimates the intersex population at about 0.05 percent of the population when considering genital variation, and as high as 0.2 percent of the population when considering other, more subtle conditions such as Klinefelter and androgen insensitivity. See *How Common Is Intersex?*, INTERSEX SOC’Y OF N. AM., <http://www.isna.org/faq/frequency> [<https://perma.cc/U2DF-7J5V>].

<sup>78</sup> See *supra* Part I; *infra* Part III.

<sup>79</sup> *First Among Equals*, by Kenneth Starr: *On Abortion*, ON THE ISSUES, [http://www.ontheissues.org/Archive/First\\_Among\\_Equals\\_Abortion.htm](http://www.ontheissues.org/Archive/First_Among_Equals_Abortion.htm) [<https://perma.cc/2FDU-T6WB>] (last visited Mar. 28, 2017) (“Antonin Scalia: Opposes Roe v. Wade despite stare decisis precedent”).

<sup>80</sup> Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 912 (2014).

<sup>81</sup> I find the idea of a “new” sex discrimination, taking the focus away from women—who founded and still very much need a movement against sex discrimination—as offensive and legally unsound as the idea that lesbian/gay/bisexual rights somehow constitute “the new civil rights movement,” when black people and others of color still very much struggle for their rights. The LGBT (Lesbian, Gay, Bisexual, Transgender—sometimes intersex and asexual communities choose to consider themselves part of this acronym) movement is its own movement, though it may borrow from, lend to, and run concurrently with the civil rights movement. In the same way, movements for intersex and transgender rights, as complicated and “new” in precedent as they are, should not be subsumed into—or worse, overshadow—existing paradigms of sex discrimination, despite any parallels.

What modern medical science *does* debunk is the concept of “brain sex”: that sex-stereotyped mind, from which the so-called “natural timidity” of women stems. And it is scientists—not courts, as one writer claims—who have the capacity to determine whether brain sex is real, and thus whether the law should classify individuals based on upon it: that is, whether “gender identity or self-identity is biologically based and a core, immutable factor.”<sup>82</sup> Courts should rely on the most up-to-date, solid research when they write decisions—not on media hype and half-explained scientific texts. As stated by Dr. Lise Eliot, “we hear a lot about gender and the brain, but . . . [t]he media loves a controversy, and the media loves noise. And so the media often makes a lot more noise about gender and the brain than actually exists in our research.”<sup>83</sup> The “pop-science version of brain sex” may be “where the money” is, but courts must not be misled by titles like *Why Men Don’t Listen and Why Women Can’t Read Maps*.<sup>84</sup>

Good science shows that brain sex does not exist—and is therefore an inappropriate model for determining one’s legal status.<sup>85</sup> The language of the “female brain” has been used—historically, improperly—to deny women rights to employment and education—Myra Bradwell the ability to practice law<sup>86</sup> and other women the ability to attend the Virginia Military Institute (VMI), at least until legal feminist Justice Ruth Bader Ginsburg refused to accept reliance on old stereotypes to exclude women from VMI’s “adversative method of training” in 1996.<sup>87</sup> But, simply put, there is no such thing as a female brain.<sup>88</sup>

Even today, stereotypical differences are exaggerated, and the plasticity of the brain is vastly underestimated.<sup>89</sup> Though the sizes of female and male brains may differ, large-scale studies show that sex differences in specific structures are “minute” when corrected for overall brain size.<sup>90</sup> This is true even in behavioral studies, where much of the supposed “hard-wired” differences between women and men have been found.<sup>91</sup> For example, a test of nineteen female and nineteen male subjects showed a difference in one language task out of three,

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<sup>82</sup> Levasseur, *supra* note 76, at 980–81 n.214.

<sup>83</sup> Eliot, *supra* note 72, at 4:36.

<sup>84</sup> *Id.* at 7:28.

<sup>85</sup> For several articles discussing this idea from the point of view of contemporary feminists, see generally *Brain Sex Does Not Exist*, SEX MATTERS, <http://sexnotgender.com/brain-sex-does-not-exist> [<https://perma.cc/2FL6-SGGH>] (last visited Mar. 28, 2017).

<sup>86</sup> See generally *Bradwell v. State*, 83 U.S. 130 (1872).

<sup>87</sup> See *United States v. Virginia*, 518 U.S. 515, 540, 542–43 (1996).

<sup>88</sup> Eliot, *supra* note 72, at 26:26.

<sup>89</sup> Christopher Bergland, *The Male and Female Brain Are More Similar than Once Assumed*, PSYCHOL. TODAY (Nov. 2, 2015), <https://www.psychologytoday.com/blog/the-athletes-way/201511/the-male-and-female-brain-are-more-similar-once-assumed> [<https://perma.cc/VQ4S-WZ6M>].

<sup>90</sup> Eliot, *supra* note 72, at 38:37–39:19.

<sup>91</sup> *Id.* at 42:00–43:00.

and it has been cited over 1,200 times; but research since then, including a meta-analysis that examined a much larger number of subjects, demonstrates absolutely *no* difference in language task ability between the sexes—that meta-analysis being cited only about 100 times.<sup>92</sup> “Even in textbooks today, [authors] continue” to cite the older, smaller studies, and not the updated science.<sup>93</sup>

Additionally, brains actually change due to experience. Take these two examples: First, the brains of taxi drivers in London physically develop, adding gray matter and assisting them in storing vast amounts of navigational information; and the longer cabbies work, the larger their hippocampuses grow.<sup>94</sup> Second, one study wherein “the individuals only differed in the religion in which they were reared” yielded extremely different brain scan results. The way human beings are raised certainly affects these seemingly “biological” differences.<sup>95</sup>

Neuroscientific studies, specifically those claiming that the brain dictates sex, have been widely debated and disputed for various methodological flaws.<sup>96</sup> Furthermore, scientists’ own sexist and political biases affect their research—and these biases often see sex differences where there are none.<sup>97</sup> Brain studies may rely upon “spurious” or chance results that exaggerate difference, or that fail to report when there is no observable difference.<sup>98</sup> A 2005 Yale University study claiming brain differences in language processing had a sample size of only thirty-eight; it was debunked by a later lateral study with a sample size of over 2,000.<sup>99</sup> Even observed differences in structures, or in brain activity lighting up on an MRI, might not actually mean anything at all—but scientists attribute meaning to them based on their biases.<sup>100</sup> These differences are then exaggerated by a society that relies upon and even delights in gender roles, whose own sexist bias is then confirmed.

The troubling implication of ignoring up-to-date brain science is that the conclusions society comes to about the so-called scientifically proven “sex” of

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 43:00.

<sup>94</sup> *Taxi Drivers’ Brains ‘Grow’ on the Job*, BBC NEWS (Mar. 14, 2000, 3:51 PM), <http://news.bbc.co.uk/2/hi/677048.stm> [<https://perma.cc/A22A-2EB3>].

<sup>95</sup> Eliot, *supra* note 72, at 45:51–46:17.

<sup>96</sup> See generally REBECCA M. JORDAN-YOUNG, *BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES* (2010); Katherine S. Button et al., *Power Failure: Why Small Sample Size Undermines the Reliability of Neuroscience*, 14 NATURE REVIEWS: NEUROSCIENCE 365 (2013), <http://www.nature.com/nrn/journal/v14/n5/full/nrn3475.html> [<https://perma.cc/RRK2-REZR>]. See also Eliot, *supra* note 72, at 19:21, 19:55 (citing a study in which “sex differences” could not be discerned in the brain at 500 subjects, but in which “very, very tiny” sex differences were suggested at 1,000 subjects).

<sup>97</sup> See Fine, *supra* note 73, at 22:54–23:05.

<sup>98</sup> *Id.* at 20:24–21:10.

<sup>99</sup> *Id.* at 21:46–23:58.

<sup>100</sup> Eliot, *supra* note 72, at 10:27, 16:55, 18:28, 19:21, 19:55.

our brains “has political implications.”<sup>101</sup> Just like the *Bradwell* decision, pseudo-science about sex differences in the brain have spawned policy decisions that impact the next generation; for example, Dr. Lise Eliot calls out authors who make “authoritative” claims based on studies that are either faulty, or which have been misinterpreted by the media—claims that then impact the way schoolchildren are taught.<sup>102</sup> Leonard Sax, who wrote an education-based book called *Why Gender Matters*, “has a little footnote to cite this claim, and the claim is based on one teeny little study with nine boys and ten girls,” not even looking at the area (emotion) on which the author makes his claim.<sup>103</sup> “He’s using these ideas about sex, these claims . . . to actually advocate for gender segregation” in public education, an idea which has had “a very fast growth trajectory in our public schools in the last ten years.”<sup>104</sup> Indeed, “he uses our taxpayer dollars . . . to train our schoolteachers in this gender pseudo-science”—meaning that the pop science about brain sex is having a negative legal impact on our children even now.<sup>105</sup>

Postmodern thinkers will undoubtedly agree with Sax: in particular, those who believe that “gender identity,” meaning the internal sense of being a woman or man, “is ‘biological’ and the primary determinant of sex.”<sup>106</sup> Such gender theorists often use the famous but discredited 1995 study by Zhou et al. to prove the soundness of the brain-sex model.<sup>107</sup> The Zhou study claimed to demonstrate steep differences between biological males who identified as men and those who identified as transgender women.<sup>108</sup> It has since been debunked.<sup>109</sup> Not only was its small sample size problematic, but its flawed methodology measured brain differences only of transgender women who, as adults, had been on artificial sex-reassignment hormones, one of the factors in brain plasticity, for many years.<sup>110</sup> Other recent studies demonstrate that this small sampling size has been a problem in brain research in general, and that the bigger picture shows that differences in brain structure and function are negligible if indeed they exist at all.<sup>111</sup> Indeed, regarding transgender people, “brain re-

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<sup>101</sup> Fine, *supra* note 73, at 18:54–19:27.

<sup>102</sup> Eliot, *supra* note 72, at 9:50.

<sup>103</sup> *Id.* at 10:06–10:46.

<sup>104</sup> *Id.* at 13:07.

<sup>105</sup> *Id.* at 13:36.

<sup>106</sup> Levasseur, *supra* note 76, at 980.

<sup>107</sup> Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and its Relation to Transsexuality*, 378 NATURE 68 (1995).

<sup>108</sup> *Id.*

<sup>109</sup> See Anne A. Lawrence, *A Critique of the Brain-Sex Theory of Transsexualism*, DR. ANNE LAWRENCE ON TRANSSEXUALISM AND SEXUALITY (2007), [http://www.annelawrence.com/brain-sex\\_critique.html](http://www.annelawrence.com/brain-sex_critique.html) [<https://perma.cc/4XNV-5C3R>].

<sup>110</sup> *Id.*

<sup>111</sup> Bergland, *supra* note 88. For a further discussion of exaggerated differences in female and male brains and the trouble these assumed differences have caused, see generally LISE

search hasn't really caught up yet" to the large-scale meta-analyses that have disproven brain-sex differences.<sup>112</sup>

Alternately, postmodern gender theorists may rely upon the famous but misinterpreted case of David Rhymer.<sup>113</sup> Rhymer's circumcision resulted in an accidental amputation of his genitals; he was raised as a girl, but was never happy as a girl.<sup>114</sup> But this is not the full story of male infants who suffer a circumcision accident or a congenital defect and are then raised as girls.<sup>115</sup> Rhymer was switched to a "female identity" at two years old.<sup>116</sup> On the other hand, "the majority" of male infants who are switched to a female "identity" while they are still infants are "happy with their female identity."<sup>117</sup>

Thus, although "gender," in the sense of personality and conformance with or resistance to sex stereotypes, may be "truly between the ears, not between the legs,"<sup>118</sup> sex is *not* between the ears. It is a physical reality with material and legal consequences, especially for women. Thus, those who "endorse[] gender identity as the sole criterion for legal sex"<sup>119</sup> have been severely misled by bad science and pop psychology.

Because "science enjoys great authority in our society," legal feminists should beware of this shoddy science and how it impacts the legal movement toward sex equity.<sup>120</sup> Legal feminists must acknowledge that "neurosexism is slowing us down" in terms of progress toward true legal and social equality.<sup>121</sup> Indeed, as even the proponents of the legal brain-sex model admit, "[i]ncorporation of an understanding of sex-based neurological and cognitive differences could serve as a backdoor for legal discrimination against women premised on 'scientific fact.'"<sup>122</sup> In determining whether such a result would be acceptable, society might well consider a question posed so poignantly by Professor Cordelia Fine: "What does it say about political values, that we seem to care so little" that the science of sex differences in the brain is not always—or even usually—sound?<sup>123</sup>

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ELIOT, PINK BRAIN, BLUE BRAIN: HOW SMALL DIFFERENCES GROW INTO TROUBLESOME GAPS— AND WHAT WE CAN DO ABOUT IT (2010).

<sup>112</sup> Eliot, *supra* note 72, at 1:12:38.

<sup>113</sup> *Id.* at 34:49.

<sup>114</sup> *Id.* at 34:55.

<sup>115</sup> *Id.* at 35:20.

<sup>116</sup> *Id.* at 35:17.

<sup>117</sup> *Id.* at 35:43.

<sup>118</sup> Blaise Vanderhorst, *Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex*, 9 HARV. L. & POL'Y REV. 241, 245 (2015).

<sup>119</sup> *Id.*

<sup>120</sup> Fine, *supra* note 73, at 50:45.

<sup>121</sup> *Id.* at 51:57.

<sup>122</sup> Vanderhorst, *supra* note 117, at 272.

<sup>123</sup> Fine, *supra* note 73, at 35:40.

*B. Legalized Neurosexism*

Neurosexism, a relatively new term that might be used to describe the age-old sex-stereotyping of the *Bradwell* decision and that today describes such gender propaganda pieces as *Men Are from Mars, Women Are from Venus*,<sup>124</sup> draws attention to the mistaken belief that because women and men are biologically different, their brains function in different ways—and that these differences are what make human beings “women” and “men,” respectively.<sup>125</sup> It is true that there are some measurable differences in brain mass due to different cranial sizes among the sexes.<sup>126</sup> In addition, like the London taxi drivers, the brains of women and men *develop* differently due to different societal expectations and experiences.<sup>127</sup> Neural plasticity does lead to differences between the brains of the sexes by the time an individual reaches adulthood.<sup>128</sup> Indeed, “learning and plasticity are a much greater determinate” of sex differences in behavior.<sup>129</sup> However, there is no inherent difference in ability, IQ, personality, taste, or any subjective characteristic of the individual determined by a “sexed” brain.<sup>130</sup>

When scientists exaggerate or even fabricate brain-sex differences—when they give in to neurosexism—“they license others to do the same.”<sup>131</sup> Educators, businesspeople, and lawmakers “are listening” when scientists claim “hard-wired differences” in female and male brains.<sup>132</sup> Faulty studies of brain sex have led even respected Cambridge scholars to suggest that women are simply intrinsically less able to do hard science and math.<sup>133</sup> This, of course, has political and legal implications. How might such studies impact constitutional equal protection issues—especially given that, according to Supreme Court jurisprudence, when there is a disagreement among scientists, states are permitted to choose the interpretation they will enshrine in the law?<sup>134</sup>

It should concern legal feminists that neurosexist assumptions might be so enshrined. This is especially true given that those who believe gender differ-

<sup>124</sup> See generally JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS* (20th anniv. ed. 2012) (1992). Interestingly, Gray “is still a huge industry, even though the place he got his Ph.D. from was never accredited . . .” Eliot, *supra* note 72, at 9:25.

<sup>125</sup> See CORDELIA FINE, *DELUSIONS OF GENDER* xviii (2011).

<sup>126</sup> See *id.* at xxiv, 143. See generally JORDAN-YOUNG, *supra* note 95.

<sup>127</sup> FINE, *supra* note 134, at 236.

<sup>128</sup> See *id.*

<sup>129</sup> Eliot, *supra* note 72, at 28:08.

<sup>130</sup> See generally FINE, *supra* note 134.

<sup>131</sup> Eliot, *supra* note 72, at 31:02.

<sup>132</sup> *Id.* at 34:45.

<sup>133</sup> *Id.* at 25:54.

<sup>134</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (affirming that “[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty”).

ences are hard-wired are “more confident that society treats women fairly.”<sup>135</sup> This has obvious political and legal ramifications. Why fight for women’s legal equality if it already exists? Or that, given our “female brains,” women have already come as far as we can? But legal feminists know this is not true.<sup>136</sup> Thus, the brain-sex model should be of concern.

Legal feminists have relied on the unscientific nature of the once-undisputed concept of stereotypical sex differences—successfully—to advocate for women’s full personhood under the law.<sup>137</sup> They have demonstrated that relying on biology is inappropriate in legislating, except where there are anatomical or historical reasons for doing so (e.g., pregnancy accommodations, or remedying historical discrimination against women).<sup>138</sup> “[J]ustifying differential treatment by citing differences in neural anatomy or function” is equally inexcusable—because it is not anatomically accurate to rely on the “sexed brain” model.<sup>139</sup> In fact, that is the very model against which legal feminists have fought.

For example, it is the neurosexist belief that women are not equipped for certain of life’s less delicate experiences that drove Justice Kennedy to suggest—not even a decade ago—that women’s mental health needs special attention in abortion matters, lest the woman suffer “severe depression and loss of esteem.”<sup>140</sup> Justice Ginsburg rightly criticized this focus on women’s “fragile emotional state.”<sup>141</sup> Justice Kennedy’s assertion of fragility is unsustainable; though the number is impossible to pin down with certainty, approximately 1.5 percent of women of childbearing age have an abortion every year—and research suggests that as many as 30 percent of American women undergoes the procedure at some point in her lifetime.<sup>142</sup> Surely, such a large portion of Amer-

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<sup>135</sup> FINE, *supra* note 134, at 185.

<sup>136</sup> See *infra* Part III.A.

<sup>137</sup> See, e.g., *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 391 (1973) (prohibiting advertising jobs by indicating the sex of the hiree); *Roe v. Wade*, 410 U.S. 113, 114 (1973) (affirming women’s constitutional right to abortion); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (relying on Title VII to prohibit employers from refusing to hire women with small children despite hiring men with small children).

<sup>138</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 556 (1996) (requiring an “exceedingly persuasive justification” for differing treatment of the sexes, and rejecting gender stereotypes as being exceedingly persuasive).

<sup>139</sup> Bobbi Carothers & Harry Reis, *The Tangle of the Sexes*, N.Y. TIMES (Apr. 20, 2013), <https://nyti.ms/2kjKVrO> [<https://perma.cc/W5KA-GAQU>].

<sup>140</sup> *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). The decision to get an abortion has been said, somewhat condescendingly, to be “a decision so fraught with emotional consequence.” *Id.*

<sup>141</sup> *Id.* at 183–84 (Ginsburg, J., dissenting).

<sup>142</sup> See, e.g., William Robert Johnston, *Percentage of United States Women Who Have Had Abortions*, JOHNSTON ARCHIVE, [http://www.johnstonsarchive.net/policy/abortion/uslifetime\\_ab.html](http://www.johnstonsarchive.net/policy/abortion/uslifetime_ab.html) [<https://perma.cc/UJS2-B8QW>] (last visited Mar. 29, 2017); 1 IN 3, <http://www.1in3campaign.org> [<https://perma.cc/9TRD-R5K4>] (last visited Mar. 29, 2017); *Induced Abortion*

ican women do not suffer from “severe” mental illness as the result of a routine procedure.

It is also neurosexism that allows states such as Arizona and Arkansas not merely to permit but to *mandate* that doctors give women “misleading information” about the abortion procedure.<sup>143</sup> For millennia, misogynistic thinking has assumed that the female mind is easily misled—and furthermore, that if it is misled, it can only be to her good, because her life should be directed for her.<sup>144</sup> The assumption is that somehow, she cannot know her own greater good.<sup>145</sup>

It would be a fatal blow to all feminisms to further legalize neurosexism, based as it is upon a scientifically indefensible conclusion.<sup>146</sup> “Language use constructs reality,” and constructing legal reality with brain-sex language has already harmed many women.<sup>147</sup> Women are not women because we have a “female brain”; and we do not suffer the legal misogyny that, for example, denies them the right to abortion, contraception, or female-specific medical care because of their “female brains.” Women suffer this legal misogyny due to the double-sided coin of female anatomy and the assumption that “female brains” limit women’s abilities.

This is why it is vital that legal feminists maintain woman-specific language when addressing these—and any other—women’s issues. The legislature and judiciary must not be allowed to give effect to stereotypical thinking of the kind that claims women, by their anatomy or neurology, are “just always . . . very sensitive”<sup>148</sup>—“naturally timid”—or any other stereotypically feminine description. This kind of thinking has already damaged women’s position in the law, and we are only now undoing that damage.

“The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”<sup>149</sup> The law cannot tolerate a postmodern interpretation of brain sex that may well send the women’s movement back decades. It cannot permit stereotypical sex differences to reinsert themselves as

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in the United States, GUTTMACHER INST. <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states> [<https://perma.cc/W9QU-XSHE>] (last visited Mar. 29, 2017).

<sup>143</sup> Editorial, *The Reproductive Rights Rollback of 2015*, N.Y. TIMES (Dec. 19, 2015), [http://www.nytimes.com/2015/12/20/opinion/sunday/the-reproductive-rights-rollback-of-2015.html?\\_r=0](http://www.nytimes.com/2015/12/20/opinion/sunday/the-reproductive-rights-rollback-of-2015.html?_r=0) [<https://perma.cc/N76V-TWZM>].

<sup>144</sup> For discussions of legal paternalism toward women, see *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); IN TENDER CONSIDERATION: WOMEN, FAMILIES, AND THE LAW IN ABRAHAM LINCOLN’S ILLINOIS 5 (Daniel W. Stowell ed., 2002); Kim Dayton, *Patriarchy, Paternalism, and the Masks of “Fetal Protection”: Response to John P. Kennedy*, 2 KAN. J.L. & PUB. POL’Y 25, 29 (1992).

<sup>145</sup> *Frontiero*, 411 U.S. at 684.

<sup>146</sup> Sneddon, *supra* note 17, at 1539 n.17.

<sup>147</sup> *See id.* at 1538.

<sup>148</sup> JANET MOCK, REDEFINING REALNESS 22 (2014).

<sup>149</sup> *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

legal realities under a shoddy scientific framework that insists that “suddenly we’re no longer being old-fashioned and sexist: we’re being modern and scientific.”<sup>150</sup>

### III. MISOGYNY BY ANY OTHER NAME

#### A. *The Material Reality of Sex-Based Discrimination*

The world, let alone the United States, has *not* evolved so much that feminism is irrelevant. Historical and current cultural attitudes, in addition to the material reality of being female, necessitate continued feminist struggle: that is, a movement centering on females. Today, women are still the overwhelming majority at risk of trafficking, sexual assault, domestic violence, and murder by intimate partners<sup>151</sup>—not to mention illiteracy,<sup>152</sup> wage discrimination,<sup>153</sup> disadvantaged employment opportunities due to family structure,<sup>154</sup> sexual harassment,<sup>155</sup> unpaid domestic labor,<sup>156</sup> being silenced in the workplace and social-

<sup>150</sup> See Fine, *supra* note 73, at 46:33.

<sup>151</sup> See generally NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, *Selected Research Results on Violence Against Women* (2007), <https://www.nij.gov/topics/crime/violence-against-women/pages/selected-results.aspx> [<https://perma.cc/BK4W-VX6V>] (clarifying that “8.1 percent of surveyed women and 2.2 percent of surveyed men reported being stalked . . . Women experience more intimate partner violence . . . 22.1 percent of surveyed women, compared with 7.4 percent of surveyed men . . . [And, w]omen are significantly more likely than men to be injured during an assault”). See DIANE KIESEL, *DOMESTIC VIOLENCE: LAW, POLICY, AND PRACTICE 2–4* (2007) (noting that “approximately 1,000 women each year killed by their husbands or intimate partners,” that “the majority of the victims [are] female,” and that “women accounted for 84 percent of all spouse abuse victims and 86 percent of all intimate partner victims . . . Three-fourths of all domestic violence perpetrators are male . . . [A]n ugly—and accepted—fact of life for a very long time.” Attitudes of violence against women are age-old, and it is these “popular attitudes . . . [that] have permeated popular culture, legislation and law”); Kathleen Waits, *The Criminal Justice System’s Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 288 (1985) (clarifying that “[h]e is violent at home . . . because he can get away with it, as long as society does not intervene”); *Intimate Partner Violence Facts and Resources*, AM. PSYCHOLOGICAL ASS’N, <http://www.apa.org/topics/violence/partner.aspx?item=2> [<https://perma.cc/6LQE-9E8Y>] (last visited Mar. 29, 2017) (specifying that “74 percent of all murder-suicides involved an intimate partner . . . Of these, 96 percent were women killed by their intimate partners”).

<sup>152</sup> *International Literacy Day 2013*, UNESCO INST. FOR STAT., <http://www.uis.unesco.org/literacy/Documents/Intl-literacy-day/literacy-infographic-2013-en.pdf> [<https://perma.cc/RFK8-JLVN>] (last visited Mar. 29, 2017).

<sup>153</sup> Behrooz Kalantari, *The Influence of Social Values and Childhood Socialization on Occupational Gender Segregation and Wage Disparity*, 41 PUB. PERSONNEL MGMT. 241, 241 (2012) (“[A]lthough female participation in the paid workforce has increased, overall women’s wages relative to men’s has not.”).

<sup>154</sup> See Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL’Y 67, 68 (2013).

<sup>155</sup> *Timeline for Development of Sexual Harassment Laws*, MINN. ST. U. MANKATO, [https://mavdisk.mnsu.edu/howard/Mgmt%20440%20Spring%202008%20Timeline%20for%](https://mavdisk.mnsu.edu/howard/Mgmt%20440%20Spring%202008%20Timeline%20for%20)

ly,<sup>157</sup> and a decreased likelihood that their medical issues will be seen to, diagnosed, or that medicines prescribed are appropriate for the female body.<sup>158</sup> And men as a class still benefit—materially, legally, and emotionally—from a patriarchal system of male privilege.<sup>159</sup> Many other demographic categories suffer or benefit along similar lines of structural privilege and oppression: for example, based on race, ability, sexuality, or socioeconomic class.<sup>160</sup> While acknowledging that all of these and more can intersect with and compound sex discrimination, this Part focuses on the current legal necessity of discussing sex-based discrimination with woman-specific language.

The material reality must be acknowledged: the root of the global patriarchy is the view of women as reproductive resource, physically and neurologically unequipped for a life outside of that role.<sup>161</sup> Most legal systems in the world have impacted and been impacted by this view.<sup>162</sup> Because of this history, and because “[p]hysical differences between men and women . . . are enduring,”<sup>163</sup> laws aimed at combatting misogyny should use women-specific language. Abortion, pregnancy, and other female health issues, in particular, must remain women’s issues—as they impact us directly. Such laws must refer to

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20development%20of%20sexual%20harassment%20law%20in%20US.htm [https://perma.cc/C6LK-VUZ4] (last visited Mar. 29, 2017). There is a long history of sexual harassment against women in the workplace. This is not to say that the reverse does not occur. But the sexualized treatment of women is a cultural institution, and undoubtedly stems at least partly from the perception that women do not belong in the workplace—or that if they do, it is only natural that their belonging is sexualized. *Id.*

<sup>156</sup> Breanne Fahs, *Second Shifts and Political Awakenings: Divorce and the Political Socialization of Middle-Aged Women*, 47 J. DIVORCE & REMARRIAGE 43, 48 (2007).

<sup>157</sup> Alice Robb, *Why Men Are Prone to Interrupting Women*, N.Y. TIMES (Mar. 19, 2015), <http://nytlive.nytimes.com/womenintheworld/2015/03/19/google-chief-blasted-for-repeatedly-interrupting-female-government-official> [https://perma.cc/WME5-WTW3].

<sup>158</sup> See, e.g., Anke Bueter, *Androcentrism, Feminism, and Pluralism in Medicine*, TOPOI 1–10 (2015); Amelia Hill, *Doctors are ‘Failing to Spot Asperger’s in Girls’*, THE GUARDIAN (Apr. 11, 2009), <http://www.theguardian.com/lifeandstyle/2009/apr/12/autism-aspergers-girls> [https://perma.cc/X9UU-K6GN]; Alyson McGregor, *Why Medicine Often Has Dangerous Side Effects for Women*, TED (Sept. 2014), [https://www.ted.com/talks/alyson\\_mcgregor\\_why\\_medicine\\_often\\_has\\_dangerous\\_side\\_effects\\_for\\_women?language=en](https://www.ted.com/talks/alyson_mcgregor_why_medicine_often_has_dangerous_side_effects_for_women?language=en) [https://perma.cc/Y8P5-EQ8Q].

<sup>159</sup> See generally McCarroll, *supra* note 11. See Kim A. Case et al., *Reflecting on Heterosexual and Male Privilege: Interventions to Raise Awareness*, 20 J. SOC. ISSUES 722 (2014).

<sup>160</sup> See, e.g., Iris Marion Young, *Five Faces of Oppression*, in GEOGRAPHIC THOUGHT: A PRACTICE PERSPECTIVE 61–63 (George Henderson & Marvin Waterstone eds., 2009).

<sup>161</sup> See, e.g., *Bradwell v. State*, 83 U.S. 130, 141–42 (1872) (Bradley, J., concurring); *supra* Part II. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 17 (1975) (“[T]hose who did assume the historic burden of her protection . . . reduced her status to that of chattel. The historic price of woman’s protection by man against man was the imposition of chastity and monogamy . . . . Man’s forcible extension of his boundaries to his mate and later to their offspring was the beginning of his concept of ownership.”).

<sup>162</sup> The historical roots of the institutions of marriage come to mind. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

<sup>163</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996).

women, and not shy away from the word out of fear—as even the Supreme Court does in its abortion jurisprudence.<sup>164</sup> Judicial and legislative language that dismisses discrimination against those with female anatomy—and in particular that which dismisses it as something other than sex discrimination, as in *Geduldig*—should not be tolerated. Indeed, legal feminists must insist upon linguistic precision when discussing women’s issues *as women’s issues*.

The ability to become pregnant is as dangerous legally as it is physically. Not only must pregnant women contend with the risks of permanent bodily changes, depression, preeclampsia, gestational diabetes, and maternal death,<sup>165</sup> they must also navigate a world of (predominantly male) lawmakers who decide issues of healthcare and abortion access, custody, and family structure. Fortunately, the Pregnancy Discrimination Act of 1978 reversed *Geduldig*, with its sexist mental gymnastics.<sup>166</sup> But the risk of dangerous, anti-female law is not at an end. For example, the right to control the “number and spacing” of children—for example by terminating an unwanted (or dangerous) pregnancy—is internationally recognized as a fundamental human right of women.<sup>167</sup> In the current American climate both of restricted access to birth control—restrictions stemming from social, religious, and political sources<sup>168</sup>—and of sub-par education on sex (both intercourse<sup>169</sup> and anatomy<sup>170</sup>), women have a high likeli-

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<sup>164</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Legal feminists, especially, must ensure that amidst the various strains of identity on which it is important to focus, we do not lose our feminist focus: the liberation of women. Unfortunately, feminists who acknowledge sex-based discrimination are being negatively targeted for writing with specificity. For a discussion of the harassment suffered by women who refer to biological reality rather than adhere to the tautological definitions of postmodern identity politics (e.g. “a woman is anyone who identifies as a woman”), see *infra* Part III.D.

<sup>165</sup> See, e.g., *Pregnancy Complications*, OFFICE ON WOMEN’S HEALTH, U.S. DEP’T OF HEALTH AND HUMAN SERVS., <http://womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.html> [<https://perma.cc/HNA8-BWVW>] (last visited Mar. 29, 2017).

<sup>166</sup> See Brake & Grossman, *supra* note 164, at 67.

<sup>167</sup> CEDAW, *supra* note 67.

<sup>168</sup> See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). See Jo Jones et al., CTR. FOR DISEASE CONTROL, *Current Contraceptive Use in the United States, 2006–2010, and Changes in Patterns of Use Since 1995*, at 6, 10–11, (2012), [www.cdc.gov/nchs/data/nhsr/nhsr060.pdf#x2013;2010,%20and%20Changes%20in%20Patterns%20of%20Use%20Since%201995,%20table%201%20\[PDF%20-%20443%20KB\]%3C/a%3E](http://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf#x2013;2010,%20and%20Changes%20in%20Patterns%20of%20Use%20Since%201995,%20table%201%20[PDF%20-%20443%20KB]%3C/a%3E) [<https://perma.cc/8JW3-L5DD>].

<sup>169</sup> In many states—even in progressive California, where this author’s sex education consisted only of scare-tactic photos of STD symptoms, without the knowledge of how they could be contracted, let alone prevented—sex education is less than thorough. See Beck Devine, *Sex Ed in High School Lacking*, DAKOTA STUDENT (Feb. 12, 2016) <http://dakotastudent.com/7544/opinion/sex-ed-in-high-school-lacking> [<https://perma.cc/3PP2-F8D6>]. And though President Obama attempted to end the practice, the federal government has “provided millions of federal dollars each year only to programs that follow a narrow abstinence-only-until-marriage curricula,” leaving young people with no knowledge as to birth control or sex-safety methods. Leah J. Tulin, *Can International Human Rights Law Countenance Federal Funding of Abstinence-Only Education?*, 95 GEO. L.J. 1979, 1980

hood of aborting a pregnancy; while it is impossible to give an exact figure of the proportion of women who will have an abortion in their lifetimes, it is telling that “[n]ineteen percent of pregnancies (excluding miscarriages) in 2014 ended in abortion.”<sup>171</sup> And yet, from 2011 to 2015, “no fewer than 288” laws designed to limit women’s access to abortion were passed.<sup>172</sup> This chipping away at access to abortion is a direct assault not on some small fringe of imaginary, irresponsible females, but on a large proportion of women.<sup>173</sup>

The author and other legal feminists such as Elizabeth Hungerford argue that this rise in targeted legal action against women is at least partly due to movements of postmodernist identity politics, and the rising practice of defanging the language used to define discrete populations.<sup>174</sup> Though due cumulatively to a myriad of factors, from religious and political conservatism to the fact that women’s biological issues are only now becoming appropriate to discuss in polite company, the rise in legal attacks on women demonstrates that, now more than ever, legal feminists must not abandon women-specific language in the fight against legalized misogyny.

*B. The Danger in Combating Reality with Defanged Postmodern Language*

The linguistic obfuscation that aims to ignore the biological roots of misogyny is by no means rare. The *Geduldig* decision in the 1970s was merely a preview of the current derailing tactics trying to take such legal issues as abortion out of the purview of “women’s issues.” Cathy Brennan and Elizabeth Hungerford, in a 2011 letter to the United Nations and a 2012 follow-up by Hungerford alone, suggested that the recent onslaught of “gender identity” legislation makes it impossible to discuss the biological roots of sex-based discrimination and oppression.<sup>175</sup> Hungerford’s letters, in particular, demonstrate

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(2007); Kevin Mathews, *Obama Attempts to Dump Federal Funding for Abstinence-Only Education*, CARE2 (Feb. 20, 2016), <http://www.care2.com/causes/obama-attempts-to-dump-federal-funding-for-abstinence-only-education.html#ixzz40xqISHNW> [<https://perma.cc/M8N7-P5XB>].

<sup>170</sup> See, e.g., MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS: HOW AMERICA’S SCHOOLS CHEAT GIRLS* 190–91 (2010); Susan Morgan et al., *Sexism and Anatomy, as Discerned in Textbooks and as Perceived by Medical Students at Cardiff University and University of Paris Descartes*, 224 J. ANATOMY 352 (2014).

<sup>171</sup> GUTTMACHER INST., *supra* note 151 (emphasis added).

<sup>172</sup> *The Reproductive Rights Rollback of 2015*, *supra* note 142.

<sup>173</sup> GUTTMACHER INSTITUTE, *supra* note 151.

<sup>174</sup> See CAROLYN D’CRUZ, *IDENTITY POLITICS IN DECONSTRUCTION* 1–3 (2008); *infra* Part III.B.

<sup>175</sup> Letter from Cathy Brennan & Elizabeth Hungerford, Esqs., to CSW Communications Procedure, Human Rights Section, UN Women (Aug. 1, 2011), [https://genderidentitywatch.files.wordpress.com/2012/09/communication\\_csw\\_un\\_brennanhungerford\\_08012011\\_.pdf](https://genderidentitywatch.files.wordpress.com/2012/09/communication_csw_un_brennanhungerford_08012011_.pdf) [<https://perma.cc/NN46-JM8N>] [hereinafter August 1st Letter]; Letter from Elizabeth

that especially in this climate of expanding identity and shifting legal definitions, it is vital to keep in mind the historic discrimination against women as a sex class,<sup>176</sup> and to maintain historically important terminology.

Legal feminists must use precise, technical terms when discussing sex-based discrimination—given the reality discussed *supra* that unites all women.<sup>177</sup> Feminism as a movement has rightfully evolved from an effort aimed at preserving the rights and privileges of wealthy white women,<sup>178</sup> to a multifaceted movement. Women of color, working-class women, lesbians, and disabled women, in particular, have contributed to this expansion.<sup>179</sup> Though there is still much to be done for these and other special populations,<sup>180</sup> various strains of feminism have emerged to answer the needs of specific populations of women: strains including radical, liberal, Black, Marxist, lesbian, legal, and many others “feminisms.”<sup>181</sup> However, feminism of all strains—and in particular legal feminism—must not stray so far from its roots that purported feminists forget one of its core tenets, one of its most important goals: the global liberation of women from any remnant of patriarchy.<sup>182</sup>

The U.S. has undergone a quiet but alarming backslide in women’s reproductive freedoms. For example, the meticulous campaign by conservatives to repeal not only abortion access, but also birth control and female-specific healthcare, has culminated in an aggressive push to defund Planned Parenthood.<sup>183</sup> This is likely due to many cultural factors—not the least of which is the absence of a consistent legal feminist movement, one that acknowledges that sex-based discrimination is the root of women’s legal disadvantage.

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Hungerford, Esq., to CSW Communications Procedure, Human Rights Section, UN Women (July 26, 2012), [https://gendertrender.files.wordpress.com/2012/08/hungerford\\_csw\\_communication\\_2012\\_8-28-2012.pdf](https://gendertrender.files.wordpress.com/2012/08/hungerford_csw_communication_2012_8-28-2012.pdf) [<https://perma.cc/8ZY7-59LQ>] [hereinafter July 26th Letter].

<sup>176</sup> See *supra* Parts I, II.

<sup>177</sup> Though, of course, various anatomical differences and difficulties impact women’s experience with menstruation, pregnancy, giving birth, and other female-specific abilities; but all women suffer under the patriarchal assumption of woman as potential mother.

<sup>178</sup> Kristin Kalsem & Verna L. Williams, *Social Justice Feminism*, 18 UCLA WOMEN’S L.J. 131, 171 (2010).

<sup>179</sup> See Janus, *supra* note 14, at 269–70; Kalsem & Williams, *supra* note 188, at 171.

<sup>180</sup> See Mary Eaton, *At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence*, 3 S. CAL. REV. L. & WOMEN’S STUD. 183, 184–85 (1994).

<sup>181</sup> See generally JENNIFER RICH, MODERN FEMINIST THEORY: AN INTRODUCTION (2d ed., rev. 2014).

<sup>182</sup> See generally POLITICAL IDEOLOGIES: AN INTRODUCTION 200 (Vincent Geoghegan & Rick Wilford eds., Routledge 4th ed. 2014) (1984).

<sup>183</sup> Erin Kelly, *House Sends President a Bill to Repeal Obamacare, Defund Planned Parenthood*, USA TODAY (Jan. 6, 2016, 5:56 PM), <http://www.usatoday.com/story/news/2016/01/06/house-sends-president-bill-repeal-obamacare-defund-planned-parenthood/78359292> [<https://perma.cc/2B33-56GV>].

The postmodern identity movement's reworking of sex and gender is at least partly to blame for this defanging of the feminist movement as a vehicle for women's liberation. At its heart, postmodernism in general "represents a challenge to the fixity of meaning."<sup>184</sup> Specifically with regard to sex and gender, the postmodern identity movement calls into question the ability of human beings to be put into sexed or gendered categories at all.<sup>185</sup> Postmodern ideas have been exceedingly useful in various academic disciplines. However, the usefulness of such ideas in the law—made up of language as it is—has its limits.

The postmodern movement has done well to deconstruct and de-essentialize the concept of gender<sup>186</sup>: that is, the roles that the sexes are "supposed" to play, with women taking on a stereotypical feminine presentation, manner, and occupation, and men taking on the masculine.<sup>187</sup> The movement acknowledges that gender, in this sense of roles, is obsolete.<sup>188</sup> Indeed, even the United States Supreme Court supports this notion, clarifying that state agents must not rely upon "fixed notions concerning the roles and abilities of males and females."<sup>189</sup> The world would be well rid of the rigid gender binary, pigeonholing both women and men into particular presentations and occupations. For example, whereas women were once not welcome in the legal field at all—considered too delicate to practice law<sup>190</sup>—the slow breakdown of gender's rigidity means that now, a woman may not be dismissed by a misogynist employer just because she does not, to his eyes, sufficiently embody or perform the "feminine."<sup>191</sup>

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<sup>184</sup> Pauline Park, *GenderPAC, The Transgender Rights Movement and the Perils of a Post-Identity Politics Paradigm*, 4 GEO. J. GENDER & L. 747, 760 (2003).

<sup>185</sup> See *id.* at 761.

<sup>186</sup> See Eaton, *supra* note 190, at 185.

<sup>187</sup> These two concepts, however, are not monolithic. The meaning behind masculinity and femininity vary by culture and time. See generally GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* 279–341 (Jim Brace-Thompson ed., 2d ed. 2001); GEERT HOFSTEDE ET AL., *CULTURES AND ORGANIZATIONS* 135–185 (rev. 3d ed. 2010); WHEN MEN WERE MEN: *MASCULINITY, POWER AND IDENTITY IN CLASSICAL ANTIQUITY* (Lin Foxhall & John Salmon eds., 2013); S. Elizabeth Malloy, *What Best to Protect Transsexuals from Discrimination: Using Current Legislation or Adopting a New Judicial Framework*, 32 WOMEN'S RTS. L. REP. 283, 288–89 (2011).

<sup>188</sup> See, e.g., Archibald, *supra* note 66, at 8, 17–18; Jessica Knouse, *Using Postmodern Feminist Legal Theory to Interrupt the Reinscription of Sex Stereotypes Through the Institution of Marriage*, 16 HASTINGS WOMEN'S L.J. 159, 160–61, 166 (2005).

<sup>189</sup> *United States v. Virginia*, 518 U.S. 515, 541 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

<sup>190</sup> See *Bradwell v. State*, 83 U.S. 130, 141 (1872) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

<sup>191</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 242 (1989).

However, the postmodern identity movement goes too far in its attempt to redefine the concept of sex, too, as socially constructed.<sup>192</sup> Some postmodern scholars suggest, for example, a performance framework: “a doctrine determining sex based on [such factors as] whether the claimant behaved privately as a man or a woman . . . [and] whether the claimant held out a consistent gendered image to the community on a continuous basis.”<sup>193</sup> The claim is that “[t]his doctrine would make sense because it would protect most third parties who came to rely on a person’s gendered self-presentation in everyday interaction.”<sup>194</sup> But this doctrine does not “make sense” for two very significant reasons.

First, what does it mean to “behave” as a man or a woman? What are the criteria? Scholars who suggest that “sexual identity . . . must be understood not in . . . biological terms, but according to a set of behavioral, performative norms that . . . create the background conditions for a person to assert, *I am a woman*.”<sup>195</sup> The question remains: what are these behaviors? What are these performances? More troublingly, who gets to define these norms? Such an assertion is antithetical to legal feminist thinking.<sup>196</sup>

Second, one cannot “perform” biological sex.<sup>197</sup> Certainly, no one should be fired or harassed based upon their expression or personality—which, in our

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<sup>192</sup> Note that there are times when sex *is* socially assigned. Intersex individuals undoubtedly suffer heinous crimes in the name of medically constructed sex. See generally Georgiann Davis & Erin L. Murphy, *Intersex Bodies as States of Exception: An Empirical Explanation for Unnecessary Surgical Modification*, 25 FEMINIST FORMATIONS 129 (2013). Many intersex individuals are violated at birth—with or without parental consent—with doctors surgically modifying their healthy genitals in order to box them into the category of “female” or “male.” *Id.* at 129–30. This issue, and the legal, medical, and ethical consequences thereof, is a topic too broad for this note. See, e.g., ELLEN K. FEDER, MAKING SENSE OF INTERSEX: CHANGING ETHICAL PERSPECTIVES IN BIOMEDICINE (2014). One future option for the U.S. might be to emulate the German convention, “providing a third gender option on birth certificates for babies born with ambiguous genitalia.” Sneddon, *supra* note 17, at 1541. But without that option available at present, and with our society addicted to binary concepts, when I discuss female reproductive issues, I include intersex women—whether or not they are capable of becoming pregnant—because of the biological roots of misogyny.

<sup>193</sup> Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 592 (2005); see also Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3–4 (1995).

<sup>194</sup> Clarke, *supra* note 203, at 592.

<sup>195</sup> Franke, *supra* note 203, at 3–4.

<sup>196</sup> See *supra* Part II.A.

<sup>197</sup> Many women reject the idea that womanhood is a performance, and reject typical femininity. See Elizabeth Hungerford, *A Feminist Critique of “Cisgender,”* LIBERATION COLLECTIVE (June 8, 2012), <https://liberationcollective.wordpress.com/2012/06/08/a-feminist-critique-of-cisgender> [<https://perma.cc/2P45-YC52>]. Contrary to the supposition of gender-conscious scholars who assume that, in American culture, “there is little debate over whether to shave or wear makeup and high heels,” in fact, many feminists question—and have questioned for some time—such practices. Malloy, *supra* note 186, at 288; see LESLIE FEINBERG, STONE BUTCH BLUES 20–21 (1993). If postmodern “performance” were given le-

rigid culture of the gender binary, *is* usually gendered. But if sex itself is linguistically rendered a performance rather than a physical reality with material consequences, the law runs the risk of not only linguistically reducing womanhood to a set of performative stereotypes, but also of defanging women's legal protections. For example, such thinking would put at risk those laws that preserve the abortion right, laws that preserve single-sex space necessary for safety,<sup>198</sup> education,<sup>199</sup> and healing,<sup>200</sup> and laws that refuse to allow employers to discriminate based on pregnancy.<sup>201</sup> Such legislation might instead become nebulous and confused, using language the likes of which *Geduldig* attempted to force into legal precedent.

Legally, it is necessary to discuss female-specific issues with woman-specific language. This is because legally-sanctioned misogyny, and its role in the control of women, can be fought only if legal feminists are able to name the problem. That problem is a legal system that continues to control female reproduction and that refuses to deal fully with the material reality of centuries of misogyny that have left women at a disadvantage.<sup>202</sup> This is the reason that, despite what postmodern identity scholars claim, biology *cannot* be “discarded in favor of a more behavioral definition of both the meaning of sexual identity and the wrong of sex discrimination.”<sup>203</sup> It is not women's behavior, but society's beliefs about female biology (both anatomical and neurological<sup>204</sup>) that has written misogyny into the law.

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gal effect, one question might be: is a woman who performs no aspect of femininity more or less of a woman than a male (whether or not he considers himself a woman) who *does* perform femininity?

<sup>198</sup> See, e.g., Katie Booth, *A Look at Women-Only Transportation Around the Globe*, N.Y. TIMES: WOMEN IN THE WORLD (Apr. 13, 2015), <http://nytlive.nytimes.com/womenintheworld/2015/04/13/a-look-at-women-only-transportation-around-the-globe> [<https://perma.cc/4SBE-RK49>].

<sup>199</sup> See, for example, IRENE HARWARTH ET AL., U.S. DEP'T OF EDUC., *WOMEN'S COLLEGES IN THE UNITED STATES: HISTORY, ISSUES, AND CHALLENGES* viii–ix, 31, 74 (1997); Candi Brancato, *Women's Colleges: Advantages of Choosing a Women's College*, INT'L STUDENT GUIDE TO THE U.S., [http://www.internationalstudentguidetotheusa.com/articles/women\\_colleges.htm](http://www.internationalstudentguidetotheusa.com/articles/women_colleges.htm) [<https://perma.cc/FQF3-ZLYN>] (last visited Mar. 31, 2017) for discussions about the advantages for women of women-only academic space.

<sup>200</sup> For testimonial about the importance of women-only space in the context of healing from sexual assault, specifically, see, for example, *On Women Only Space*, VANCOUVER RAPE RELIEF & WOMEN'S SHELTER, <http://www.rape-relief-shelter.bc.ca/shelter-movement/women-only-space/women-only-space> [<https://perma.cc/PTP8-SMXE>] (last visited Mar. 31, 2017); *Why Women & Girls?*, RAPE CRISIS ENG. & WALES, <http://rapecrisis.org.uk/whywomen-girls.php> [<https://perma.cc/K947-HGLP>] (last visited Jan. 28, 2017).

<sup>201</sup> E.g., 42 U.S.C. § 2000e(k) (2012).

<sup>202</sup> This is true both in the U.S. and in most of the world. Though this Note focuses almost exclusively on U.S. law, the vital necessity of legal language with the capacity to address discrimination against women is exemplified in CEDAW, discussed *infra* Part IV.

<sup>203</sup> Franke, *supra* note 203, at 99.

<sup>204</sup> See generally *supra* Part II.A.

In the vernacular, an adult human female is known as a woman. The post-modern identity movement, however, has tried to shift the definition of “women” to include others who feel compelled to or who choose to adopt the label.<sup>205</sup> For example, the transgender movement, particularly in the U.S., has demonstrated that regardless of anatomy, some individuals are more comfortable “identifying” with a group of their choosing rather than the one to which biology has assigned them.<sup>206</sup> However, the movement has also led to a more extreme push to redefine the word woman as “anyone who identifies as a woman.”<sup>207</sup> In other words, some believe that there are no criteria for womanhood—other than identification with the word alone.

But a definition—especially a legal definition—should not be tautological.<sup>208</sup> If a woman is merely “anyone who identifies as a woman,” the term “woman,” and the legislation that describes and/or protects women specifically, is completely useless, legally and culturally. If “sex” does not exist—or at least if it is not to be used in the definition of “woman”—how can legal feminists advocate for the group that has historically been and is continuously subject to, at the mild end, workplace discrimination and harassment, and at the extreme, sexual violence and a denial of autonomous personhood? One speaker advocating for gender rights articulates this paradox without giving way to the ever-moving target of postmodern language: “A movement that purports to include everyone includes no one, because it does not speak to the specificity of particular forms of oppression, which must be named in order to be addressed.”<sup>209</sup> And sex-based oppression—and the way it impacts women—must be named so that it may be addressed.

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<sup>205</sup> See, e.g., Kaitlin Reilly, *All-Female Smith College Accepts “Anyone Who Identifies as a Woman,”* CAMBIO (May 16, 2015, 4:14 PM), <http://www.cambio.com/2015/05/16/all-female-smith-college-accepts-transgender-women> [<https://perma.cc/NY6T-HEUX>]; Shawn Thomas Meerkamper, *Contesting Sex Classification: The Need for Genderqueers as a Cognizable Class*, 12 DUKEMINIER AWARDS 1, 4 (2013) (claiming that some “may identify as a man one day and a woman the next”).

<sup>206</sup> See Levasseur, *supra* note 76, at 951–58. Note, however, that Levasseur’s definition of brain sex is unsupported by modern science. *Id.* at 955. See *supra* Part II.A.

<sup>207</sup> See Reilly, *supra* note 204; *Reaffirmation of Mission and Announcing Gender Policy*, WELLESLEY C., <http://www.wellesley.edu/news/gender-policy/communityletter> [<https://perma.cc/3VT5-5H3Q>]. But see Elizabeth Hungerford, *An Open Letter to Smith College About Transwomen* (Dec. 15, 2014), <http://ehungerford.com/?p=65> [<https://perma.cc/85PZ-8KDR>] for a legal feminist response to Smith College’s policy change. “Being a woman is not a spiritual or metaphysical experience. It is not a feeling and it is not a performative utterance. Being a woman is a lived experience with material consequences. Smith’s admission policy must reflect some clear limitations on male gender identification, lest the social category ‘woman’ become entirely meaningless.” *Id.*

<sup>208</sup> See, e.g., *Summerlin v. Ga. Pines Cmty. Serv. Bd.*, 690 S.E.2d 401, 402 (Ga. 2010) (noting that a tautological definition makes statutory interpretation difficult).

<sup>209</sup> Park, *supra* note 183, at 765.

This line of thinking need not, and should not, legally erase transgender or intersex individuals. Indeed, radical feminists argue that sex-specific language in the law will protect intersex women and transitioned transgender women.<sup>210</sup> First, it will allow these populations to highlight that though they share some experiences with natal women, they have individual issues that themselves require linguistic specificity. Second, it will protect all human beings perceived by others as natal women, whom society assumes to embody the anatomy and the “female brain”<sup>211</sup> that will put them at a legal disadvantage.

*C. Modern Attempts at Claiming the Word “Woman” Versus the Legal Need for Linguistic Specificity*

Those writing about women’s issues should not confuse shared experience with identical experience. We must not cede woman-specific language needed for women’s protection and advancement. Postmodern scholars, especially those who study gender, might well view the “total elimination of ‘sex’ as a legal category” as a boon.<sup>212</sup> But legal and material reality in the United States does not allow for such total elimination—at least not yet. The elimination of sex as a category would not only destroy the language necessary to talk about woman-specific legal issues such as abortion, but it would also threaten the protections against sex discrimination that feminists have worked for so many decades to obtain.

Nor should woman-specific language be abandoned out of fear of the kinds of threats and silencing tactics used against female defenders who dare to use women-specific language.<sup>213</sup> “[T]he law has a tradition of ‘natural male dominance,’” and woman-specific language is necessary to point out and deconstruct this dominance.<sup>214</sup>

In advocating for the legal rights and protections of women, there is a middle ground that has yet to be reached. Everyone—female, male, transgender, and intersex—is entitled to equal protection under the law, and to human dignity and respect. But biological differences between the sexes—and their important history and legacy of discrimination based on reproductive ability—must not be a taboo subject, even and especially in legal discussions. American legal feminists and lawmakers need an accurate way to refer to historical and ongoing sex-based discrimination. This will allow for discussion of discrimination that *only* female people face, based on the capacity to become pregnant and

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<sup>210</sup> Elizabeth Hungerford, Comment to *Contact Me* (April 27, 2015, 7:28 PM), [http://ehungerford.com/?page\\_id=6](http://ehungerford.com/?page_id=6) [<https://perma.cc/3VQY-TE6L>].

<sup>211</sup> See generally discussion *supra* Part II.A.

<sup>212</sup> Olga Tomchin, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans\* People*, 101 CALIF. L. REV. 813, 818 (2013).

<sup>213</sup> See *infra* Part III.D.

<sup>214</sup> Sneddon, *supra* note 17, at 1537, 1545.

the assumed mental and personal abilities this leaves women with—or without. Given historical and ongoing misogyny, legal feminists must highlight the existence of women as a suspect class; we must demand linguistic precision that gives women a chance to acknowledge and correct ongoing discrimination.

The United States Supreme Court once held that pregnancy discrimination is not sex discrimination: that is, the highest court in the land attempted to erase sex differences as a basis of sex discrimination.<sup>215</sup> It is a mistake to think, given the climate of our time, that it might not happen again. The modern push for “brain sex” as the legal model is merely a return of the cyclical thinking that led Charlotte Gilman to reject the idea of the “female mind” as being as absurd as speaking of a “female liver.”<sup>216</sup> With the danger of brain sex resurfacing as a legal model, those advocating for the advancement of women’s rights must take care.<sup>217</sup>

If women, on the basis of our anatomy and our history of discrimination, are to remain even a “quasi-suspect class,”<sup>218</sup> the language of the law must precisely describe women’s issues. If “woman” has no definition, how can animus (such as misogyny, the biologically-based hatred of women) be shown toward women? Is it merely animus toward feminine people, then? Of course, *Price Waterhouse v. Hopkins* has already shown that a woman need not be “feminine” to gain sex-specific protections under Title VI.<sup>219</sup> But this merely reinforces the idea that the category “women” must not become so legally broad that it loses all meaning.

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<sup>215</sup> Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976) (“[A]n exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.” (citing *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974))), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2012)).

<sup>216</sup> GILMAN, *supra* note 20, at 149.

<sup>217</sup> Though it is an extreme example, the language of postmodern gender identity has also been used by conservative lawmakers in Iran to legally structure gender nonconformity and sexual orientation as maladies that must be remedied surgically. Homosexuality is a capital offense; but sex change is legal. Ali Hamedani, *The Gay People Pushed to Change Their Gender*, BBC NEWS (Nov. 5, 2014), <http://www.bbc.com/news/magazine-29832690> [<https://perma.cc/7RLX-5A2R>]. Since “the founder of the Islamic Republic, Ayatollah Khomeini, issued a fatwa allowing gender reassignment surgery” in the 1980s, lesbians and gay men have been pressured by family, doctors, and officials alike to medically transition—or risk death. *Id.* Unfortunately, this is by no means a phenomenon found only in countries where religious conservatism dominates the legal landscape. In the United States, young, gender non-conforming children are often pressured to transition by peers and even the medical community. For example, one young boy—who has been exposed to the transgender movement but who chooses to continue identifying as a boy—has had his gender scrutinized and criticized by complete strangers. See Lori Duron, *The New Gender Binary*, HUFFINGTON POST (Feb. 21, 2016, 1:37 PM), [http://www.huffingtonpost.com/lori-duron/the-new-gender-binary\\_b\\_9267482.html](http://www.huffingtonpost.com/lori-duron/the-new-gender-binary_b_9267482.html) [<https://perma.cc/JYX4-GR7Y>].

<sup>218</sup> Franke, *supra* note 203, at 6.

<sup>219</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 258 (1989).

#### D. *Fear Tactics and Feminist Resistance*

Some third-wave feminists disagree with the idea that “woman” should have a definition.<sup>220</sup> Many have campaigned with vitriol against those who acknowledge the sex-based discrimination of the kind discussed in this Note.

In 2011, after their letter to the UN discussing language, sex-based discrimination, and the law, Cathy Brennan and Elizabeth Hungerford were subjected to an extreme harassment campaign by postmodern thinkers who object to a set definition of the term “woman” (or even “female”).<sup>221</sup> And while online harassment of women is by no means new or rare, this campaign against Brennan and Hungerford may in fact have proved these feminists’ point: postmodern gender identity language obscures sex-based discrimination and makes it very difficult to discuss.

A common Internet-based insult for a feminist who acknowledges the existence of biological sex is “TERF”—an acronym for “trans exclusionary (or exterminatory) radical feminist.”<sup>222</sup> It is not a mere descriptor, but a silencing tactic, used to quiet, harass, and incite popular opinion against such women.<sup>223</sup> The Internet is undoubtedly a mean place, but surely one should not expect to see such terminology used by politicians or legal writers.

Yet with postmodernism in the mix, expectations do not always yield results. Not only has this term become increasingly popular in mainstream online discourse, and even outside of the echo chamber of the Internet,<sup>224</sup> but in academic discourse as well—including legal scholarship. For example, one book

<sup>220</sup> See Reilly, *supra* note 204.

<sup>221</sup> See Brennan v. Stevenson, No. JKB-15-2931, 2015 U.S. Dist. LEXIS 158848, at \*2 (D. Md. Nov. 24, 2015); Elizabeth Hungerford, *Cracks in Your Foundation: Dana Beyer, M.D. and Monica Roberts Support Brennan and Hungerford’s UN Letter*, SEX MATTERS (Sept. 9, 2013), <http://sexnotgender.com/2013/09/09/cracks-in-your-foundation-dana-beyer-m-d-and-monica-roberts-support-brennan-and-hungerfords-un-letter> [<https://perma.cc/5NPX-FJDJ>].

<sup>222</sup> Penny White, *Why I No Longer Hate ‘TERFs’*, FEMINIST CURRENT (Nov. 10, 2015), <http://www.feministcurrent.com/2015/11/10/why-i-no-longer-hate-terfs> [<https://perma.cc/T2QW-JHYV>].

<sup>223</sup> See, e.g., Open Letter, *We Cannot Allow Censorship and Silencing of Individuals*, THE GUARDIAN (Feb. 14, 2015, 7:04 PM), <http://www.theguardian.com/theobserver/2015/feb/14/letters-censorship> [<https://perma.cc/4STH-HTQP>]; Adam Lusher, *Transgender Activists Target Peter Tatchell and Mary Beard After Free Speech Letter*, INDEPENDENT (Feb. 16, 2015), <http://www.independent.co.uk/news/people/transgender-activists-target-peter-tatchell-and-mary-beard-after-free-speech-letter-10050155.html> [<https://perma.cc/2VNU-YGGH>] (detailing the ironic harassment against Tatchell after he signed the open letter criticizing the silencing and harassment of those who refer to sex as biological category, not identity); *Violent Receipts*, TUMBLR, <http://violentreceipts.tumblr.com> [<https://perma.cc/S29Z-TBJZ>] (last visited Mar. 31, 2017); *Violent Trans Witness*, TUMBLR, <http://violenttransmalewitness.tumblr.com> [<https://perma.cc/J9SC-K5SR>] (last visited Mar. 31, 2017).

<sup>224</sup> Unsurprisingly, given this Note’s acknowledgement that biological sex has material consequences, this label has been hurled at its author, both online and in at least one face-to-face conversation.

review—claiming that there are feminists who call themselves “TERFs” (a patently false statement)—states that feminists who acknowledge sex-based discrimination “are actively speaking out against transgender rights.”<sup>225</sup> This is not accurate. While some may in truth oppose human rights, such as the conservative politicians who believe that woman’s proper place is as a breeding and child-rearing machine,<sup>226</sup> feminists who openly challenge sex-based discrimination are not speaking out against anyone’s rights; we merely draw attention to the age-old legal and social bias against those with female bodies—who assumedly have “female brains.”<sup>227</sup> This silencing tactic, especially when discussed with academic legitimacy, is alarming. It could easily be hijacked by the anti-woman rhetoric of the right wing—perhaps even codified into law.

If “language must be led by the person with that body,”<sup>228</sup> why are adult human females—women, in the vernacular—harassed and threatened by so-called progressives for using the language that has historically protected us? Must women cede our protections, which are still legally necessary? Must women who acknowledge biological reality, and its dangers, yield the floor of feminism to another group merely because they find our existing platform convenient?

*E. The Legal Redundancy of Sex as Identity, Rather Than Material Reality*

Gender identity laws that compel employers, landlords, and business owners to respect the presentation, names, and pronouns of all people—including intersex and transgender individuals—are immeasurably valuable.<sup>229</sup> But these laws cannot replace the legal concepts of female and male.<sup>230</sup> Instead, they should augment them.

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<sup>225</sup> Asher Waite-Jones, *Queer Injustice: The Criminalization of LGBT People in the United States* by Joey L. Mogul, Andrea J. Ritchie, & Kay Whitlock, 30 BERKELEY J. GENDER L. & JUST. 182, 186–87 (2015).

<sup>226</sup> See Franke, *supra* note 203, at 24 (discussing Congresswoman Edith Green’s opposition to the inclusion of sex in the Equal Employment Opportunity Bill).

<sup>227</sup> See, e.g., August 1st Letter, *supra* note 185. See generally DWORKIN, *supra* note 67, and the works of Professor Catharine A. MacKinnon, a noted legal feminist and one of the “most widely-cited scholars in the English language,” for other extensive feminist discussions of sex-based discrimination; MacKinnon’s works are listed here: *MacKinnon, Catharine A.*, U. MICH. L. SCH., <https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=camtwo> [<https://perma.cc/SGN5-HGMF>] (last visited Mar. 31, 2017).

<sup>228</sup> Levasseur, *supra* note 76, at 1002.

<sup>229</sup> For a Nevada-specific example, see NEV. REV. STAT. § 613.330 (2015), which makes unlawful “discrimination [in employment] on basis of . . . sex, sexual orientation, gender identity or expression . . .” and NEV. REV. STAT. § 118.100 (2015), which prohibits discrimination in housing on the basis of several categories including gender identity.

<sup>230</sup> Furthermore, despite what some proponents of the brain-sex model claim, women are put at risk through the passage of some gender identity laws. See, e.g., Sheila Jeffreys, *Written Evidence Submitted to the Transgender Equality Inquiry* (Aug. 20, 2015), <http://data.par>

For example, if an individual is “genderqueer” but still needs female healthcare,<sup>231</sup> or if “there are trans men [female-to-male transgender individuals] looking to get on birth control,”<sup>232</sup> the physical reality of sex remains; the language, even of the law, cannot alter it. Barring drastic surgical intervention,<sup>233</sup> femaleness—and the vulnerability to violence and legal discrimination it brings—is not a material reality out of which women can opt. Even if “some who consider themselves genderqueer may identify as a man one day and a woman the next,”<sup>234</sup> society (and the law) has no access to that inner changeability; and the person in question will be treated, by people and by the law, at least in part according to their biological sex. At any rate, the material reality of that person’s sex, whether the person acknowledges it or not, will inform the way the world interacts with them—up to and including the provision or prescription of legal rights such as abortion, and access to a legal framework of protection against sex discrimination. Hiding that material reality behind the language of the postmodern identity movement is not legally helpful.

#### IV. WOMEN AS AN INTERNATIONAL SUSPECT CLASS—CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (“CEDAW”)

International instruments like Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW”) are necessary for all the class-based reasons discussed *supra*.<sup>235</sup> And it is because of CEDAW’s specificity, and not in spite of it as some postmodern thinkers claim, that it and conventions and laws like it are useful. Rightly, CEDAW does not include a broad definition of the term “woman.” Its language draws attention to the long history of discrimination against female-bodied people. Such specificity is necessary if legal scholars and lawmakers wish to remedy said discrimination.<sup>236</sup> And in terms of international discourse, it is especially important to clarify the class of people the document intends to address, as international treaties must already be interpreted across different languages and through different cultural filters.

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liament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19512.html [https://perma.cc/B2ST-QTBR].

<sup>231</sup> See generally Meerkamper, *supra* note 215, at 4.

<sup>232</sup> Laura Nixon, *The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 WM. & MARY J. OF WOMEN & L. 73, 83 (2013).

<sup>233</sup> Even then, genetics and years of socialization remain.

<sup>234</sup> Meerkamper, *supra* note 215, at 4.

<sup>235</sup> CEDAW, *supra* note 67.

<sup>236</sup> See, e.g., August 1st Letter, *supra* note 185.

*A. What Is CEDAW?*

It is not only American legal feminists who have successfully used women-centric language to remedy legal misogyny. In the mid-twentieth century, the United Nations Commission on the Status of Woman initiated the idea for an international treaty aimed at improving the status of women worldwide.<sup>237</sup> It began “to monitor the situation of women and to promote women’s rights” in 1946.<sup>238</sup> After more than thirty years of work and research by the Commission, in December 1979, the United Nations General Assembly adopted CEDAW.<sup>239</sup> After twenty countries (known in international law as “states”) had ratified it, CEDAW entered into force as an international treaty in September 1981.<sup>240</sup>

CEDAW is the leading international convention calling for an end to legal and social systems holding women back from full equality and liberation.<sup>241</sup> CEDAW calls on its parties to eliminate not only legal, but also social, discrimination.<sup>242</sup> The substantive calls to action include eliminating all legalized discrimination, temporarily adopting measures to “correct[] historical gender inequality,” enacting “protective maternity legislation,” and appropriately addressing human sex trafficking.<sup>243</sup> CEDAW requires its parties to submit a report every four years regarding the status of women in that country.<sup>244</sup> The victories won by countries that have ratified CEDAW include programs aimed at lessening violence against women, a rise in accountability for such violence, public education for women, and fewer discriminatory measures being permitted in the institution of marriage.<sup>245</sup>

The vast majority of United Nations member states, and *all* industrialized democracies in the world with the exception of the United States, have ratified CEDAW.<sup>246</sup> These parties have pledged to take action, and have acknowledged that the history of women’s oppression means that articulating international standards regarding women’s rights, especially in terms of reproductive rights and sexual violence, is necessary.<sup>247</sup>

However, because of the ancient, insidious nature of misogyny, CEDAW is also “the most heavily reserved international document,” with individual states

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<sup>237</sup> CEDAW, *supra* note 67.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> Lisa Baldez, Why Hasn’t the US Ratified the UN Women’s Rights Convention? 4 (Sept. 1, 2011) (unpublished manuscript) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1900265](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900265) [<https://perma.cc/PQ4X-MNZZ>].

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 5.

<sup>245</sup> *Id.* at 18.

<sup>246</sup> *Id.* at 1.

<sup>247</sup> *See generally* CEDAW, *supra* note 67.

signatories making many substantive reservations.<sup>248</sup> This means that these countries do not consider themselves bound, and other CEDAW parties do not hold them bound, to specific CEDAW-guaranteed rights for women.<sup>249</sup> Many of these reservations are based upon individual CEDAW parties' religious and cultural beliefs about the roles women should play in society.<sup>250</sup> For example, the Islamic states of Bahrain, Bangladesh, and Egypt have specifically made reservations against Article 2,<sup>251</sup> which "condemn[s] discrimination against women *in all its forms*."<sup>252</sup> The reader might imagine how much less useful CEDAW would be as an internationally binding document if postmodernism's muddying of the term "woman" itself were used as rationale in generating yet more reservations.<sup>253</sup> If the treaty protects "women," but the class that is "women" cannot be defined (according to postmodernist thinking), then the treaty is useless.

### B. CEDAW and the U.S.—A Troubled Relationship

Although the U.S. signed CEDAW in 1980, it has not ratified it, and thus it is still not a party.<sup>254</sup> The possible reasons are multifold.<sup>255</sup> However, "[e]xisting research on treaty ratification provides little traction in explaining" the true rationale, especially considering that the U.S. has ratified other human rights treaties despite "institutional constraints."<sup>256</sup> Part of the debate over CEDAW's ratification stems from the Democrat and Republican debate surrounding women's rights, not only with regard to access to abortion<sup>257</sup> but with

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<sup>248</sup> Nadine Gartner, *Articulating Lesbian Human Rights: The Creation of a Convention on the Elimination of All Forms of Discrimination Against Lesbians*, 14 UCLA WOMEN'S L.J. 61, 67 (2005).

<sup>249</sup> *Id.*

<sup>250</sup> See *Declarations, Reservations and Objections to CEDAW*, UNITED NATIONS ENTITY FOR GENDER EQUAL AND THE EMPOWERMENT OF WOMEN, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [<https://perma.cc/2P4R-E3S9>] (last visited Mar. 31, 2017) [hereinafter CEDAW Reservations].

<sup>251</sup> *Id.*

<sup>252</sup> CEDAW, *supra* note 67, art. 2 (emphasis added).

<sup>253</sup> See *supra* Part III.C.

<sup>254</sup> See generally Baldez, *supra* note 253; *Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=en) [<https://perma.cc/CVE9-4QN4>] (last visited Mar. 31, 2017).

<sup>255</sup> See generally *A Fact Sheet on CEDAW: Treaty for the Rights of Women*, AMNESTY INTERNATIONAL (Aug. 25, 2005), [https://www.amnestyusa.org/sites/default/files/pdfs/cedaw\\_fact\\_sheet.pdf](https://www.amnestyusa.org/sites/default/files/pdfs/cedaw_fact_sheet.pdf) [<https://perma.cc/2CVB-PK44>]; Baldez, *supra* note 253.

<sup>256</sup> Baldez, *supra* note 253, at 2.

<sup>257</sup> But note that even countries where abortion is 100 percent illegal, such as Ireland, have ratified CEDAW—so this is a moot point. See *A Fact Sheet on CEDAW*, *supra* note 252, at 2.

regard to women's position at large.<sup>258</sup> Today, Republicans "remain[] staunchly opposed to CEDAW."<sup>259</sup> Another position states that "countries ratify treaties either because it is the morally right thing to do or because they already share the norms that a particular treaty promotes."<sup>260</sup> In that respect, perhaps the American refusal to become a party to CEDAW demonstrates that the U.S. does not, in fact, share CEDAW's sentiments.

Some scholars question whether these feuding politicians truly understand how CEDAW would operate should the U.S. ratify. In sum, the U.S. would be asked only to "regulate [its] own behavior in order to comply with international standards."<sup>261</sup> Since many politicians and their constituents fear the imposition of unpopular policy, this point is critical.<sup>262</sup> But CEDAW "is more about process than policy," and could offer a step-by-step way to bring about de facto liberation for women.<sup>263</sup> Whatever the reasons, the U.S. has elected not to be bound by international standards of women's humanity, and has been left to its own devices to determine the position of women in law and society.

### C. *The Postmodernism Identity Movement's Struggle with CEDAW*

If the linguistic obfuscation surrounding women's issues continues—including the postmodern debate about the very definition of the word "woman"—CEDAW has little chance at ever being acknowledged in the United States. A human rights treaty is nothing but a collection of words—words that must be interpreted via their ordinary meaning, and if that is not clear, via extrinsic sources like the preparatory documents of the treaty.<sup>264</sup> But with American legal scholars—even legal feminists—advocating so stubbornly for a different interpretation of the word "woman," how is a treaty written exclusively about women's rights to be interpreted? How can the U.S. pledge, before the global community in which it holds such policy sway, to uphold the rights of a population that it cannot even define?

For example, one of CEDAW's most important tenets, mentioned in Articles 11 and 12, regards eliminating pregnancy discrimination.<sup>265</sup> Articles 12 and 14 speak to female healthcare.<sup>266</sup> If postmodern understandings of sex and gen-

<sup>258</sup> Baldez, *supra* note 253, at 2–3, 7, 10.

<sup>259</sup> *Id.* at 19.

<sup>260</sup> *Id.* at 9.

<sup>261</sup> *Id.* at 4.

<sup>262</sup> *Id.* at 19 (describing "[r]epublican leaders [who] . . . portray the convention as representing the interests of a narrow constituency of radical feminists, who support CEDAW as a way to force their agenda on an unsupportive majority").

<sup>263</sup> *Id.* at 23.

<sup>264</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

<sup>265</sup> CEDAW, *supra* note 67, art. 11–12.

<sup>266</sup> *Id.* art. 12, 14.

der control, would it not be an expected result for such postmodern scholars to oppose CEDAW given its use of woman-specific language?

Perhaps unsurprisingly, this is already happening. Some argue that CEDAW presents a problem for transgender athletes in that it “defines the term woman by using the word ‘sex.’”<sup>267</sup> The complaint is that for such athletes to be protected under CEDAW, the Convention must “include a definition of ‘woman’ that includes all individuals that identify as women.”<sup>268</sup>

There are two issues with such a statement. First, CEDAW intends to fight discrimination against women as the term is colloquially understood—that is, discrimination against female people, who have historically been legally and socially disadvantaged due to sex-based oppression.<sup>269</sup> To ask CEDAW to expand to include “anyone” who uses the term “woman,” no matter who they are, is—legally—absurd. Whom does CEDAW protect if there are no criteria for who a “woman” is? Second, contentions that “CEDAW is not good enough,” and that it should “not just [be for] those that are biologically female” (as if protections for biological women are “just” anything), seem to suggest that if CEDAW cannot protect biological females along with everyone within the LGBT purview, it is useless.<sup>270</sup> Undoubtedly, lesbian, gay, bisexual, transgender, intersex, asexual, and other sexual minorities deserve legal protections. But, as their issues are not (always<sup>271</sup>) the same as women’s struggles under international law with its history of patriarchy, CEDAW is not the most appropriate instrument through which sexual minorities may vindicate their rights. Indeed, this postmodern request for linguistic expansion within a document intended to protect a very specific class of people perfectly crystallizes the argument that just as women must have access to legal language that specifies and addresses our issues, so must all other marginalized populations.

Others argue outright that CEDAW is dangerous because it does not include men or “other” sexes, that it “must . . . be ‘unsexed’ to realize its potency.”<sup>272</sup> But this is counter to the treaty’s purpose—and to the purposes of feminism. Women’s rights must remain a focus for legal feminists striving to undo

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<sup>267</sup> Emily J. Cooper, *Gender Testing in Athletic Competitions—Human Rights Violations: Why Michael Phelps is Praised and Caster Semenya is Chastised*, 14 J. GENDER, RACE & JUST. 233, 257 (2010).

<sup>268</sup> *Id.*

<sup>269</sup> See *supra* Parts I, II, III.

<sup>270</sup> “Lesbian, gay, bisexual, and transgender.” Cooper, *supra* note 277, at 257, 262.

<sup>271</sup> For a discussion of the need for separate instruments for the lesbian population within the umbrella acronym, see generally Gartner, *supra* note 258. For agreement that an LGBT-specific instrument would be most helpful, see Rebecca Lee, *Forced Sterilization and Mandatory Divorce: How a Majority of Council of Europe Member States’ Laws Regarding Gender Identity Violate the Internationally and Regionally Established Human Rights of Trans\* People*, 33 BERKELEY J. INT’L L. 114, 149 (2015).

<sup>272</sup> Darren Rosenblum, *Unsex CEDAW, or What’s Wrong with Women’s Rights*, 20 COLUM. J. GENDER & L. 98, 100 (2011).

centuries of legal inequities suffered by women. One author claims that while “[w]omen face subjugation by the power relationship that establishes men as superior,” the more significant problem arises “from the division of humanity into two groups, one of which necessarily sits on top.”<sup>273</sup> It is this variety of binarism against which legal feminism fights. Feminists believe that there need not be a hierarchal system within categories of sex and gender.<sup>274</sup> Feminists reject the notion that categories must lead to hierarchy.<sup>275</sup> In particular, feminists reject the notion that fighting for women’s rights inherently subjects men to “to the Despotism of the Peticoat [sic].”<sup>276</sup>

Because everyone suffers from rigidly enforced gender roles and norms, a document that tried to “eliminat[e] . . . categories themselves” would not solve the problem.<sup>277</sup> The categories already exist in the eyes of society and the law. Humans “are incorrigible categorizers,” and there is no evidence to suggest that humanity’s fascination with putting things in categories will ever end.<sup>278</sup> In fact, postmodernism’s obsession with expanding categories simply goes to show that terms intending to indicate categories, terms like “woman,” will always be around. Further, and more importantly, the category of sex has consequences in material reality: for example, rape, forced pregnancy, and discrimination based on female anatomy and on stereotype.<sup>279</sup> These are not phenomena that can be “eliminated” by postmodern attempts to expand or undo categorization itself. Indeed, it is these material consequences that CEDAW fights against.

CEDAW did not create the sex binary or neglect women and girls in the American Declaration of Independence, the Constitution, state legislation, and Supreme Court precedent. The argument that there’s something “wrong with women’s rights”<sup>280</sup> because certain legal documents specify women—a group that, with international consensus, has suffered and still suffers discrimination—is ahistorical, and deeply disrespectful to women’s rights’ defenders who

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<sup>273</sup> *Id.* at 104.

<sup>274</sup> See, e.g., Ruth Groenhout, *The Virtue of Care: Aristotelian Ethics and Contemporary Ethics of Care*, in *FEMINIST INTERPRETATIONS OF ARISTOTLE* 171, 177 (Cynthia A. Freeland, ed., 1998) (naming “a rejection of hierarchies” as a “central feature of feminist thought”); Knouse, *supra* note 198, at 166 (highlighting that “[t]he postmodern feminist goal is not simply to equalize power between the sexes or to redefine the existing sex roles. Rather, the goal is to destabilize the sex hierarchy . . .”).

<sup>275</sup> Knouse, *supra* note 198, at 166.

<sup>276</sup> Letter from John Adams to Abigail Adams, *supra* note 33.

<sup>277</sup> Rosenblum, *supra* note 282, at 101.

<sup>278</sup> NATALIE ANGIER, *WOMAN: AN INTIMATE GEOGRAPHY* 195 (First Anchor Books ed. 2000).

<sup>279</sup> See *supra* Part III.A.

<sup>280</sup> Especially when said “wrongness” is claimed by a man. The power of the title “What’s Wrong with Women’s Rights”—used by a respected professor—is jarring, and dismisses the remaining struggle to achieve equal rights and status for women. See generally Rosenblum, *supra* note 282.

acknowledge that the world still has a long way to go in terms of rectifying misogyny. Until that historical discrimination is fully undermined, it is difficult even to dream of a world where the category of “woman” does not matter—or should not, legally, matter.<sup>281</sup> Legal feminists who focus on this population are not only not in the wrong, but are in fact doing the work of justice, given the historical and contemporary reasons discussed throughout this Note.

#### V. CONCLUSIONS AND SUGGESTIONS FOR MARCHING FORWARD

As stated in the Introduction, full and equal dignity of every human being is self-evident. Unfortunately, the current social and legal system does not afford equal dignity to all. With that in mind, each culturally and legally disadvantaged group must be able to address its disadvantages with linguistic specificity. To that end, women need woman-specific language, especially in an area of such linguistic precision as the law. Without it, we could well face another *Geduldig*.

I believe it is possible to respect the legal rights both of women—who have been subjected to all of the historical, legalized misogyny discussed above—and of those who are most comfortable conceiving of reality through the new wave of postmodern politics, with its shifting identities and questioning of binaries. Sometimes these rights overlap, for example in the person of one born female (who may still need access to services such as female healthcare and who are thus directly impacted by, for example, anti-choice legislation) but who has chosen to pursue another gendered label. But for such individuals, both of those realities—biological sex and postmodern conception of gender—will be sources of discrimination. It is vital, then, that the law not kowtow to postmodern scholars who insist that biological sex is obsolete. The law must be able to identify and protect such an individual on the basis of both realities: “gender identity,” and biological sex.

To do so, the language of the American legal system should continue to list “sex” and “gender identity” as separate concepts, for example in civil rights statutes such as the anti-discrimination statutes discussed above. The law should absolutely not replace the concept of “sex,” protected by these and other civil rights statutes such as Title VII, with “brain sex.”

In addition, the U.S. might choose to become more heavily involved in the international discussions of the legal rights of marginalized people. The U.S. might ratify CEDAW, and thus create more space in the language of the law to speak of issues that impact women and only women. It might also help promulgate an international LGBT convention that offers linguistic specificity in the discussion of gender transition (among other discussions that such a convention

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<sup>281</sup> See *id.* at 104.

would help promote, including the rights of lesbians, gay men, and bisexuals to love and marry whom they choose, free from persecution).

The key to preserving and expanding the legal rights of all marginalized groups will be linguistic. This is a fight—as every legal fight is—about language. Legal feminists should not surrender the battle against the idea that, legally, the word “woman” means “anyone who identifies as a woman.” Those who recognize the history of legalized sex-based discrimination are all too aware of what happens when the realities of sex are obfuscated by language. The warning of *Geduldig* still hangs over us all. But the legal community *can* and *should* acknowledge the distinct existence of both sex, as a biological reality, and “gender,” as a cultural phenomenon that both oppresses and liberates. Once we do, we will have won half the war.

This will require compromise on all sides of this debate. Those who pursue names and gendered identities different from those they started life with suffer discrimination in every facet of life. But those who adhere to postmodern identity politics must also be willing to concede that women suffer along a different—sometimes intersecting—axis: that of sex-based discrimination. Both of these realities are valid and deserve dedicated, linguistically precise legal discussion.

History—and the current, softened trajectory of feminism—each reveal that Western culture still needs woman-specific language to fight the remnants of legalized misogyny and neurosexism. Legal feminists, and all who advocate for the equal rights of all groups, should worry about the consequences of legally defining sex through anything other than biology, including through the brain. We should also take heed of the vitriol with which this change in definition is currently being championed. But none should be silenced by it.