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Gender Outlaws: 
*Challenging Masculinity in Traditionally Male Institutions*

Valorie K. Vojdik†

"Let her in—then fuck her to death."
—Graffito in The Citadel men's room

INTRODUCTION

In the summer of 1995, South Carolina was at war against my young client, Shannon Faulkner. For three years, I had led the legal battle in federal court challenging the males-only admission policy of The Citadel, a powerful military-style college that had excluded women for more than 154 years. What I thought would be a simple case of sex discrimination had exploded into a full-fledged gender war. By challenging traditional notions of femininity, Shannon became a gender outlaw, targeted by Citadel alumni and cadets for harassment and ridicule. Alumni sold t-shirts that proclaimed "1952 Bulldogs and One Bitch." Citadel supporters screamed obscenities at Shannon in public; an anonymous columnist in the student newspaper dubbed her "Shrew Shannon," "The Divine Bovine," and asked, "who will be the first to saddle up?" As her admission

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3. *The Scarlet Pimpernel*, Brigadier, Jan. 28, 1993, at 7 ("The PIMP doth long to tame the PLASTIC COW on this most wondrous of nights but it seem that we will have a live specimen, a
GENDER OUTLAWS

When I began the lawsuit, the legal issue seemed to be a simple and straightforward application of formal equality doctrine. As in *Mississippi University for Women v. Hogan*, the exclusion of women from The Citadel appeared to be a product of outdated stereotypes about the proper roles for men and women, a relic from the past that somehow had managed to evade the judicial radar. The arguments like those made by the college—women were not suited for a military-style education because they lack the aggressiveness, “fanaticism,” strength, and self-confidence of men—long had been rejected by the U.S. Supreme Court in similar cases as overly broad stereotypes. As a matter of law, gender was irrelevant, I argued. Women were fully capable of performing well as cadets; their admission would not destroy The Citadel, nor require material changes in its methodology, as the college asserted.

Only later, on the frontline of this gender war, did I begin to realize that The Citadel was right—the admission of women would require fundamental changes in this masculine institution. The more I learned about The Citadel, the more I saw that its exclusion of women was not simply a relic from the past, but its essential and defining feature. Its mission was to create the “whole man” through a military-style system structured around a hypermasculinity that depended on the denigration of the female. “We know how to train young men to be men,” said Major Rick...
Mill, The Citadel's spokesman. We don’t know how to train young women to be men.10 In this all-male institution, young men defined their gender identity as masculine by punishing those cadets who were perceived as effeminate or weak.11 The exclusion of women was accomplished not only through its admission policy, but also through myriad institutional policies and practices that enforced a compulsory masculinity and denigrated femininity.12

One of those practices was the "buzz cut,"13 the tradition of shaving the heads of incoming freshman.14 With this cut, freshmen are called "knobs,"15 British slang for penis.16 The haircut became a flashpoint for intense debate on the nature and terms of women’s right to equal protection.17 As District Court Judge C. Weston Houck called in the federal marshals to accompany Shannon onto campus,18 The Citadel sought court approval to shave Shannon’s head, giving her the same haircut as male freshmen received on their admission.19 The Citadel argued that the haircut was a traditional rite of passage, designed to eliminate all differences

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10. Id.
13. See Mimi Hall, “Buzz Cut” for Woman at Citadel, USA TODAY, Aug. 11, 1994, at 1A.
17. A poll conducted by The State, the newspaper in Columbia, South Carolina, resulted in 2680 calls, with a majority of 2371 agreeing that Faulkner should get her head shaved. The poll, reported in an article entitled Off With Faulkner’s Hair, was the second most popular in the past three years. Poll: Faulkner Should Get Buzz Cut, UNITED PRESS INT’L, Aug. 4, 1994 (on file with author). A San Antonio newspaper described it as “one of the most famous haircuts since Delilah had Samson’s locks shorn to rob him of his mythical source of power.” Marianne Means, Citadel Admission Close Shave, SAN ANTONIO EXPRESS-NEWS, Aug. 15, 1994, available at 1994 WL 3551965. Newspapers, radio, and television shows across the country covered the haircut debate, expressing passionate views on both sides of the issue in editorials. See, e.g., Russell Baker, The Bald Truth About Shaving, DAYTON DAILY NEWS, Aug. 15, 1994, at Op Ed 7A (“Male chauvinist swine, not to mention just plain swine of both sexes, were delighted when the judge ruled that the school was [free to cut her hair]...”). Feminists saw injustice. Talk-radio brothers frothed...); Cornwall, supra note 2; Catherine S. Manegold, Women Without Hair: Lost or Found?, N.Y. TIMES, Aug. 7, 1994, § 4, at 3 (referring to Shannon’s haircut as “the hair thing” and tracing the history of cutting women’s hair through history) [hereinafter Manegold, Women Without Hair]; Mike Nelson, Changes: To Shave or Not to Shave?, ROCKY MOUNTAIN NEWS, Aug. 18, 1994, at 7A (“My colleague and her ilk remind me of the Red Queen in Alice in Wonderland... except they’re shrieking, ‘Off with her hair,’ instead of ‘Off with her head.’” (ellipsis in original)); Carl T. Rowan, Shave Female Cadet? Maybe in South Carolina, BUFFALO NEWS, Aug. 17, 1994, at Viewpoints 3 (“Don’t you appreciate the wisdom of Judge Houck in deciding that when a French poodle wants to run with the hounds it has to look like a hound?”).
19. See id.
between incoming cadets, stripping them of their individual identity. Equal treatment, The Citadel asserted, meant the same treatment afforded male cadets. Almost immediately, bumper stickers cropped up throughout Charleston: "Shave the Whale."

The principle of formal equality, however, ignored the social meaning of the haircut, a code for masculinity that marks a cadet as male. The haircut was not gender neutral, but what Pierre Bourdieu terms a rite of institution, a ritual that constitutes a cadet as male, distinguished from the female. Stripped of her hair, Shannon would be doubly excluded: she would not look like a male cadet, but neither would she look like a real woman. She would be a gender outlaw—neither male nor female. Doubtless many male cadets would label her a "dyke," a butch lesbian whose sexual desire for women makes her not a "real woman." The price of admission, I argued to the court, should not compel conformance to masculine norms or identity.

The district court judge refused to enjoin the knob haircut, however. Applying formal equality doctrine, the court held that women must be treated the same as men, absent a difference that justified differential treatment. As a practical issue, the haircut soon became moot. Shannon resigned from The Citadel less than a week after she entered, overcome by stress and terror as the only woman alone in the barracks with 1800 male cadets, most of whom hated her guts.

The haircut raised fundamental questions, however, about how women should be integrated into traditionally male institutions, questions that go to the heart of the meaning of discrimination based on sex or gender.

In a seven-to-one decision in United States v. Virginia, the U.S. Supreme Court subsequently held that Virginia could not deny admission to qualified women who sought the unique opportunities offered at Virginia Military Institute (hereinafter "VMI"), the only other males-only public
Like The Citadel, VMI employed a military style educational method. While the Court acknowledged that some changes would be required to assure privacy and to accommodate physical differences, it dismissed the claim that women would destroy VMI as the type of doomsday prediction historically used to exclude women. In contrast to racial desegregation cases such as Brown v. Board of Education, the Court did not condemn VMI’s males-only tradition as a badge of inferiority or a means of subordination, nor did it require VMI to eliminate discrimination “root and branch.” Instead, the Court required the assimilation of women into VMI’s existing masculine culture.

VMI subsequently refused to change the name for its cadets and alums from “Brother Rats” or to eliminate the sexually offensive and derogatory language used in the barracks system, including “dykes,” “raping your virgin ducks,” “boning a cadet” (for verbally reprimanding cadets), and “running a period.” The president of VMI, who had testified that the admission of women into The Citadel would be like a “toxic kind of virus” that would destroy the school, insisted that these words are “significant, historical accretions that help us sustain the legacies of our predecessors.” VMI argued to the Court that it would have to modify its physical fitness standards to accommodate women, yet refused to do

29. Id. at 540-43.
30. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).
31. Compare United States v. Virginia, 518 U.S. at 558 (reversing the final judgment of the court of appeals that affirmed the Mary Baldwin plan as an adequate remedy and remanding “for further proceedings consistent with this opinion”) with Green v. County Sch. Bd., 391 U.S. 430, 438 (1968) (noting school boards’ affirmative duty to eliminate racial discrimination “root and branch”).
33. LAURA FAIRCILD BRODIE, BREAKING OUT: VMI and the Coming of Women 75-81 (2000). Brodie, the wife of VMI’s band director, served on a committee that helped to oversee the assimilation of women into VMI. Id. at xiii. Brodie describes the difficulties female cadets face in VMI’s masculine culture, struggling with issues of acceptance by male cadets who oppose coeducation, as well as with the double bind of negotiating their identity as women within VMI’s masculine culture. See id. at 284-88, 291, 295-96, 348-49. After the first female cadets became officers with the power to issue orders to freshman “rats,” many experienced blatant insubordination as male upperclassmen instructed their freshman “rats” to ignore the women’s commands. Id. at 348.
35. BRODIE, supra note 33, at 79. Bunting instructed VMI officials: “Gentlemen: Please note that I do not want the VMI stoop lingo changed, not a word of it, in order ‘to accommodate’ women. You might think these small items, but they are important and significant, historical accretions that help us sustain the legacies of our predecessors: The words are hardy old VMI words. They are not to be excised from the Rat Bible, etc., during my time as Superintendent.” Id.
so. To modify its system, VMI argued, would deny equality to those women who sought the VMI experience.

Though the gates to VMI and The Citadel have been forced open, female cadets struggle for acceptance within a hostile masculine culture that continues to define a cadet as male. At VMI, defiant male sophomores in the graduating Class of 2000 referred to themselves as the “Last Class with Balls” and inscribed the inside of their VMI rings with “LCWB.” Inside the barracks, women face harassment and abuse. This new generation of gender outlaws must negotiate the dilemma of being female in these profoundly masculine institutions, where “woman” is a term of punishment and humiliation. A female VMI cadet explained, “I don’t know whether I want to be feminine for the outside world, or whether I want to be tough for VMI. I don’t know which world I need to live up to.” Male cadets do not face this conflict. Regardless of whether they conform to stereotypically masculine norms, they are never mistaken for women in their uniforms, nor must they transgress gender norms to derive the benefits offered by their institutions.

The difficulties faced by the female cadets in transgressing boundaries of gender are similar to those faced by women in traditionally male workplaces such as the military, police and fire departments, and construction crews. While traditional equal protection doctrine has succeeded in eliminating most formal barriers that barred women as a group, it has not led to the inclusion of women within these traditionally male workplaces. Most remain deeply segregated by sex. Formal barriers to entry have been replaced by informal barriers of control that punish those women who transgress gender bounds. Methods of policing gender such

37. BRODIE, supra note 33, at 23.
38. See id. at 157-58.
39. Id. at 343-44.
41. BRODIE, supra note 33, at 291.
43. See Dep’t of Labor, Twenty Leading, supra note 42; Dep’t of Labor, Nontraditional, supra note 42.
as sexual harassment and social ostracism enforce the definition of these jobs as appropriate for men only, and operate to exclude women from these challenging and well-paid jobs.\footnote{In her article \textit{Reconceptualizing Sexual Harassment}, Vicki Schultz argues persuasively that many forms of sexual harassment "are designed to maintain work ... as bastions of masculine competence and authority." \textit{107 Yale L.J.} 1683, 1687 (1998). Harassment, in its myriad forms, undermines the perceived competence of women, reinforcing the definition and identity of jobs as masculine. \textit{Id.} Schultz argues that sexual harassment functions to force women out of traditionally male jobs and thereby reinforces the definition of the job as masculine. \textit{Id.} at 1694-95. Moreover, harassment "remind[s] women that they are different and out of place." \textit{Id.} at 1687. The result, Schultz argues, is the reinforcement of sex segregation in the workplace. \textit{Id.} at 1691.}

In this article, I propose that the treatment of gender in equality jurisprudence needs to be expanded to take into account the practices and policies inside social institutions that are based upon, and perpetuate, the classification of persons according to gender. Formal equality erroneously assumes that gender discrimination is a mistake in classification by individual state actors, who have failed to determine correctly whether men and women are the same or different for purposes of a particular statute. Gender is better conceptualized as an institution, a social process of exclusion that distinguishes persons based on their sex, simultaneously reinforcing a hierarchy that privileges the male and masculinity, and subordinates women. Gender is a social practice that is produced not only at the level of individuals, but within institutions as well.\footnote{R.W. CONNELL, \textit{Masculinities} 72-73 (1995) (discussing the way in which masculinity and gender are produced at the personal level as well as within societal institutions).} Institutional practices construct and reinforce traditional norms of masculinity, perpetuating the boundaries of gender formerly maintained by formal classifications that denied women admission.\footnote{See Epstein, \textit{Tinkerbells}, supra note 44, at 232.} Unlike men, women must transgress the boundaries of gender as the price of admission. In the process, they become gender outlaws, subject to censure and exclusion. The price of admission should not be the compelled performance of masculine identity.

Merely making an institution's admissions policy or hiring procedure gender neutral is not enough, as the U.S. Supreme Court has routinely recognized with respect to race neutrality in racial desegregation cases.\footnote{See, e.g., United States v. Fordeice, 505 U.S. 717, 729 (1992); \textit{cf.} Green v. County Sch. Bd., 391 U.S. 430, 439-41 (1968) (arguing that simply allowing students of any race to choose to attend does not go far enough).} The remedial obligations of historically male institutions should include the elimination of those policies and practices that perpetuate the exclusion of women. Analogizing to the cases involving racial segregation in education, the Court should shift the burden to the defendant at the remedial stage to prove that it has eliminated all vestiges of its prior discrimination and will effectively prevent future discrimination.\footnote{See, e.g., \textit{Fordice}, 505 U.S. at 729.} Courts should give full effect to the remedial mandate that women be put back in the
position they would have attained absent the discrimination. Traditionally male institutions should be required to eliminate their institutional practices that are traceable to their all-male status and that disparately affect women, including stigmatizing women as unsuitable or inappropriate for the institution. This proposal eliminates the assumption that traditionally male institutions are gender neutral and requires them to examine and eliminate facially neutral practices that disparately affect women, regardless of their intent to discriminate.

Reconceptualizing gender as a social institution focuses on the way in which gender is inscribed within institutions, integrating feminist anti-subordination theories with cultural and postmodern theories of gender as a social construction. Antisubordination theorists such as Catharine MacKinnon have illuminated the use of gender as a means to subordinate and naturalize the inequality of women. Cultural and postmodern feminist scholarship has focused on gender as a social construction or performance, sometimes assuming that gender is fluid and can be changed at will. As social theorist Pierre Bourdieu explains, masculine domination in our society is constructed in both the material and symbolic world. Drawing on this approach, my proposal focuses on both material and symbolic practices that construct gender within institutions themselves, through rituals, symbols, and practices that mark a job or institution as appropriate for men, but not for women.

Part I of this article discusses the remedial analysis employed by federal courts in cases involving racial desegregation in public education. Where a state has maintained segregation in higher education, the Supreme Court requires that the state not only eliminate the racially discriminatory admissions policies, but eliminate those policies and practices traceable to the former system that impede student choice or have other discriminatory effects, regardless of intent.

Part II analyzes the manner in which formal equality doctrine frames gender discrimination as a classificatory error, rather than as a system of subordination.

Part III argues that gender should be reconceptualized as a social institution, drawing on recent social theories of gender and masculinity to explore the ways in which gender is produced within traditionally masculine institutions.


52. See, e.g., Judith Butler, Gender Trouble, Feminism and the Subversion of Identity 33-34 (1990) (arguing that sex is a "performatively enacted signification" and urging feminists to "make gender trouble" by mobilizing and subverting the constitutive categories of gender identity).

53. See Bourdieu, Masculine, supra note 50, at 1-4.
Part IV illustrates the limitations of formal equality doctrine in re-
dressing the exclusion of women from The Citadel and VMI, institutions
that are profoundly gendered. In section A, I analyze VMI and The Cita-
del as institutions that construct the identity of cadets as male and the
culture of these institutions as masculine, explaining how the admission of
women fundamentally threatened the boundaries of gender inside these
powerful institutions. In section B, I analyze the judicial treatment of
VMI within the framework of formal equality. The federal courts consid-
ered its admissions policy under the traditional principles of formal equal-
ity, framing the exclusion of women from VMI as a textbook case of
impermissible sex stereotyping, rather than an institutional process of
exclusion. In section C, I consider the remedial implications of formal
equality in these cases. Unlike courts in cases involving racial desegrega-
tion in education, the federal courts did not require VMI to dismantle their
all-male policies and practices “root and branch,” nor to examine and
eliminate the disparate effects of policies that continue to stigmatize
women as inferior.

In Part V, I propose the expansion of remedial obligations of his-
torically male institutions, like The Citadel and VMI, to require them to
eliminate facially neutral practices traceable to the exclusionary system
that disparately affect women or enforce a compulsory masculinity that
denigrates and stigmatizes women. I then apply my proposal to VMI to
demonstrate how it would require these institutions to modify their exist-
ing practices to better include women.

I. REMEDIAL PRINCIPLES OF RACIAL DESEGREGATION:
ELIMINATION OF DISCRIMINATION “ROOT AND BRANCH”

In 1954, in the landmark case of *Brown v. Board of Education*, the
U.S. Supreme Court held that state-enforced racial segregation in public
education violated the right to equal protection guaranteed by the Four-
teenth Amendment. Brown marked a radical break with the segrega-
tionist principles in *Plessy v. Ferguson*, in which the Court held that
separate facilities for blacks and whites did not violate the Equal Protec-
tion Clause, as long as they were provided on an equal basis. Plessy em-
braced a formalistic notion of equality premised on the assumption that
racial differences were natural and enduring. Segregation of races, the
majority held, did not imply the inferiority of one race or the other.

55. 163 U.S. 537, 543 (1896), overruled by Brown, 347 U.S. at 495.
57. Plessy, 163 U.S. at 543.
In his now-famous dissent, Justice Harlan rejected the formalistic conception of equal accommodations embraced by the majority and instead focused on the social meaning of state-sponsored segregation in American society. State-sponsored segregation, Harlan concluded, was ordinarily interpreted as denoting the inferiority of black citizens. It was a badge of inferiority that marked blacks as unfit to share public facilities with whites. "Separate but equal" accommodations did not assure equality, but preserved white supremacy.

Fifty years later, Brown rejected the premise of Plessy, agreeing with Justice Harlan that "[s]eparate educational facilities are inherently unequal." While the Court invoked social science evidence to bolster its conclusion that separate facilities were inherently unequal, it fundamentally relied on the social meaning of race-based segregation in our society. The Court found that segregation with the sanction of law, "usually interpreted as denoting the inferiority of the negro group," sent a powerful message that blacks were inferior. The Court focused on the message sent to black school children: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

In the rehearing of Brown v. Board of Education (hereinafter "Brown II") and subsequent cases, the Court recognized that segregation was part of a system of subordination that must be eliminated "root and branch." The Court explicitly held that "discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination." School authorities have the affirmative duty to eliminate a variety of obstacles in order to make the system comply with the constitutional principle set forth in Brown. Under basic remedial principles, federal courts must require state defendants to restore the plaintiff to the position that she would have been in but for the discrimination. This requires the state not only to bar future discrimination, but also to eliminate the effects of past dis-

58. See id. at 560.
59. See id.
60. See id. at 562.
61. See id.
63. Id. at 494-95.
64. Id. at 494.
65. Id.
66. Id.
67. See id. at 560.
68. See id.
69. See id. at 562.
70. See id.
71. See id.
The ultimate objective is to make whole the victims of discrimination and achieve a school system "wholly free from racial discrimination." The U.S. Supreme Court repeatedly has held that a state does not satisfy its remedial obligations by merely opening the doors of public schools on a racially neutral basis. In Green v. County School Board, the defendant school board claimed that it had complied with Brown's mandate by adopting a "freedom-of-choice plan"—students were now free to choose to attend any school. The Court noted that freedom-of-choice plans had tended to perpetuate racially identifiable schools, placing the burden of desegregation on black children and their families, who became targets of violence and reprisal by whites. While the immediate goal of desegregation was to place those black children "courageous enough to break with tradition" in white schools, the ultimate goal was to dismantle the dual system and establish a "unitary, non-racial" system of public education. The Court ruled, "'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of segregation and its effects," thus determining that freedom-of-choice plans in and of themselves were invalid.

To eliminate racial discrimination in education, the Court has upheld a range of remedial measures designed to eliminate the "vestiges" of discrimination, the inequalities that are the legacy of segregation. Federal courts have approved compensatory educational programs to remedy the deficiencies in the education provided in former black schools, to provide onsite teacher training, and to modify testing programs that disparately affect children who had attended inferior schools. In United States v. Fordice, the Court held that the remedial principles announced in Green applied to racially segregated systems of higher education as well.

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72. Green, 391 U.S. at 438 n.4.
74. Green, 391 U.S. at 439-41.
75. Id. at 437.
76. Id. at 441 n.5 (quoting U.S. COMM'N ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION, 1966-1967 88 (1967)).
77. Id. at 436.
78. Id.
79. Id. at 440 (quoting Bowman v. County Sch. Bd., 382 F.2d 326, 333 (4th Cir. 1967)).
80. See, e.g., Milliken v. Bradley, 433 U.S. 267 (1977) (upholding plan including reading measures, inservice teacher training, testing, and counseling); United States v. Missouri, 523 F.2d 885 (9th Cir. 1975) (holding that a plan including inservice training programs, community education, and nonracial faculty evaluation criteria should be implemented in a timely manner); Lemon v. Bossier Parish Sch. Bd., 444 F.2d 1400 (5th Cir. 1969) (mandating maintenance of unitary school system).
81. E.g., Milliken, 433 U.S. at 286; United States v. Missouri, 523 F.2d at 887.
82. E.g., Lemon, 444 F.2d at 1401.
constitutional duty to dismantle the dual school system. However, like New Kent County in Green, Mississippi merely eliminated the race-based admission policies in its institutions of higher education, and then claimed that its so-called “freedom-of-choice” plan fulfilled its remedial obligation to eliminate discrimination. The Court rejected its freedom-of-choice plan, holding that establishment of race neutral policies alone was not sufficient to discharge a state’s obligation to dismantle its former de jure segregated system. The Court recognized that many policies and factors affect student choice and enrollment; those that have segregative effects must be eliminated as well. A state must examine all of its practices, even those that are facially neutral. To fulfill its remedial obligations, states must eliminate those policies that are rooted in its de jure system and that continue to influence student choice or have discriminatory effects, to the extent possible and where consistent with sound educational policy. No showing of intent to discriminate is necessary, so long as the policy can be traced back to the prior de jure system.

Desegregation has not succeeded in assuring black children equal opportunity or educational equity. The U.S. Supreme Court has gradually eroded the promise and vision of Brown. While the Court recently reaffirmed that de jure segregation in education was both the means and the end of a policy motivated by the disparagement or hostility toward the disfavored race, it has limited the power of federal courts to remedy the effects of resegregation and to order broad, system-wide relief. In matters of race generally, it has shifted away from understanding race as a system of subordination to a more Plessy-like legal formalism that focuses on color-blindness as a goal, and it has tended to view stereotyping rather

84. Id. at 727.
86. Fordice, 505 U.S. at 725, 727 (quoting Ayers v. Allain, 914 F.2d 676, 678 (5th Cir. 1990)).
87. Id. at 729. De jure segregation is “[s]egregation that is permitted by law”; de facto segregation, on the other hand, is “[s]egregation that occurs without state authority, [usually] on the basis of socioeconomic factors.” BLACK’S LAW DICTIONARY 1362 (7th ed. 1999).
88. Fordice, 505 U.S. at 729.
89. See id. at 733, 742-43.
90. Id. at 729.
91. Id. at 731-32.
92. See generally AMSTERDAM & BRUNER, supra note 56, at 273-74 (noting that African-American children are often relegated to inner-city schools bereft of opportunities); see also Robin D. Barnes, Black America and School Choice: Charting a New Course, 106 YALE L.J. 2375, 2376 (1997) (“Black children have less access than white students to the limited number of quality public education programs, and they are significantly overrepresented in the worst.”).
93. See, e.g., Missouri v. Jenkins, 515 U.S. 70 (1995) (reversing district court remedial order that the state continue funding remedial education programs in order to eliminate the vestiges of racial segregation and to attract non-minority students); Freeman v. Pitts, 503 U.S. 467 (1992) (holding that resegregation is a product of private choice without constitutional implications); see also AMSTERDAM & BRUNER, supra note 56, at 55-59 (discussing examples where the Court has overruled orders of lower courts).
than subordination as the constitutional wrong. Still, the notion that separate is inherently unequal continues to have legal and moral force.

In 1996, the Harvard Project on School Desegregation concluded that both "conservatives and liberals alike still treat the 1954 ruling as a source of pride" despite the erosion of its integrative ideal. The basic remedial principles of Brown and Fordice, though far from sufficient, at least acknowledge that race conscious admissions policies are likely to have negative systematic effects that state defendants must eliminate. In Knight v. Alabama, the Eleventh Circuit applied these principles to Alabama's formerly segregated higher education system and held that the State must examine and eliminate both official and unofficial actions that fostered a racially inhospitable environment if there are practicable and educationally sound alternatives. The court also recognized that a curriculum devoid of black thought, culture, and history constitutes a vestige of past discrimination that must be eliminated as far as practicable.

II. GENDER DISCRIMINATION AS AN ERROR IN CLASSIFICATION

While the U.S. Supreme Court has recognized that our nation has a "long and unfortunate history of sex discrimination" in which women, like blacks, have been denied the fundamental rights of citizenship, it has never understood gender as a system of subordination.

Beginning with Reed v. Reed in 1971, the Court began to subject sex classifications to heightened scrutiny. The Court has acknowledged repeatedly that:

throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of
their own children... And although blacks were denied the right to vote in 1870, women were denied even that right... until adoption of the Nineteenth Amendment half a century later.\textsuperscript{101}

Unlike classifications based upon race or national origin, however, classifications based on sex have not been afforded strict scrutiny.\textsuperscript{102} While the law has rejected the notion that supposed inherent differences justify racial discrimination, it has expressly assumed that there are differences between men and women that may justify differential treatment.\textsuperscript{103} Sex-based classifications, therefore, are not absolutely proscribed. Judicial skepticism of such classifications is warranted, however, in light of the historical willingness of legislators to rely on outdated assumptions that sex is an accurate proxy for more germane bases of classification.\textsuperscript{104} To justify a sex-based classification, states must offer an “exceedingly persuasive” justification that meets the requirements of intermediate scrutiny, i.e., the state must prove that the classification is substantially related to an important state purpose.\textsuperscript{105}

Formal equality, as MacKinnon and others have argued, frames the issue of gender discrimination as a matter of sameness or difference.\textsuperscript{106} The task of the courts is to determine whether men and women are the same or different for purposes of the classifications.\textsuperscript{107} Courts focus on whether the state has relied improperly on stereotypical assumptions about men and women.\textsuperscript{108}

Rather than focus on the systematic exclusion of women throughout history, the U.S. Supreme Court’s gender jurisprudence has focused primarily on the wrong of stereotyping.\textsuperscript{109} The Court scrutinizes the asserted objective to determine whether it reflects “archaic and stereotypic

\begin{enumerate}
\item \textsuperscript{101} \textit{Frontiero}, 411 U.S. at 685.
\item \textsuperscript{102} See, e.g., \textit{J.E.B.}, 511 U.S. at 135-36.
\item \textsuperscript{103} E.g., United States v. Virginia, 518 U.S. 515, 533-34 (1992).
\item \textsuperscript{104} See, e.g., id. at 531-32; \textit{J.E.B.}, 511 U.S. at 138-40; \textit{Hogan}, 458 U.S. at 725 n.10.
\item \textsuperscript{105} United States v. Virginia, 518 U.S. at 533.
\item \textsuperscript{106} MacKinnon, supra note 51, at 216.
\item \textsuperscript{107} See id. at 216-17.
\item \textsuperscript{108} See id. at 218.
\item \textsuperscript{109} Id. MacKinnon criticizes liberal theories of discrimination as being based upon the wrong of stereotyping: “Laws or practices that express or reflect sex ‘stereotypes,’ understood as inaccurate overgeneralized attitudes often termed ‘archaic’ or ‘outmoded,’ are at the core of this definition of discrimination.” Id. More recently, Mary Anne C. Case analyzed the Supreme Court’s equal protection jurisprudence with respect to gender, arguing that it embodies the principle of anti-stereotyping rather than anti-subordination. “The Very Stereotype the Law Condemns”: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 CORNELL L. REV. 1447, 1472 (2000) (citing Ruth Colker, Anti-subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. REV. 1003, 1003 (1986)) [hereinafter Case, The Very Stereotype]. In applying intermediate scrutiny, courts focus on the issue of whether rules or practices that facially distinguish between males and females “rely on a stereotype.” \textit{See id.} at 1449-50. “Stereotype” is now a term of art, Case argues, for “any imperfect proxy.” Id. A law will not be upheld when it is based on an assumption that is untrue for either all women or no women, or for all men or no men. \textit{Id.}
notions” about men and women. Classifications may not be used to exclude or protect members of one gender because they are presumed “to suffer from an inherent handicap or be innately inferior.” Even if the objective is legitimate, courts scrutinize the relationship between the asserted state objective and the classification to ensure that the classification is the product of “reasoned analysis” rather than “the mechanical application of traditional, often inaccurate assumptions about the roles of men and women.” Consistently, the Court has invalidated statutes based upon stereotypical beliefs about the proper roles, abilities, or interests of men and women, regardless of whether there is any empirical support for the classification.

Even though stereotypes may contain a shred of truth, states may not use gender as a proxy where the effect is to stigmatize or to perpetuate historical patterns of discrimination. In Mississippi University for Women v. Hogan, for example, the Court held that the University violated the Fourteenth Amendment by categorically excluding men from enrolling in its nursing college for credit. Although the University argued that its female-only policy compensated women for past discrimination, the Court held that exclusion of males from the nursing school “tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job.” In J.E.B., the Court invalidated the government’s use of peremptory challenges to exclude prospective jurors based solely on their sex. While the Court recognized that gender makes a difference in juror attitudes, it held that state actors who exercise peremptory challenges based upon sex stereotypes “ratify and reinforce prejudicial views of the relative abilities of men and women.” Given the long history of excluding women from juries, the government’s use of sex-based peremptory strikes sends a powerful message that “certain individuals, for no reason other than gender, are presumed unqualified” for jury service.

111. Id.
112. Id. at 726.
113. E.g., J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994) (invalidating use of gender-based peremptory challenges); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 151 (1980) (invalidating statute that required the widower, but not the widow, to show incapacitation or dependence upon spouse to recover benefits for spouse’s death, even though men may be more likely to provide primary support); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) (invalidating Utah statute specifying different age of majority for males and females).
114. E.g., J.E.B., 511 U.S. at 141-42; see also Hogan, 458 U.S. at 729. As the Court in J.E.B. explained, “The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.” 511 U.S. at 140 n.11.
115. 458 U.S. at 733.
116. Id. at 729.
117. 511 U.S. at 146.
118. Id. at 140.
119. Id. at 142.
Analogizing to the stigma that results from racial discrimination, the majority held that the use of sex in preemptory strikes is "practically a brand upon them, affixed by the law, an assertion of their inferiority."\(^{120}\)

Although the Court’s language in *Hogan* and *J.E.B.* suggests that the Court recognizes that sex-based classifications stigmatize women, marking them as inferior, the Court has not treated sex discrimination as a system of subordination. Through the lens of formal equality used by the Court, sex discrimination does not appear as a system of subordination of women, but as the stereotypical actions of discrete, individual state actors who intentionally, but incorrectly, have chosen to treat men and women who are similarly situated in a different manner.\(^{121}\) As Catharine MacKinnon has pointed out, the equal protection doctrine that the Court uses is based on the principle that like should be treated alike.\(^{122}\) The Court does not prohibit the act of classification per se, but only those classifications that fail to treat similarly situated persons the same, or to treat differently situated persons differently.\(^{123}\) Under this concept of equality, discrimination is an error in classification, a cognitive mistake.\(^{124}\)

The requirement of intent perpetuates the construction of gender discrimination as the intentional and discrete acts of individual state actors who adopt inaccurate classifications, rather than as part of a larger social system or institution. Policies that do not discriminate on their face, but that disparately affect members of one sex, may be challenged only if the plaintiff demonstrates that the policy intentionally discriminates on the basis of sex.\(^{125}\) As a practical matter, this requirement is nearly impossible to satisfy. Once gender discrimination is framed in this way, the social system of subordination is rendered invisible. The requirement of intentional discrimination, therefore, reinforces the construction of sex discrimination as a classificatory error.

In *Personnel Administrator v. Feeney*, for example, the U.S. Supreme Court applied the requirement of intent to uphold Massachusetts' absolute preference for veterans in hiring civil service employees, despite its devastating effect on women's employment.\(^{126}\) Until 1971, the state legislature had exempted certain jobs traditionally held by women from

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120. *Id.* (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).
121. MacKINNON, *supra* note 51, at 218 ("[C]onsidering gender a matter of sameness and difference covers up the reality of gender as a system of social hierarchy, as an inequality.").
122. See *id.* at 216.
123. See *id.* at 216-17.
126. *Feeney*, 442 U.S. at 270.
the preference.\textsuperscript{127} Because only 1.8\% of veterans in the state were women,\textsuperscript{128} however, the effect of the preference was to create and perpetuate a segregated workforce, where men held the high-paying jobs and women were relegated to the lower-paying pink collar positions exempted from the preference.\textsuperscript{129} Since both men and women could be veterans, a majority of the Court held that the preference for veterans did not classify on the basis of gender.\textsuperscript{130} To prevail, the plaintiff would have to prove that the state chose the veteran preference scheme not merely "in spite of" its discriminatory effects, but "because of" its discriminatory effects.\textsuperscript{131} The majority held that there was no evidence that Massachusetts sought intentionally to disadvantage women.\textsuperscript{132} Having framed the analysis narrowly to focus on the state's choice to adopt the veterans preference, the Court ignored both the historical exclusion of women from military service and the overall statutory scheme of relegating women to lower paid, pink collar jobs within the civil service system.

Because equality doctrine affords women equal protection to the extent that women can prove they are similar to men,\textsuperscript{133} women must prove that they conform to the male norm.\textsuperscript{134} In practice, it is the exceptional woman who is entitled to equality, a woman whose privilege, abilities, or experience are most like those of men.\textsuperscript{135} As MacKinnon suggests, the argument becomes: "[W]e are as good as you. Anything you can do, we can do. Just get out of the way."\textsuperscript{136} Having proven that she is no different than a man, the exceptional woman loses standing to challenge the terms on which she is afforded access to male rights and privileges:\textsuperscript{137} if men and women are similarly situated, there is no reason to treat them differently. The legal wrong is defined as a cognitive mistake in classification,\textsuperscript{138} and the remedy becomes assimilation on male terms.\textsuperscript{139} Under

\begin{footnotesize}
\begin{enumerate}
\item[127.] \textit{Id.} at 284-85 (Marshall, J., dissenting).
\item[128.] \textit{Id.} at 270.
\item[129.] \textit{Id.} at 270-71.
\item[130.] \textit{Id.} at 275.
\item[131.] \textit{Id.} at 279.
\item[132.] \textit{Id.} at 281.
\item[133.] MACKINNON, \textit{supra} note 51, at 220-21.
\item[134.] \textit{Id.} at 221.
\item[135.] As MacKinnon explains:
\begin{quote}
The standards of sex discrimination law are for society's exceptions. To claim that they are situated similarly to men, women must be exceptions. They must be able to claim all that sex inequality has, in general, systematically taken from women: financial independence, job qualifications, business experience, leadership qualities, assertiveness and confidence, a sense of self, peer esteem, physical stature, strength or prowess, combat skills, sexual impregnability, and, at all stages of legal proceedings, credibility. \textit{Id.} at 228.
\end{quote}
\item[136.] \textit{Id.} at 221.
\item[137.] Those exceptional women who can prove they are like men "are served equality with a vengeance. If they win, they receive as relief the privilege of meeting the male standard . . . ." \textit{Id.} at 226.
\item[138.] \textit{Cf.} Franke, \textit{The Central Mistake}, \textit{supra} note 12, at 4-5.
\end{enumerate}
\end{footnotesize}
traditional equality jurisprudence, equal treatment becomes the same treatment.

While equality doctrine has succeeded in eliminating many of the formal barriers to women's right to participate in traditionally male institutions, it has failed to assure women equal access to power and opportunity in these institutions. By focusing on sex discrimination as an error in classification, courts ignore the ways in which gender is institutionalized through the social and regulatory practices that are based upon, or perpetuate, gender within institutions. To assure women equal protection, it is not enough to require traditionally male institutions merely to open their doors to women. Rather, the notion of gender must be reconceptualized as an institution, a social practice of subordination.

Most courts have considered "gender" to be interchangeable with "sex," without any analysis of whether they have different meanings. Seeking to reframe the sameness/difference dilemma, feminist legal scholars have focused on gender as a social construction, criticizing courts for conflating sex, gender, and sexual orientation, and urging courts to disaggregate sex and gender. Drawing on postmodern feminist theory,

139. Equality doctrine thus "grant[s] women access to what men have: to the extent that women are no different from men, women serve what men have." MacKinnon, supra note 51, at 220. While courts have approved various affirmative action plans to remedy discrimination in the workplace, they carefully delimit the extent to which plans correct effects of past discrimination. See, e.g., Ensign Branch, NAACP v. Seibels, 31 F.3d 1548, 1569 (11th Cir. 1994) (prescribing strict scrutiny "[t]o ensure that affirmative action programs do not go too far . . . ". As used by courts and administrative agencies, affirmative action generally refers to "temporary, flexible policies of limited preferences for qualified individuals . . . to remedy gender and racial imbalances." Deborah Rhode, Speaking of Sex 163-64 (1999). In a few notable cases, federal circuit courts have approved plans that seek to increase the hiring and retention of female police officers, contractors, and firefighters. See, e.g., Seibels, 31 F.3d at 1583-84. In Johnson v. Transportation Agency, for example, the United States Supreme Court upheld an affirmative action plan under Title VII that, inter alia, took sex into account in selection of applicants to work in a county transit authority office. 480 U.S. 616, 641-42 (1987). As Susan Sturm and Lani Guinier note, however, "most affirmative action programs in place do not respond to the bias and invalidity of selection practices by posing a direct and systemic challenge to those practices" or offer alternative approaches to defining selection criteria. The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 Cal. L. Rev. 953, 1002 (1996).

140. See Judith Lorber, Paradoxes of Gender 225-30 (1994) (describing continued segregation by sex within U.S. workplaces and the persistence of a glass ceiling that limits women's representation at the top tiers of work hierarchies).

141. In the 1970s, Ruth Bader Ginsburg noted that the word "gender" is more appropriate than the word "sex" when referring to "sex discrimination" because of the more salacious connotations of "sex." Gender in the Supreme Court: The 1973 and 1974 Terms, 1975 Sup. Ct. Rev. 1 n.1.

142. Mary Anne C. Case, for example, writes that courts erroneously have failed to distinguish between sex and gender, even though social theories have done so for years. Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1, 2 (1995) [hereinafter Case, Disaggregating].

143. Francisco Valdes analyzes the failure of courts to separate the constructs of sex, gender, and sexual orientation, which, he argues, assumes and reinforces heterosexual norms. Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation," 83 Cal. L. Rev. 1 (1995). Katherine M. Franke argues that courts improperly fail to recognize that claims about "sexual biological facts" ultimately involve questions of gender. Franke, The Central Mistake, supra note 12, at 98. More recently, Taylor Flynn has argued that cases involving the rights of transgendered persons present the opportunity to expand the judicial understanding that sexual identity involves questions of gender. Transforming the Debate: Why
some have argued that "sex" refers to the biological or physical characteristics distinguishing men and women, while "gender" usually refers to the cultural attributes or attitudinal characteristics that are associated with the biological categories of male and female.144 Under this definition, gender refers to those socially constructed behaviors, both descriptive and normative, that correspond to the categories of male and female in our society.145 Gender is both descriptive, in that it purports to reflect social expectations of appropriate behavior for men and women, as well as prescriptive, in that it operates normatively to prescribe appropriate behavior and roles for men and women.146

The disaggregation of sex and gender challenges the well-entrenched belief in natural sex differences. Conceptualizing gender as a social construction makes clear that the categories of male and female are neither natural nor essential.147 Once the categories of male and female are understood to be socially constructed, rather than biologically necessary or essential, the rationale for sex as a classification begins to disappear.148 Focusing on gender as a social construction reveals the power of society to prescribe and to regulate behavior.149 Social expectations of how men and women should behave are extremely effective tools to regulate behavior and to make distinctions between men and women appear natural.150 As several scholars have argued, the disaggregation of sex and gender makes actionable the regulation of men and women who do not conform to traditional gender norms.151 In Price Waterhouse v. Hopkins, for example, the U.S. Supreme Court held that an employer discriminates

144. KATHERINE BARTLETT & ANGELA HARRIS, GENDER AND LAW 1084-87 (2d ed. 1998). See also J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) ("[G]ender is to sex as feminine is to female and masculine is to male.").

145. See BARTLETT & HARRIS, supra note 144, at 1086. The assumption that sex is a natural, biological category recently has come under attack by cultural and queer theorists such as Judith Butler, who posit that sex is not a pre-social state, but is just as socially constructed as gender. See, e.g., BUTLER, supra note 52, at 140-41; Franke, The Central Mistake, supra note 12, at 98 (arguing that "every sexual biological fact is meaningful only within a gendered frame of references. Indeed, every observation about biology ultimately collapses into normative gender roles.").


147. See, e.g., BUTLER, supra note 52, at 6-7 (analyzing connections and distinctions between sex and gender).

148. See, e.g., Franke, The Central Mistake, supra note 12, at 68 (explaining that sumptuary rules and sex specific bathrooms create and reinforce the gendered identity of "real women" and "real men" who conform to gender norms).

149. Cynthia Fuchs Epstein explains that "[t]he social ordering of the workplace by sex of worker is a persevering phenomenon, often explained by reference to market forces, personal choices, and so on. But there are distinct social controls that maintain gender distinctions in the workplace." Epstein, Tinkerbells, supra note 44, at 238.


151. See, e.g., Case, Disaggregating, supra note 142, at 2-5; Franke, The Central Mistake, supra note 12, at 1-6.
on the basis of sex when it punishes employees who do not conform to its stereotypical expectations and gender norms.\textsuperscript{152} Price Waterhouse failed to promote Anne Hopkins to partnership even though she generated substantial business, complaining that Hopkins was too aggressive and "macho," that she would benefit from "charm school," and that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."\textsuperscript{153} Prior to \textit{Price Waterhouse}, numerous courts held that discrimination based on gender was separate and distinct from discrimination based on sex, and not actionable under Title VII.\textsuperscript{154} This often occurred in cases involving claims of discrimination against gays, lesbians, or transgendered persons—claims that courts were reluctant to consider as sex discrimination within the meaning of Title VII.\textsuperscript{155} In \textit{Price Waterhouse}, the Court recognized that discrimination on the basis of gendered expectations of masculinity or femininity constitutes sex discrimination.\textsuperscript{156} At least three federal appellate courts have held subsequently that employers and state actors discriminate on the basis of sex when they punish people for failing to conform to social norms and expectations about what it means to be male or female, man or woman.\textsuperscript{157}

Shifting the doctrinal focus to gender as a social construct, however, does not necessarily disrupt or transform the hierarchy or power of gender in preserving social inequality. Rather, conceptualizing gender as a set of culture-specific behaviors or norms risks reproducing the social con-

\textsuperscript{152} 490 U.S. 228, 240 (1989).
\textsuperscript{153} \textit{Id.} at 235.
\textsuperscript{154} See, e.g., \textit{Ulane v. E. Airlines, Inc.}, 742 F.2d 1081, 1084-85 (7th Cir. 1984) (rejecting claim that discrimination against transgendered employee constituted discrimination on the basis of "sex" under Title VII, and not on the basis of "gender"); \textit{DeSantis v. Pac. Tel. & Tel. Co.}, 608 F.2d 327 (9th Cir. 1979) (holding that discrimination on the basis of sexual preference did not constitute sex discrimination within the meaning of Title VII) \textit{abrogated by Nichols v. Azteca Rest. Enter.s.,} 256 F.3d 864 (9th Cir. 2001).
\textsuperscript{155} See, e.g., \textit{Ulane}, 742 F.2d at 1084-85; \textit{DeSantis}, 608 F.2d 327.
\textsuperscript{156} 490 U.S. at 250-51.
\textsuperscript{157} \textit{Nichols}, 256 F.3d at 874-75 (agreeing with plaintiff's theory, derived from \textit{Price Waterhouse}, 490 U.S. 228, that discrimination based upon a stereotype that a man should not appear effeminate is prohibited under Title VII); \textit{Higgins v. New Balance Athletic Shoe, Inc.}, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (reasoning that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.") (citation omitted). Other courts have applied \textit{Price Waterhouse} to recognize claims of discrimination under other statutes where the plaintiff has been penalized for failure to conform to gender expectations of masculinity or femininity. See, e.g., \textit{Rosa v. Park W. Bank & Trust Co.}, 214 F.3d 213, 215-16 (1st Cir. 2000) (holding that a bank's refusal to serve a biologically male customer who wore a dress could constitute impermissible gender discrimination); \textit{Hernandez-Montiel v. Immigration & Naturalization Serv.}, 225 F.3d 1084, 1094 (9th Cir. 2000) (granting asylum claim of gay man with female sexual identity on grounds that he was a member of a separate social group in Latin American society of persecuted gay men with effeminate characteristics). \textit{See also Flynn, supra} note 143, at 396 (arguing that courts have failed to apply \textit{Price Waterhouse} as aggressively as they should).
struction of gender as difference.\textsuperscript{158} Although the meaning of gender is highly contested among social theorists,\textsuperscript{159} courts and many feminist scholars treat gender as an adjective: a constellation of characteristics, attributes, abilities, and norms that are socially constructed rather than biologically determined.\textsuperscript{160} Courts and scholars frequently reduce gender into a category of opposites—"masculine" and "feminine"—that supposedly correspond to the biological categories of male and female. Justice Scalia, in his dissent in \textit{J.E.B.}, for example, observed that "gender is to sex as feminine is to female and masculine is to male."\textsuperscript{161} Under this definition, gender becomes a code for the biological categories of male and female.\textsuperscript{162}

The very notion of masculine and feminine is under-developed in judicial analysis. Courts have not attempted to analyze the meaning or content of each, preferring to treat masculinity and femininity much like they treat pornography: "I know it when I see it."\textsuperscript{163} In \textit{Price Waterhouse}, for example, the Court used the terms masculine and feminine without defining what either means.\textsuperscript{164} The operational assumption is that there is a common cultural or social understanding of the content of these categories and that the content of each is static or fixed—a foundational premise that many social theorists outside the law dispute. R.W. Connell, a leading sociologist who studies masculinity, writes: "In many practical situations, the language of 'masculine' and 'feminine' raises few doubts. We base a great deal of talk and action on this contrast. But the same terms, on logical examination, waver like the Danube mist. They prove remarkably elusive and difficult to define."\textsuperscript{165}


\textsuperscript{159} See, e.g., Connell, supra note 46, at 3 ("[T]he character of gender itself [is] historically changing and politically fraught. . . . Gender terms are contested because the right to account for gender is claimed by conflicting discourses and systems of knowledge."). Mary Hawkesworth argues that despite the belief that the term gender is unproblematic, scholars use gender in significantly different ways. \textit{Confounding Gender}, 22 Signs 649, 650 (1997). "Gender has been analyzed as an attribute of individuals, as an interpersonal relation, and as a mode of social organization. Gender has been defined in terms of status, sex roles, and sexual stereotypes. [I]t has been discussed as a product of attribution, socialization, disciplinary practices, and acculturated stance. Gender has been depicted as an effect of language; a matter of behavioral conformity; a structural feature of labor, power, and cathexis; and a mode of perception." \textit{Id.} at 650-51 (citations omitted).

\textsuperscript{160} Mary Anne C. Case, for example, argues that sex is for nouns, disputing Richard A. Epstein's claim that "[g]ender is for [n]ouns." \textit{Compare Case, Disaggregating, supra note 142, at 11-12 with Richard A. Epstein, Gender Is for Nouns, 41 DePaul L. Rev. 981 (1992). R.W. Connell contrasts his concept of gender as a social practice or institution with theorists who define masculinity as an "object," i.e., "a natural character type, a behavioural average, a norm." \textit{Connell, supra note 46, at 71.}


\textsuperscript{162} See, e.g., Case, \textit{Disaggregating, supra note 142, at 1 (noting that the terms "gender" and "sex" are treated as synonyms in much discrimination law).}

\textsuperscript{163} Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

\textsuperscript{164} See, e.g., \textit{Price Waterhouse v. Hopkins, 490 U.S. 228, 236 (1989).}

\textsuperscript{165} \textit{Connell, supra note 46, at 3.}
Framing gender as dichotomous categories of masculine and feminine that correspond to the biological categories of male and female does not “disrupt” the naturalness of sex as hierarchy, but reinforces the myth of difference that rationalizes social inequality as natural.\textsuperscript{166} The disaggregation of sex and gender, therefore, risks reproducing the very hierarchical categories that it seeks to challenge and reinforces the meaning of gender as difference.\textsuperscript{167} The underlying assumption of many postmodern theorists is that gender is a performance and that one can change identities at will.\textsuperscript{168} The disruption or subversion of the fixed categories of gender and sex, they reason, advance equity.\textsuperscript{169} But the notion of gender as performance ignores the real power of gender as a means to create and reinforce gender inequality.\textsuperscript{170} As Pierre Bourdieu explains, the historical duality of male and female is deeply rooted in the material world and “cannot be abolished by an act of performative magic, since the genders, far from being simple ‘roles’ that can be played at will (in the manner of drag queens), are inscribed in bodies and in a universe from which they derive their strength.”\textsuperscript{171}

\section*{III. RECONCEPTUALIZING GENDER AS A SOCIAL INSTITUTION}

If gender is a social construction, the critical question should be “[h]ow and where does the construction of gender take place?”\textsuperscript{172} Rather than relegate gender to the realm of categories, courts should reconceptualize gender as a social practice situated within structures of specific social relations and institutions.\textsuperscript{173} Gender is a social process that constructs the category of male/female as difference, and privileges the social definition

\begin{itemize}
\item \textsuperscript{166} Butler criticizes the circularity of current theories of sex/gender, concluding that “[t]he univocity of sex, the internal coherence of gender, and the binary framework for both sex and gender are . . . regulatory fictions that consolidate and naturalize the convengent power regimes of masculine and heterosexist oppression.” \textit{Butler, supra} note 52, at 33.
\item \textsuperscript{167} See \textit{Lamos, supra} note 158, at 85-86 (arguing that distinctions between sexuality and gender can “naturalize[\textit{e}l]” the categories they critique and analyze).
\item \textsuperscript{168} See \textit{Bourdieu, Masculine, supra} note 50, at 103 (criticizing the postmodernist idea that genders are just roles “played at will”). Similarly, Katharine T. Bartlett criticizes the suggestion that the elimination of dress codes will lead to increased personal autonomy, arguing that “if meaning is created through the institutions, arrangement, and practices of a particular time and place, the freedom to create one’s ‘own’ meanings is a misleading objective.” \textit{Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality}, 92 Mich. L. Rev. 2541, 2549 (1994).
\item \textsuperscript{169} See \textit{Bartlett, supra} note 168, at 2581 (citing \textit{Elizabeth Wilson, Adorned in Dreams: Fashion and Modernity} 58 (1987)).
\item \textsuperscript{170} See \textit{Bourdieu, Masculine, supra} note 50, at 103.
\item \textsuperscript{171} \textit{Id.} at 103.
\item \textsuperscript{172} See \textit{Butler, supra} note 52, at 7-8.
\item \textsuperscript{173} See \textit{Lorber, supra} note 140, at 5 (drawing on “research on the social aspects of gender from anthropology, history, sociology, social psychology, sociolinguistics, men’s studies, and culture studies” to establish a “coherent picture of gender as a product of social construction”); see also, \textit{e.g.}, \textit{Connell, supra} note 46, at 38 (advising against treating different types of masculinity as fixed categories).
\end{itemize}
and characteristics of masculinity. Gender is not a noun; gender is a verb—a process, a practice, a tool for marking and enforcing the bounds of gender within social structures such as the workplace, the state, and other institutions. Gender is properly understood as part of larger-scale social processes and structures. This necessitates a shift from a positivist understanding of gender that underlies current gender jurisprudence, to a more structural analysis that locates gender as a social practice that intersects with a range of social institutions, relationships, and constructs.

In an important sense, then, gender is better understood as a social institution. Cynthia Fuchs Epstein, a leading sociologist of gender, argues persuasively that gender is a social process that creates and maintains socially significant differences between men and women, differences that naturalize social inequality between men and women. Sociologist Judith Lorber depicts gender as “a process of social construction, a system of social stratification and an institution that structures every aspect of our lives.” As a social process and institution, gender is embedded at all levels of our society: “in the family, the workplace and the state, as well as in sexuality, language and culture.” Gender organizes social relations between individuals, but also organizes social structures such as the workplace, state, and other organizations and institutions. As a social process, gender constructs and signifies relations of power in our society.

Within the process of gender, masculinity and femininity are not objects or fixed categories, but social practices that construct the material

174. Connell, Epstein, and Lorber distinguish between gender as a noun or object of categorization and gender as a process. Connell criticizes the attempt to define masculinity (and gender) as an object, i.e., a type or a norm, and argues that “we need to focus on the processes and relationships through which men and women conduct gendered lives.” CONNELL, supra note 46, at 71. Cynthia Fuchs Epstein similarly distinguishes between conceptions of gender as a dichotomous category, which assume difference as a given, and gender as a process of distinction and control. The Difference Model: Enforcement and Reinforcement of Women’s Roles in the Law, in SOCIAL ROLES AND SOCIAL INSTITUTIONS 53, 57-58 (Judith R. Blau & Norman Goodman, eds., Transaction Publishers 1995) (1991) [hereinafter Epstein, The Difference Model]. Lorber likewise argues that gender is not merely socially constructed, but itself is a “process of social construction.” LORBER, supra note 140, at 5.

175. See, e.g., CONNELL, supra note 46, at 67.

176. See, e.g., id. at 71.

177. Epstein, The Difference Model, supra note 174, at 58-59. Epstein argues that our society creates and preserves the social construction of gender as a dichotomous category, which rationalizes difference and material inequality as natural. Id. Her book DECEPTIVE DISTINCTIONS: SEX, GENDER AND THE SOCIAL ORDER (1988) is a classic and thorough exposition of the ways in which society constructs gender as difference.

178. LORBER, supra note 140, at 5.

179. Id.

180. Id. at 6 (“Gender organizes social relations in everyday life as well as in the major social structures, such as social class and the hierarchies of bureaucratic organizations. The gendered microstructure and the gendered macrostructure reproduce and reinforce each other.”) (citation omitted).

world. As Connell explains, masculinity is "simultaneously a place in gender relations, the practices through which men and women engage that place in gender, and the effects of these practices in bodily experience, personality and culture." Bourdieu writes that masculinity consecrates the existing social order by inscribing gender distinctions in the social world. "The social order functions as an immense symbolic machine tending to ratify the masculine domination on which it is founded."

The boundaries of gender that differentiate masculine from feminine and male from female are symbolically and materially constructed. Bourdieu refers to the rites of institution in society that consecrate through symbolic rituals gender difference as natural. These rites are "aimed at accentuating in each man or woman the external signs most immediately corresponding to the social definition of his or her sexual distinction or encouraging the practices appropriate to his or her sex ...."

Masculinity is not fixed, but rather is relational, created by and through its opposition to femininity. In practice, masculinity is "constructed in front of, and for the benefit of, other men and against femininity." "[M]anliness must be validated by other men, in its reality as actual or potential violence, and certified by recognition of membership of the group of ‘real men.’" Bourdieu explains that rites of institution in society often test the masculinity of individual men while enforcing solidarity among and between men. Practices such as gang rapes, for example, challenge men to prove their virility through violence and their denial of gentle or "feminine" qualities. The group harassment of men who are perceived to be effeminate or homosexual is another powerful rite that marks "real" men from homosexuals and women. Men who fail these tests or refuse to participate in these rituals are relegated to the "typically female category of ‘wimps,’ ‘girlies,’ and ‘fairies.’"
The power of gender is largely invisible, so deeply engrained that it
does not require formal controls to ensure compliance with gender norms.
Its power derives from its ability to coerce. Gender boundaries, critical
to preserving traditional gender roles, are enforced through a range of so-
cial and institutional practices. As Connell explains, “institutions are
substantively, not just metaphorically, gendered.” The practices, rules,
and requirements within an institution are structured around gender. For
example, Connell explains that the ban on gays in the military can be seen as the result of the “cultural importance of a particular definition of masculinity in maintaining the fragile cohesion of modern armed forces.” Organizations influence member behavior through a range of practices and policies, from training to reward and opportunity structures. Informal and formal social controls operate to maintain gender distinctions in the workplace, preserving sex segregation as a persistent phenomenon.

It is the process of domination that is important, rather than our
particular understanding of what is masculine or feminine at any sociohis-
torical moment. Changes in social relations between men and women may alter social understandings of masculinity and gender, yet still pre-
serve gender as hierarchy. For example, the elimination of facially discriminating policies has not abolished the exclusion of women, but merely changed its form. Formal exclusion is replaced with another form of social control and distinction that preserves the relationship of gender domination.

The integration of women into historically male domains such as The Citadel profoundly threatens the meaning of gender and the very notion of masculinity or manhood itself. The admission of women challenges the meaning of gender as immutable difference. As sociologist Richard Stoller explains, “if the physical differences which are visible, measurable, and the traditional basis of the division of labor are irrelevant,

194. Moreover, the postmodern notion that gender is a performance and that one can change identities at will ignores the power of gender as a means to enforce gender inequality in the material world. Epstein, Tinkerbells, supra note 44, at 233.
195. See generally id.
196. CONNELL, supra note 46, at 73.
197. See, e.g., id. (discussing the state as a “masculine institution”).
198. Id.
200. See BOURDIEU, Masculine, supra note 50, at 102 (recommending “a truly relational approach to the relation of domination between men and women as it establishes itself in the whole set of social spaces and subspaces . . . ”).
201. Id. (noting the “constancy of the structure of the relation of domination between men and women which is maintained beyond the substantive differences in condition linked to moments in history and positions in social space”).
202. See generally Epstein, Tinkerbells, supra note 44.
how can other, less tangible differences be significant?" Given the material and symbolic significance of the erosion of gender boundaries, the integration of women often serves to highlight the boundaries rather than to erode them. The integration of women into such traditionally masculine institutions has been met with intense opposition; women in traditionally male occupations experience a higher rate of sexual harassment than in other jobs. Their manhood at stake, men often have retaliated by sexually harassing those women who transgress the boundaries of gender. As Vicki Schultz has argued, sexual harassment serves a regulatory function—it polices the boundaries between the sexes, punishing women as well as men who transgress the bounds of gender. Moreover, harassment "exaggerates gender differences to remind [women] that they are 'out of place' in a 'man's world,' . . . marking nontraditionally employed women workers as exceptions to their gender" while reinforcing the definition of such work as masculine. The institution thus preserves the boundaries of gender within sex segregated workplaces.

IV. VMI AND THE CITADEL: GENDERED INSTITUTIONS OR IMPROPER STEREOTYPING?

The VMI and Citadel lawsuits illustrate the failure of equal protection doctrine to understand gender as a social practice that operates within institutions to subordinate women. Shannon Faulkner sued The Citadel in federal district court in Charleston, South Carolina, in March 1993, challenging its males-only admission policy as a violation of her right to equal protection as guaranteed by the Fourteenth Amendment. The district court consolidated her case with a pending lawsuit against The Citadel challenging the exclusion of female veterans from its Veterans Day Program, which allowed male veterans to attend classes with cadets and receive undergraduate degrees. What appeared to be a simple case of sex discrimination quickly exploded into a holy war. Rather than ad-

204. Id. at 189.
205. Vicki Schultz argues that harassment is a "central mechanism through which men preserve their work and skill as domains of masculine mastery." Schultz, supra note 45, at 1761. Her analysis focuses on the use of harassment to undermine women's perceived competence in the workplace, which reinforces the definition and identity of such jobs as masculine. See generally id. In contrast, Katherine Franke focuses on harassment as a means to enforce masculinity as the natural expression of maleness and femininity as the natural expression of femaleness, constructing female workers as passive and male workers as agents. See Franke, The Central Mistake, supra note 12, at 4.
207. See Schultz, supra note 45, at 1756-61.
208. Id. at 1760.
210. See id.
mit women, The Citadel launched a campaign of massive resistance, employing legal tactics reminiscent of the battle against racial desegregation in the schools.  

The Citadel and VMI are not merely state colleges, but powerful Southern institutions and traditional icons of masculinity. The Citadel boasts that its cadets fired the opening shots of the Civil War; VMI continues to celebrate the anniversary of the day that VMI cadets fought Union troops in New Market, Virginia.  

Both colleges offer graduates the intangible benefits of joining a powerful network of influential and loyal alums. VMI boasts "the largest per-student endowment of all public undergraduate institutions in the nation," impressive evidence of its alumni's loyalty. The alumni networks at The Citadel and VMI wield tremendous power and influence in politics, business, and the military. VMI alumni include members of Congress, military generals, and prominent businesspeople. Prominent Citadel alumni include United States Senator Fritz Hollings, two governors, three military generals, and the head of a major newspaper chain. Citadel men easily recognize each other by the giant gold ring that they each wear, the symbol of their brotherhood. "It's the proudest thing a man can be seen wearing," proclaimed retired Brig. Gen. Claudius Watts III.

Neither The Citadel nor VMI are official military colleges; both are public colleges that educate their students in a military-style environment similar to West Point. Cadets are organized into companies within battalions; they wear uniforms and live in barracks, subject to a student chain of command that is similar to the military. Entering freshmen are called "knobs" at The Citadel, "rats" at VMI. Both colleges delegate

[211. See Faulkner v. Jones, 51 F.3d 440, 447-48 (4th Cir. 1995) (citing instances of delay in the prosecution of the appeal); Faulkner v. Jones, 858 F. Supp at 568 (“Throughout the pendency of this action the defendants have done nothing to indicate that they would be inclined to hasten the process. To the contrary, all of the actions witnessed by this court clearly and unequivocally indicate that the defendants would exert all of their considerable influence to insure that Faulkner would never have the opportunity to enroll in such a parallel institution or program.”). The court also noted that in Watson v. City of Memphis, the defendants requested additional time in order to desegregate municipal parks and recreational facilities. 373 U.S. 526, 568-69 (1963).


213. Peter Finn, At VMI, Pioneers Recall Breaking Earlier Barrier, WASH. POST, Oct. 5, 1997, at B1 [hereinafter Finn, VMI Pioneers]. Until the late 1970s, VMI required cadets to salute the Confederate flag at the New Market ceremony and the band played "Dixie." Id.


215. Id.

216. MANEGOLD, IN GLORY'S SHADOW, supra note 27, at 58.


authority to their cadet chain of command to control the day-to-day lives of cadets. Freshmen cadets at The Citadel are subject to the Fourth Class system, "an extreme set of disciplinary and behavioral rules" described in past Citadel regulations as "an intense, high-stress experience designed to facilitate development of 'The Whole Man.'" Knobs must respond to an upperclassman by one of four statements: "yes Sir;" "no Sir;" "no excuse, Sir;" and "request permission to make a statement, Sir." Upperclassmen in the chain of command are entitled to discipline knobs, requiring them to do push-ups, walk tours, and a range of other punishments, both written and unwritten.

VMI calls its system of freshmen indoctrination the "ratline," which is designed to "'break down' individual freshmen into one 'rat mass' and rebuild them as 'VMI Men.'" Each rat is assigned an upperclassman advisor, called a "dyke." Rats must "strain"—keep their chins buried in their necks—and walk in an imaginary straight line at rigid attention, with their arms stiff at their sides. They must endure minimal sleep, screaming taunts by upperclassmen who literally spit into their faces, and drop and do twenty push-ups on command. Four percent of freshmen drop out in the first five days; twenty-four percent leave by the end of the first year.

The admission of women profoundly threatened the all-male traditions of these military-style colleges. To preserve its all-male status, The Citadel and its supporters pumped millions into a legal defense fund, mobilizing money and political clout in the campaign to keep women out. The Citadel and South Carolina spent nearly ten-million dollars in defense of the males-only program, not including the amount spent for the plaintiff's attorneys' fees. VMI likewise mounted a bitter defense against the lawsuit.

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221. United States v. Virginia, 766 F. Supp. at 1422 ("Entering students are called 'rats' because the rat is 'probably the lowest animal on earth.'").
223. Mentavlos, 85 F. Supp. 2d at 616.
224. Id.
225. Id.
226. See id. at 615-18.
227. BRODIE, supra note 33, at 6. See also United States v. Virginia, 766 F. Supp. at 1422.
229. BRODIE, supra note 33, at 39.
230. See Peter Finn, Former Rats Remember Torturous Times at VMI, WASH. POST, Aug. 20, 1997, at B1 [hereinafter Finn, Former Rats].
231. Id.
233. VMI alumni donated approximately $10 million to defend the lawsuit brought by the Justice Department. Ed Vulliamy, Take It Like a Man, THE GUARDIAN (London), Aug. 26, 1997, at T2. After the Supreme Court held that VMI could not exclude women, VMI's Board of Visitors voted narrowly, 9-8, to admit women. Wes Allison, VMI Votes 9-8 to Admit Women; Some Alumni Weep; Officials Promise Survival, RICHMOND TIMES DISPATCH, Sept. 22, 1996, at A-1. VMI's alumni association lobbied hard to make the college private: "Alumni pledges
Both The Citadel and VMI advanced two justifications for their exclusionary policies. First, the exclusion of women was substantially related to the important state interest in providing single-sex education as part of a diverse range of educational opportunities within the state. Second, the unique “adversative method” offered at these military-style colleges would have to be modified to accommodate women. Both rationales were based on the claim that men and women are fundamentally different. Men, The Citadel claimed, are aggressive, competitive, and learn best in a stressful environment in which the teacher is a brutal taskmaster. Women, on the other hand, are nurturing and cooperative, unable to handle extreme stress, and learn better in a more supportive environment. While men thrive in The Citadel’s and VMI’s stressful, military-style environments, women are not suited for the experience. The admission of women would require “drastic” and “radical” changes in the military-style system that would “destroy” an institution like VMI, denying both men and women the unique educational program they sought.

A. Inside the Gates: VMI and The Citadel as Gendered Institutions

The more I learned about The Citadel, the more I realized that the exclusion of women was the defining feature of such an institution, which “not only practice[d] discrimination, but celebrate[d] it.” The Citadel prided itself on being the “toughest” military system in the nation. Like the military, it considered itself a proving ground for real men to demonstrate their manhood. Citadel cadets were supposed to be real
men, molded in the crucible of the Fourth Class system. It was inconceivable to officials at The Citadel that women would want to become cadets. Counsel for The Citadel asked one of our expert witnesses whether a woman interested in attending The Citadel would be the “kind of woman” who “would not be all that different from men.” When the witness agreed, The Citadel’s lawyer felt triumphant that his point had been made. No “real woman” would want to go to The Citadel.

The more I learned about The Citadel, the more I realized that exclusion of women was part and parcel of a system that was premised upon a hypermasculine culture, in which men were defined as the opposite of women. The physical toughness and mental discipline described in court papers translated into a form of masculinity marked by violence and hostility toward women. Since the 1960s, The Citadel has commissioned blue ribbon committees to study allegations of harassment inside the Corps. Each committee documented rampant physical abuse and harassment of cadets. Inside the barracks, a culture of violence continued to flourish, enforced by a code of silence that chilled protests or complaints. Physical violence, while proscribed by the written regulations, was rampant within the Fourth Class system. The U.S. military assigned only one active duty officer to help supervise The Citadel’s four barracks at night. As a result, the upperclassmen had nearly total control over the lives of the knobs.
Although the methods of formal discipline prescribed by Citadel regulations were limited, upperclassmen routinely used physical force or stress as a method of discipline. Abuse took many forms: upperclassmen often assaulted knobs, beating or striking them with their hands or with broomsticks known as "knobby wands," hangers, and an array of other objects. One practice involved upperclassmen pouring flammable liquid on a knob's uniform and forcing the knob to stand at attention while the upperclassmen lit the fabric on fire. In one incident, a leader of the Junior Sword Drill team climbed on top of a five-foot dresser and jumped onto the head of a knob who lay prone beneath him; the knob was found unconscious in his own blood, teeth broken. A federal investigation into allegations of hazing in 1997 reported various incidents of violence in the Corps, including reports of upperclassmen stapling a freshman's chest and cutting a freshman's face with a sword; one freshman had "his company's letter carved into his chest with a knife." While many cadets sought medical treatment at the infirmary, they routinely denied that their injuries were from abuse. Inside their rooms at night, knobs urinated in the sinks rather than risk being subjected to abuse by stepping outside to use the hallway bathrooms.

The culture of violent hypermasculinity inside The Citadel was premised upon the inferiority of women. A recent Citadel graduate, Ron Vergnolle, volunteered for us at trial; he was a recipient of the Star of the West, the most prestigious scholarship offered at the college, as well as an athlete and president of the Honor Court. He came from a long line of Citadel men: his father, uncle, and brother were alumi. Vergnolle testified that The Citadel was premised upon the degradation of women. He said that the exclusion of women taught cadets that women are not equal, but inferior, to men. At The Citadel, "[w]hen you make a mistake, you are either a faggot, a queer, weak, a woman, and then the terms just go right down into the gutter from there." "Woman," as opposed to such derogatory terms for females as "pussy," "cunt," "whore," "bitch," or

253. See Faludi, Stepped, supra note 1, at 139; Manegold, in Glory's Shadow, supra note 27, at 256.
254. Manegold, in Glory's Shadow, supra note 27, at 122.
258. See Manegold, in Glory's Shadow, supra note 27, at 157.
260. For an excellent discussion of the cult of masculinity within The Citadel, see generally Faludi, The Naked Citadel, supra note 11.
261. See Faulkner Transcript, supra note 40, vol. IX at 53 (Direct Examination of Ronald Vergnolle, May 20, 1994).
fucking little girl," was hardly used. Vergnolle testified that he could not estimate how frequently degrading terms for women were used: "It occurred so frequently, it was an everyday part, every minute, every hour part of life there." Other taunts compared male cadets to women: "Are you menstruating?" or "You look like you’re having an abortion." As Vergnolle explained, "if you are not doing what you are supposed to do, you are not a man, you are a woman, and that is the way you are disciplined in the barracks every day, every [hour]."

The Citadel's hypermasculine culture expressed itself in violence toward women and the image of the feminine. Cadets used sexually derogatory language to describe the day-to-day activities of the Corps. Washing the floors of the barracks hallways was called "douching the galleries;" a uniform hat was called a "cunt cap."

In one chilling incident, male cadets unleashed their rage against the feminine on a raccoon that had the misfortune to have stumbled onto the campus late at night. High-ranking cadets found the raccoon and started screaming, "Kill the bitch! Kill the bitch!" They brandished a knife, stabbed it, and tortured it to death. Cadets marched and drilled to cadences like those in the military, which affirmed their masculinity by the representation of sexualized violence against women. One Citadel cadence was chanted in tune with the song "The Candy Man": "Who can take two jumper cables/Clip 'em to her tit/Turn on the battery and watch the bitch twitch/The S & M man can,/The S & M man can . . . ." The images of violence toward women spilled over into the mistreatment and abuse of cadets' girlfriends and female professors.

As Susan Faludi has argued, cadets constructed their own class of "women" to distinguish the masculine from the feminine. The "women" were comprised of those cadets who were considered effeminate, weak, or gay. These cadets were singled out for abuse in an effort

262. Id. at 54-55.
263. Id. at 54.
265. See Faulkner Transcript, supra note 40, vol. IX at 55 (Direct Examination of Ronald Vergnolle, May 20, 1994).
266. MANEGOLD, IN GLORY'S SHADOW, supra note 27, at 183.
267. Faludi, The Naked Citadel, supra note 11, at 67 (noting that accounts of the story differ, but that this version was widely circulated and was recounted by a faculty member in his testimony).
268. Id.
269. FAUCCI, STIFFED, supra note 1, at 119.
270. See id. at 117-18 (graphically describing incidents of violence, such as a time when a cadet boasted that after his date rejected him, he smashed the head of her cat against a window).
271. Faludi describes "a submerged gender battle, a bitter but definitely fixed contest between the sexes, concealed from view by the fact that men played both parts. The beaten knobs were the women, 'stripped' and humiliated, and the predatory upperclassmen were the men, who bullied and pillaged. If they couldn't re-create a male-dominant society in the real world, they could re-stage the drama by casting male knobs in all the subservient feminine roles." Faludi, The Naked Citadel, supra note 11, at 70.
272. See id. at 70-71, 80.
to isolate them from their peers, an effective way to drive a cadet out of the Corps. Many cadets who were suspected of being homosexual were isolated and harassed out of the school. By purging the Corps of "femininity," the male cadets who remained would necessarily be masculine.

Inside the barracks, cadet rituals used violence, often with sexually sadistic and homoerotic overtones, to force compulsion to a norm of masculine power and subordination. Cadets at both colleges organized "sweat parties," where upperclassmen order freshmen to dress and put on rain gear, herding them into the showers, turning on the water as hot as possible, and then make the knobs exercise until they collapse or vomit. At The Citadel, some knobs were singled out for full body shaves, in which upperclassmen would force a knob to strip and stand naked at attention, and then use razors to shave off all of his body hair.

One company had a ritual that culminated in a process called "Banana-rama," when a banana was inserted into a cadet's anus. Upperclassmen have forced knobs to run through the showers, then knocked the soap out of their hands and, as the knobs bent over to pick it up, unzipped their pants and threatened, "Don't pick it up, don't pick it up! We'll use you like we used those girls!" In "the birthday ritual," cadets strip the birthday boy, tie him to a chair, and cover his body with shaving cream while coating his groin in liquid shoe polish.

Hazing incidents at both The Citadel and VMI often targeted the testicles and groin area. A Citadel freshman athlete described how a group of cadets entered his room, turned off the lights, and forced him to hang spread-eagled by his fingertips from the top of his door frame. "What-

273. See Faludi, STIFFED, supra note 1, at 146-47.
275. See Faludi, The Naked Citadel, supra note 11, at 80. Faludi describes the "social rage" directed toward cadets perceived to be gay, several of whom were "hounded out of the school." One cadet, Herbert Parker, said he was "falsely accused of having a sexual encounter with a male janitor." Cadets completely isolated him; he received "incessant threatening phone calls and death threats." Id.
276. See, e.g., Finn, Former Rats, supra note 230. Cf. Brodie, supra note 33, at 260 (defining "sweat parties" as vigorous physical exercise required of rats during predawn hours). Thomas Moncure, Jr., a member of VMI's Board of Visitors, described a more sadistic form of hazing that he experienced: "He and a group of rats were packed into a shower wearing their fatigues and raincoats. Everyone was ordered to run on spot and then drop down for push-ups and then run on spot again. And just when the milling group was good and sweaty, the upperclassmen turned on the water so the temperature reached what seemed like 120 degrees. . . . I remember some guy shouting, 'Well, rats, what do you think of Friday nights at your new school?'" Finn, Former Rats, supra note 230.
277. MANGEOLD, IN GLORY'S SHADOW, supra note 27, at 307.
278. Id.
279. Faludi, STIFFED, supra note 1, at 146. Other rituals that involve group nakedness include "Senior Rip-Off Day," a spring rite in which the senior cadets rip off each other's clothes, "burn them in a bonfire, and hug and wrestle on the ground;" and "Nude Platoon," where juniors run naked and yelling around the quad. Faludi, The Naked Citadel, supra note 11, at 79.
280. Faludi, The Naked Citadel, supra note 11, at 80.
281. Id. at 79.
ever you do,” they taunted, “don’t drop!” Several minutes later, they
allowed him to look down. When he did, he saw a sword between his legs,
pointing directly up at his genitals.282

At VMI, cadets were subjected to unauthorized workouts behind
closed doors, physical violence, ritualized spankings, and whippings.283
Several male cadets were expelled in 1996 for attacking a cadet who had
been excused from physical fitness training for medical reasons.284 They
entered his room at night, “flipped his bunk, held him down,” and at-
ttempted to shave his head and pour a hot adhesive-like liquid over his tes-
ticles.285 In 1998, VMI disciplined several senior cadets for sadistically
beating freshmen cadets on the buttocks and thighs with coat hangers and
belts over the course of several weeks, causing welts and bruises.286 Later
that year, another group of cadets was expelled for running a “whacking-
system” in their rooms, beating freshmen for infractions such as bad
grades or spilled drinks.287

Like The Citadel and VMI, the military defines warriors as hetero-
sexual males; neither women nor homosexuals are worthy
equals.288 The federal service similarly fought the admission of women until 1975, when
Congress compelled the admission of women into the federal service
academies beginning in 1976.289 The integration of women was accompa-
nied by widespread harassment and hostility toward women.290 In a par-
ticularly glaring incident that illustrates the profound sexualized hostility
toward women, midshipmen at the Naval Academy handcuffed a woman
to a urinal in the men’s bathroom, taunted her with sexually derogatory
comments, exposed themselves, pretended to urinate in front of her, and
took her picture.291 Cadences that celebrated the sexual exploits of mili-
tary warriors and denigrated women continued even after women were
admitted. At the Naval Academy, one cadence bragged about the sexual
exploits of a downed pilot: “Climbed all out with his dick in his hand/Said,
‘Looky here, ladies, I’m a hell of a man.’/Went to his room and lined up

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282. Reilly, supra note 249, at 74.
283. See Brodie, supra note 33, at 262-63, 273-74.
284. Ellen Nakashima, 6 at VMI Suspended in Attack on Cadet Taken off “Rat Line”, WASH. POST, Apr.
17, 1996, at D01.
285. Id.
286. Brodie, supra note 33, at 273.
287. Id. at 275.
288. See Karst, supra note 187, at 545-46.
(describing opposition to the admission of women into the federal service academies).
290. According to a GAO survey in 1994 of sexual and gender harassment, “over half the female ca-
dets experience[ed] ‘mocking gestures,’ offensive posters or graffiti and ‘derogatory comments’
at least once a month. One in six female cadets reported being repeated targets of ‘unwanted
horseplay or hijinks’ while one in seven reported ‘unwanted sexual advances.’” Id. at 204
(quoting U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-94-6, DOD SERVICE ACADEMIES: More
Actions Needed to Eliminate Sexual Harassment 21 (1994)).
291. Id. at 183-185. Male midshipmen also handcuffed many other female “middies.” “We’ll keep
doing this until you all get a sense of humor.” Id. at 185.
a hundred . . . /Swore up and down he’d fuck everyone./Fucked ninety-eight till his balls turned blue/Then he backed off, jacked off, and fucked the other two.” 292 Another version of “The Candy Man” cadence similarly celebrated sex and violence: “Who can take a chain saw/Cut the bitch in two/Fuck the bottom half/[A]nd give the upper half to you.” 293 Another verse ran: “Who can take an ice pick/Ram it through her ear/Ride her like a Harley,/As you fuck her from the rear.” 294

These violent and misogynistic rituals operate as rites of institution within these traditionally male institutions, constructing masculinity and marking cadets as male. As Bourdieu describes, manliness is construed by and for other men through rites of institution that mark participants as “real men,” opposite from, and superior to women. 295 Rituals that require male cadets to enact actual or symbolic violence toward women simultaneously validate the manliness of individual cadets and reinforce the solidarity of cadets as men. 296 Like the military, The Citadel and VMI preserve the boundaries of gender by excluding and denigrating females. 297 By driving out those cadets who are weak and effeminate, these institutions preserve their identity as male. As one Citadel graduate explained, “Why you quit is immaterial. Either you wear the Ring or you are a woman, a fag, a loser.” 298

As Linda Bird Francke argues, to accept women as peers would be “antithetical to the hypermasculine identity traditionally promoted by [military institutions].” 299 Not surprisingly, the prospect of women inside the Corps unleashed a similar onslaught of hostility, aimed directly at Shannon Faulkner, the young woman who dared to transgress the traditional boundaries of gender inside culture. In the process, The Citadel revealed its intense animosity toward women in general. Citadel alumni sold the infamous “1952 Bulldogs and One Bitch” t-shirt, which could be seen all over Charleston. 300 By challenging traditional norms of gender, Shannon became a gender outlaw, targeted for abuse and censure by Citadel supporters, both male and female. Their hostility reached its zenith on the day Shannon resigned. Male cadets celebrated wildly, surfing across

292. Id. at 162.
293. Id. at 190-91.
294. Id. at 191.
295. See BOURDIEU, MASCULINE, supra note 50, at 53 ("Manliness . . . is an eminently relational notion, constructed in front of and for other men and against femininity . . . .").
296. See id. at 52.
297. See FRANCKE, supra note 289, at 157 (arguing that the hypermasculine culture of the military requires the marginalization of women through their exclusion and denigration).
298. See Fix, Women, supra note 250.
299. See FRANCKE, supra note 289, at 157.
300. Cornwell, supra note 2.
the quadrangle tiles on mattresses, whooping victory cries, fists pumping in the air.  

B. VMI in the Courts: Improper Stereotyping  

Applying traditional equal protection doctrine, the federal courts ignored the hostility toward women that marked VMI and The Citadel, and instead framed the exclusion of women from VMI as an issue of sameness and difference. The federal district court upheld VMI’s males-only policy as constitutional based on extensive factual findings that men and women were fundamentally different in their cognitive, emotional, and physical abilities, as well as in their educational needs. While some women might succeed at VMI, Judge Kiser found that most women were not suited for its stressful military-style environment. The court found that VMI offered a unique education that would be altered materially if women were admitted. Specifically, the district court found that VMI would be required to change three aspects of its program: the physical training, the absence of privacy, and the adversative approach.  

Although the United States appealed the judgment of the district court, it inexplicably chose not to appeal the court’s factual findings, which were generalizations about men and women routinely rejected by federal courts, and subsequently by the U.S. Supreme Court. The Fourth Circuit nevertheless reversed, holding that VMI had failed to articulate a justification for offering “the unique benefit of VMI’s type of education and training to men and not women.” Relying on the factual findings of the district court, the Fourth Circuit agreed that if VMI were ordered to admit women, “the program would be irrevocably altered, forever denying its unique methodology to both women and men.” In light of its conclusions and the “generally recognized benefit that VMI provides,” the Fourth Circuit did not require VMI to admit women, but instead held that VMI could propose an alternative remedy that might

302. See Case, Disaggregating, supra note 142, at 8-9 (arguing that United States v. Virginia is culmination of Court’s anti-stereotyping jurisprudence of sex discrimination).
304. See id. at 1414.
305. See id. at 1412.
306. See id. at 1412-13, 1438-40.
308. See Case, Disaggregating, supra note 142, at 97, 102 (arguing that VMI and the Virginia Women in Leadership program, the parallel program established at Mary Baldwin College, provide a “textbook case of sex and gender stereotyping”).
include "parallel" programs or institutions, or "other more creative options."³¹²

Rather than admit women, Virginia and VMI created and funded a separate and deliberately unequal program for women at Mary Baldwin College, a private women's college near VMI.³¹³ Virginia deliberately replaced VMI's barracks lifestyle with a kinder, more nurturing leadership program for women.³¹⁴ Turning back the constitutional clock for women, both the district court and Fourth Circuit approved the Mary Baldwin plan, even though it failed to meet Plessy's now-discredited test of "separate but equal."³¹⁵ The lower courts conceded that the plan differed substantially from VMI and lacked "those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years."³¹⁶ Nonetheless, the Fourth Circuit refused to apply intermediate scrutiny and instead created its own standard of review: the remedial plan need not be equal to VMI, as long as the benefits provided were "substantively comparable" and the program did not tend, "by comparison to the benefits provided to the other, to lessen the dignity, respect, or societal regard of the other gender."³¹⁷ "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."³¹⁸

The U.S. Supreme Court, in a seven-to-one decision, affirmed that VMI's males-only admission policy violated the right to equal protection, but reversed the determination of the lower courts that the Mary Baldwin plan adequately remedied the violation.³¹⁹ Virginia had failed to demonstrate that the exclusion of women was substantially related to an important state purpose, as required by intermediate scrutiny.³²⁰ The Court recognized that, unlike supposed inherent differences between races, physical differences between men and women are "enduring."³²¹ Nevertheless, such differences may not be used to deny individuals opportunity or "to create or perpetuate the legal, social, and economic inferiority of women."³²² Virginia admitted that VMI's methodology could be used for some women.³²³ Even assuming that most women were unsuited for

³¹² United States v. Virginia, 976 F.2d at 900.
³¹³ United States v. Virginia, 44 F.3d at 1233-34.
³¹⁴ Id.
³¹⁷ United States v. Virginia, 44 F.3d at 1237.
³²⁰ See id. at 534.
³²¹ Id. at 533.
³²² Id. at 534.
³²³ Id. at 540-41.
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VMI’s rigorous training, however, Virginia could not categorically exclude all women from a unique educational opportunity, nor remedy their exclusion by offering an unequal program at another college. As a matter of law, Virginia could not deny the unique benefits of VMI to those women who are “capable of all of the individual activities” required of cadets.

Citing Milliken, the Court held that basic remedial principles required Virginia not only to cease its discriminatory policy, but to restore those women unconstitutionally denied a VMI education to “‘the position they would have occupied in the absence of [discrimination].’” In evaluating the Mary Baldwin plan, the Court explained that Virginia was required to “‘eliminate . . . the discriminatory effects of the past’ and to ‘bar like discrimination in the future’” by admitting women to VMI. The Court held that the Mary Baldwin plan was a “pale shadow” of VMI and would not provide women with the educational offerings, facilities, or endowment enjoyed by men at VMI, nor any of the intangible benefits, such as the position and influence of the alumni, prestige, or reputation. Those women who were qualified for VMI were entitled to the benefits that it has uniquely provided to men. The Court conceded that the admission of women “would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.” The Court did not explain, however, the nature or extent of the changes required, nor did it recognize the hostility that women would face breaking into this all-male bastion. The Court optimistically observed that such changes were not insurmountable, noting that VMI had modified its program in the past following the admission of black students.

324. See id. at 541-47.
325. See id. at 547-56.
326. See id. at 550-51.
327. Id. at 547 (citing Milliken v. Bradley, 433 U.S. 267, 280 (1977)).
328. Id. (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).
329. Id. at 551-53. The U.S. Supreme Court did not address the issue of whether separate programs for men and women were inherently unequal. The question was not presented because the Mary Baldwin program clearly was different from and unequal to VMI in both tangible and intangible respects. Id. Reaching back into constitutional history, the Court held that Virginia’s proposed remedy was analogous to the one in Sweatt v. Painter, 339 U.S. 629 (1950). Id. at 553. Like Virginia, Texas in Sweatt elected to create a brand new, separate school for blacks, rather than admitting them to the older and more venerable University of Texas Law School. Id. (citing Sweatt, 339 U.S. at 632). The Court held that the new law school did not provide blacks with an equal program, finding that it lacked the tangible and intangible benefits offered by the whites-only law school. Id. at 553-54 (citing Sweatt, 339 U.S. at 632). Like the law school in Sweatt, the Mary Baldwin program was not a substantially equal educational opportunity. Id. at 554.
330. See id. at 547-49.
331. Id. at 550 n.19.
333. VMI eliminated the students’ singing of “Dixie,” took down the Confederate flag at sports events, and established recruitment and retention programs for black cadets. Id. at 546 n.16. Although VMI has stopped flying the Confederate flag at games or requiring cadets to salute the
Unlike cases involving racial desegregation, the U.S. Supreme Court did not consider the exclusion of women from VMI as a form of legal subordination of women, nor as an institution based upon the denigration of women. Instead, the Court framed the case within the narrow confines of formal equality, defining the constitutional wrong as the improper use of sex stereotypes. Finding that Virginia historically excluded women from public higher education because it considered education to be dangerous and inappropriate for women, the Court concluded that VMI's exclusionary policy reflected not a reasoned choice to pursue single-sex education, but an outmoded education system based on traditional gender norms and roles. The Court similarly rejected VMI's claims that women were unsuited for its adversative system and that they would destroy the institution, stating that such claims were impermissible stereotypes. "State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" The Court likewise dismissed the factual findings by the district court that women would destroy the adversative system or downgrade its stature as "a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophecies'... once routinely used to deny rights or opportunities." The Court observed that "[w]omen's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded."

By focusing on stereotyping, the Court erroneously assumed that VMI used sex as a proxy for other, more germane characteristics. But the only characteristic relevant to VMI was maleness. Although VMI conceded that its system was not inherently unsuitable for women, it nevertheless sought to preserve its homosocial environment from women,

flag, it continues to celebrate "the valor of VMI men in a Civil War battle" at a ceremony held in New Market, Virginia, and cadets voluntarily continue to salute the Lee Chapel. Finn, VMI Pioneers, supra note 213.

335. See id. at 535-40.
336. Id. at 540.
337. Id. at 541 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).
338. Id. at 542-43 (referring to arguments against allowing women in the legal and medical professions and citing Miss. Univ. for Women, 458 U.S. at 730). Justice Scalia complained in his dissent that the majority had improperly ignored the findings of fact of the district court. See id. at 566 (Scalia, J., dissenting).
339. Id. at 544-45.
340. Mary Anne C. Case, Two Cheers for Cheerleading: The Noisy Integration of VMI and the Quiet Success of Virginia Women in Leadership, 1999 U. Chi. Legal F. 347, 358 [hereinafter Case, Two Cheers].
341. Case, The Very Stereotype, supra note 109, at 1455 ("VMI was not really using sex as a proxy for anything; it was maleness itself in which the school was interested.").
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who it claimed would "destroy" the institution. Josiah Bunting, one of VMI's experts and its current president, testified that women are like a "toxic kind of virus" whose very presence would destroy the culture of the school. Like the state defendants in Plessy and Brown who sought to preserve whiteness from blackness, VMI sought to preserve its maleness from the contamination of women. Like states that practiced de jure racial segregation in education, Virginia refused to admit women and instead sought to segregate them in a separate and inferior program, sending the unmistakable message that women were inferior and less deserving than men, and that their very presence would contaminate VMI. The generalizations about men and women offered by the Virginia defendants were not merely mistakes in reasoning, but rationalizations for the underlying belief that women are different from, and inferior to, men.

Within the Court's narrow framework of formal equality, VMI as a gendered institution became invisible. Rather than look inside the institution, the Court assumed that VMI was no different than a host of other professions that had excluded women. While this bolstered the case for improper stereotyping, it obscured the power of VMI as an institution and the depth of its hostility toward women. Relying on notions of formal equality, the Court focused narrowly on a comparison between men and women and ignored the masculine culture of the institution itself. In contrast to Green and Fordice, the Court did not see VMI as a system of subordination that must be dismantled to eliminate the effects of deeply rooted discrimination.

342. United States v. Virginia, 518 U.S. at 540 ("Alterations to accommodate women would necessarily be 'radical,' so 'drastic,' Virginia asserts, as to transform, indeed 'destroy,' VMI's program." (quoting Brief for Cross-Petitioners at 34-36)).
344. Case, The Very Stereotype, supra note 109, at 1455. Case writes: "What really mattered to VMI was its cult of masculinity in a world sealed from the presence of women who might either meet or undermine the masculine standard, in each case threatening male privilege." Id.
345. Case argues that United States v. Virginia is more similar to the race cases from Plessy through Loving, in which states sought to preserve institutions as all-white, thereby maintaining white supremacy. Id. While the exclusionary admissions policy as a classificatory scheme is much like the anti-miscegenation scheme in Loving, as Case points out, it is better understood as an institutional system of subordination similar to de jure segregation, that must be completely dismantled. See id. Recognizing that VMI seeks to preserve masculinity begins, not ends, the inquiry. See id.
346. See United States v. Virginia, 518 U.S. at 542. In rejecting VMI's argument that the admission of women would "destroy" VMI, the majority implicitly found that VMI was similar to, and not materially different from, the legal profession, the medical profession, the U.S. military, and institutions of higher education.
347. Compare United States v. Virginia, 518 U.S. at 547-56 (demonstrating VMI's failure to order comprehensive institutional reform to compensate for history of gender exclusion) with Brown v. Bd. of Educ., 349 U.S. 294, 299-300 (1955) (suggesting courts of equity may need to call for the "elimination of a variety of obstacles" by school systems to undo the legacies of race discrimination).
348. Compare United States v. Virginia, 518 U.S. at 555-56 (concluding that Virginia failed to show justification for exclusion of women from VMI) with Green v. County Sch. Bd., 391 U.S. 430, 441-42 (1968) (holding that the school board's "freedom-of-choice" plan allowing each pupil to choose the public school he or she would attend failed to unify the district's dual system of racial segregation, and requiring the board to formulate a new plan aimed at such a result).
Seen through the lens of formal equality, the women who were entitled to admission were only those who “have the will and capacity” to succeed at VMI—the exceptional women who were like men in all relevant respects. The notion that equal treatment meant the same treatment, therefore, appeared quite reasonable. These women would be able to assimilate easily into VMI’s military-style culture.

C. The Remedy: Assimilation of Women

Both VMI and The Citadel adopted plans to admit women into these male institutions with the goal of assimilating the women into the existing male culture and minimizing any changes to their systems. VMI chose to change virtually no aspect of its barracks system. VMI installed shades on cadet windows, and modified its bathrooms. It did not change any of its physical fitness requirements, which United States v. Virginia observed would be required.

VMI also modified its grooming standards only slightly for women, ordering that that “[a]ll rats will receive a close-cropped haircut; after six weeks all rats will be allowed to grow hair to a length and style in keeping with the military nature of the Institute, but not so short as to be unattractive in a civilian setting.” In practice, VMI allowed females to wear their hair a quarter inch longer than males. It has also adopted sex-specific grooming regulations that permit female cadets to wear uniform skirts; upperclass females may wear conservative makeup at designated times.

Although its plan contrasted markedly with its earlier claim that “radical” changes would be required, VMI did not see this as a fatal contra-

350. See Memorandum from The Citadel Board of Visitors, to Lt. Gen. Claudius E. Watts III, President, The Citadel (July 30, 1996), enclosing its APPROVED PLAN FOR ASSIMILATION OF FEMALE CADETS [hereinafter APPROVED PLAN] (on file with author); Status Report no. 8, N.M. Bissell, Chairman, Executive Committee, Virginia Military Institute, Assimilation Plan (June 19, 1997) (on file with author).
351. BRODIE, supra note 33, at 67 (VMI, the board chairman announced, “will not change the military and academic features of its culture . . . ”).
352. See id. at 110-12, 118-21; Status Report no. 8, supra note 350. Prior to the admission of women, there were no shades on the doors of cadet rooms, nor locks on any cadet doors. See United States v. Virginia, 766 F. Supp. 1407, 1412 (W.D. Va. 1991). The district court expressly found that the admission of women would require VMI to add locks and shades to assure privacy. Id. at 1412, 1438. VMI refused to install locks; the shades that it did install, over the opposition of some “who viewed the shades as the first step toward the demise of VMI’s open community,” were inadequate and easily destroyed. See BRODIE, supra note 33, at 110-11.
353. See Status Report no. 8, supra note 350. Although VMI had argued that its fitness standards would have to be changed, Bunting justified his decision not to modify the test on the ground that such a change would be “demeaning” to women. See BRODIE, supra note 33, at 148.
356. See Case, Two Cheers, supra note 340, at 376 n.142.
357. See BRODIE, supra note 33, at 133; Status Report no. 8, supra note 350.
diction. In effect, the U.S. Supreme Court held that the women whose rights had been denied were women who were willing and able to succeed at VMI. The circuit court had characterized this situation, aptly, as a Catch-22, denying women an opportunity to receive an education at VMI because their very admission would require changes to VMI’s methodology.

Contrary to VMI’s suggestion, the Court expressly acknowledged that some changes would be required, including accommodations for privacy and modifications to physical fitness standards. Fundamentally, the Court rejected VMI’s argument that its unique pedagogical method was entitled to protection; VMI’s methodology was simply a means to an end—the opportunity to receive a quality undergraduate education and access to a powerful and influential alumni network. As the Court observed, VMI eliminated some of its Confederate traditions to integrate black cadets, changed its school fight song from “Dixie,” and eliminated the requirement that cadets salute the Confederate flag.

The Citadel also initially sought to make minimal changes to its system. It modified the physical fitness requirements for women to mirror the Army’s separate standards for men and women, modified the knob haircut for females, and put locks on the doors of female cadets. After two of the first four women left alleging that they had been sexually and physically harassed, the Justice Department and The Citadel subsequently entered into a consent agreement under which The Citadel agreed to hire more women in command positions, take additional steps to eliminate sexually derogatory references, provide additional sexual harassment training, and appoint a confidential ombudsman to handle reports of harassment. While it agreed to hire more tactical officers to supervise the barracks and screen cadet leaders to make sure they support “gender assimilation,” The Citadel did not significantly modify its Fourth Class system, nor demonstrate specific sources of funding for the plan.

Although Judge Houck did not require The Citadel to make specific changes in its Fourth Class system, he insisted that The Citadel take steps to eliminate the use of sexually derogatory language and, sua sponte, directed The Citadel to provide females with a Citadel ring that is equal in size to the ring worn by its male graduates. The South Carolina federal

358. See United States v. Virginia, 518 U.S. at 542.
359. See United States v. Virginia, 976 F.2d 890, 897 (4th Cir. 1992); BROADIE, supra note 33, at 68 (describing some VMI Board of Visitors members’ belief that the decision to modify VMI was a “disservice” to “Virginia’s . . . daughters”).
360. See Finn, VMI Pioneers, supra note 213. VMI also established recruitment and retention programs for minority cadets. United States v. Virginia, 518 U.S. at 546 n.16.
361. APPROVED PLAN, supra note 350, at nos. 10, 51, 52.
363. Id. Before women were admitted, The Citadel issued smaller replicas of its ring for the girlfriends and fiancées of male cadets. See GUIDON, supra note 8, at 50.
court thus recognized the power of language and symbols to subordinate women and took steps to insure that female cadets were treated with respect. But the remedial goal has permitted the assimilation of women rather than the dismantling of these masculine institutions.

New female cadets continue to face hostility and physical abuse. Male cadets at The Citadel scream obscenities at the females and spit at them in the barracks. A female cadet, Mandy Garcia, is now second in command at The Citadel, but many male cadets refuse to salute her. Female cadets with rank experience similar disrespectful treatment. Such insubordination speaks volumes about the continued hostility and resentment that female cadets still face, five years after women were first admitted. The first female commandant hired to oversee the assimilation of women, retired Lt. Colonel Bonnie Jo Houchen, resigned last year. She no longer had the energy “to come at the monster every day.”

Female cadets at VMI also have suffered from overt and subtle hostility from male cadets. During the first year of coeducation, VMI dismissed one of its top cadets, selected by the college to be regimental commander of the Corps the following year, for sexually harassing female cadets under his command. Female cadets have complained that male cadets have spit on them, ignored them, and made disparaging comments such as that women do not belong in the Corps (“Why don’t you go home”) or sexually derogatory comments (“Your butt’s big”).

364. See Fix, Women, supra note 250 (describing injuries suffered by Jeannie Mentavlos and Kim Messer, who claimed that male cadets had set their clothes on fire while ordering them to stand at attention and subjected them to verbal, physical, and sexual harassment).
365. Mary Aguilar, one of seventeen female cadets in the second coeducational class at The Citadel, reported in 1998 “daily battles with some male cadets, who are still reluctant to accept females as equals.” Dave Morantz, KC Woman Takes Tough Cadet Course in Stride, KANSAS CITY STAR, Jan. 8, 1998, at C1. In 2000, female cadets reported that “formidable” tensions remained and that many male cadets continued to resent the presence of women. Marja Mills, Surviving The Citadel, CHICAGO TRIB., Mar. 23, 2000, at D1. Female cadets reported that male cadets leaned over the open barracks stairwells and spit at them, yelled at them through barracks windows, made disparaging comments to female athletes, and shouted “get out of my battalion” when a female cadet would enter another barracks. Id. See also Skip Wood, An Officer and an Athlete Senior Opened Door for Women’s Sports at The Citadel, USA TODAY, Sept. 27, 2000, at 12C.
367. Garcia explains: “To me, as an officer, to not get saluted [sic], that’s the most offensive thing. This person, this ‘knob,’ has no idea what I’ve had to go through to get where I am. To not get saluted [sic] is a kind of slap in your face at your hard work, and it’s just because I have a little more estrogen and not as much testosterone.” Id.
368. “It’s time to move on,” Houchen said. ‘My energy and enthusiasm has waned, and you need that energy to come at the monster every day.’ Houchen questioned whether the school’s leadership is moving forward quickly enough with assimilation efforts left undone. . . . ‘The real challenge ahead is changing the attitudes and behavior instead of driving it underground,’ Houchen said. ‘There will be things going on that you won’t be able to see or hear. It’s going to be (a challenge) finding a way to keep a finger on that pulse and to make sure things are healthy.” Charlene Gunnells, First Female Admissions Officer to Leave Citadel, POST & COURIER (Charleston, S.C.), July 31, 2000, at B1.
369. Id.
370. BRODIE, supra note 33, at 349-50.
female officers at The Citadel, women at VMI face insubordination by male freshmen who have been told to ignore the commands of female upperclassmen.\textsuperscript{372} One member of the first class of females reported that male cadets urinated in their beds and avoided contact with women for fear of being branded "woman lovers."\textsuperscript{373} After two female cadets were selected for membership in VMI's cadet cadre, an elite cadet group, VMI's student newspaper accused the women of being unqualified and charged that their selection was rigged by the administration.\textsuperscript{374}

Female cadets not only must deal with being tokens, they must negotiate the bind of gender—the dilemma of being female in an institution that historically has defined a cadet as male. In a system that defines masculinity by denigrating women, female cadets face a difficult Catch-22: act like a male cadet, and you are not a woman; act like a woman, and you are not a cadet. Linda Bird Francke describes this process in the federal service academies, where female cadets entered a state of "gender limbo, subverting their own feminine identities to adopt a more acceptable male identity."\textsuperscript{375} Female cadets pay a tremendous price for crossing the gender border, challenging fundamental notions of male identity held by cadets.

One of the most striking examples of the policing of gender in these institutions is the hostility and harassment of VMI's first female cheerleaders. During the first year that women were admitted, VMI decided to allow freshman female cadets to be VMI cheerleaders, along with male upperclassmen.\textsuperscript{376} Male cadets responded with intense hostility, mocking the women in the student paper, heckling them, and forcing them to perform cheers in barracks instead of push-ups.\textsuperscript{377} In a widely publicized incident, VMI's male cadets threw peanuts at the female cheerleaders at the football game during Parent's Weekend, while screaming "You suck!"\textsuperscript{378} Some male cadets argued that rats should not be in a leadership position and complained about growing "sexual tension" from the sight of their "brother rats" in skirts.\textsuperscript{379} The intense rage and desire to degrade the female cheerleaders, however, is better explained as a visceral reaction to the females crossing the boundaries of gender. The image of female cadets, hair shorn to look like men yet wearing a skirt and performing a stereotypical feminine role, was deeply disturbing. As one cadet explained

\textsuperscript{372} Id.
\textsuperscript{373} Id.
\textsuperscript{374} Brodie, supra note 33, at 348-49.
\textsuperscript{375} Francke, supra note 289, at 210.
\textsuperscript{377} Id.
\textsuperscript{378} Id.
\textsuperscript{379} Id.
succinctly, "They don’t look like cheerleaders. They look like men in skirts." \[^{380}\]

**V. PROPOSAL: DISMANTLING GENDERED INSTITUTIONS**

As the experiences of women within these institutions demonstrate, equality doctrine has focused too narrowly on gender as a category of classification, rather than on gender as a process of exclusion that occurs within social institutions. Conceptualizing gender as a process widens the analytical frame to see how the relationship between sex, gender, and power operates in our society. It allows us to see that the construction of gender is not a static event, but an ongoing process that occurs at the level of the individual, within social institutions, and by the state. Gender as a social process creates the analytical space to explore the myriad ways in which institutions create and perpetuate gender disadvantage of women—and which will help inform courts seeking to fashion more equitable remedies for sex discrimination.

Once gender is reconceptualized as a social practice or institution, the inadequacy of assimilation as an effective remedy for the exclusion of women from traditionally male institutions becomes apparent. Simply opening the doors is not enough to dismantle the gendered practices inside these institutions, just as racially neutral admissions policies did not eliminate the effects of racial segregation in Mississippi’s system of higher education.\[^{381}\] Institutions like VMI and The Citadel create and reinforce gender through policies and practices that construct a cadet as male and celebrate masculinity as their institutional identity.\[^{382}\]

Rather than require women to assimilate into the masculine culture that perpetuates their exclusion, courts should give full effect to the remedial mandate that the plaintiff should be put back in the position she would have been in but for the discrimination. Under basic remedial principles, federal courts are obligated to use their equitable powers to insure that defendant institutions like The Citadel and VMI take affirmative steps to eliminate the effects of their past discrimination and prevent discrimination in the future.\[^{383}\] Courts should analogize to the racial desegregation cases and require that these institutions eliminate sexual discrimination “root and branch,” including those policies that appear neutral but that operate to exclude women. Courts should require them to reevaluate those policies and practices that were adopted during the period when the institution was exclusively or predominantly male, and to elimi-

\[^{380}\] In the past, VMI recruited female cheerleaders from nearby women’s colleges, including Mary Baldwin. *Id.*


\[^{382}\] See supra Part III.A.

nate those that disparately affect women, whether or not they are facially discriminatory.

“Disparate effects” should include those practices that stigmatize women as inferior, unsuited or inappropriate for the role, or institution. Practices that assume or reinforce masculinity as the institutional norm, or construct a particular role or institution as appropriate for men but not for women, should be eliminated if they stigmatize or disparately exclude women. This analysis would require courts to consider the social meaning of institutional policies and practices. The Supreme Court did precisely that in J.E.B. and Hogan, where it recognized that the use of peremptory challenges (J.E.B.) and the exclusion of men from Mississippi University for Women’s nursing program (Hogan) not only were based on stereotypes, but operated to stigmatize women as inferior. By focusing on the social meaning of practices that were designed for men, this proposal would insure that institutions are truly gender neutral.

Under this remedial proposal, the assimilation plans offered by The Citadel and VMI would have looked very different. Both institutions would have been required to reevaluate a host of policies and practices that appear facially neutral, but which are the vestiges of their all-male traditions. Practices that might be eliminated as discriminatory include hair and grooming standards, the use of derogatory language or terms for corps activities and traditions, and physical fitness standards. I briefly discuss each of these below, to compare the analysis under a system of formal equality and under my remedial proposal.

A. The Haircut Revisited

After the U.S. Supreme Court ruled in United States v. Virginia, The Citadel chose not to shave women’s heads, but instead to require a short haircut, similar to those of U.S. military women. Under traditional equality jurisprudence, the courts would scrutinize the haircut regulation selected by either institution within the framework of sameness and difference. To the extent that these colleges arguably impose different hair standards for males and females, a female cadet could argue that requiring these separate standards constitutes differential treatment that marks women as different and inherently stigmatizes women as inferior. But courts have been notoriously hostile to claims that differential hair or grooming standards violate the constitutional right to liberty, religious

386. Mary Anne C. Case argues that The Citadel's modification of its grooming standards, physical fitness requirements, and hazing rituals could be challenged as discriminatory and stigmatizing to women. See Case, The Very Stereotype, supra note 109, at 1484.
During the 1970s, a number of cases upheld school regulations that prescribed different hair standards for males and females in public schools. Federal courts have been particularly deferential to appearance standards adopted by the military and paramilitary departments, such as the police force, holding that these organizations are entitled to adopt standards that promote cohesiveness and discipline. In the employment context, courts similarly have been reluctant to hold that different hair or grooming standards violate Title VII, or equal protection. Courts afford employers wide discretion in setting workplace hair and appearance standards. In Rogers v. American Airlines, for example, the Southern District of New York held that American Airlines' prohibition on corn-row hairstyles did not violate Title VII. Because hair is not an immutable characteristic, employer regulations of hairstyle had "at most a negligible effect on employment opportunity." Ignoring the social meaning of corn-row hairstyles to black women, the court noted that the airline could decide the hairstyle did not project a "business-like" appearance. In the wake of Price Waterhouse, courts have recognized claims of men who have been penalized for failure to conform to masculine norms, yet have nevertheless refused to recognize dress and grooming standards as impermissible gender discrimination.

387. See Karl E. Klare, Power/Dressing: Regulation of Employee Appearance, 26 New Eng. L. Rev. 1395, 1400-05, 1415 (1992) (discussing courts' reluctance to uphold claims against appearance regulations either on liberty interest grounds or under Title VII).

388. See, e.g., King v. Saddleback Junior Coll. Dist., 445 F.2d 932 (9th Cir. 1971) (upholding school regulation that limited male students' hair length); Trent v. Perritt, 391 F. Supp. 171 (S.D. Miss. 1975) (holding that limitations on male hair length did not constitute sex discrimination). But see Crews v. Cione, 432 F.2d 1259 (7th Cir. 1970) (finding that restrictions on male hair length impinge on fundamental rights and require substantial justifications not provided by "health and safety" when females allowed to wear longer hair).

389. See, e.g., Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (holding that the military's prohibition on wearing yarmulkes did not violate the religious freedom of a Jewish service member because, inter alia, the military was entitled to adopt appearance and dress standards to promote unit cohesiveness and effectiveness); Rathert v. Vill. of Peotone, 903 F.2d 510, 516 (7th Cir. 1990) (finding the enforcement of a police department regulation preventing male officers from wearing ear studs was rationally related to preventing loss of respect for police and did not violate equal protection).

390. Courts have rejected Title VII challenges to sex-specific dress and grooming standards on various grounds, including that disparate appearance standards have de minimis effects on employment opportunity, Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996); are not within the statutory goal of Title VII, Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977); constitute an appropriate exercise of employer discretion, Rogers v. Am. Airlines, 527 F. Supp. 229, 232 (S.D.N.Y. 1981); and reflect community norms, which courts conclude are inherently neutral, Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (1975) (upholding workplace rule permitting women but not men to have long hair, and finding that "both sexes are being screened with respect to a neutral fact, i.e., grooming in accordance with generally accepted community standards of dress and appearance").

391. 527 F. Supp. at 231.

392. Id.

393. Id. at 233. See also Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 Duke L.J. 365, 381.

394. See, e.g., Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 n.7 (9th Cir. 2001) (stating that Price Waterhouse did not prohibit all gender discrimination, citing disparate dress and grooming codes
Though the rationales differ, the bottom line is that courts do not consider hair to implicate equality concerns—hair, it seems, does not matter.

A female cadet would find it difficult to challenge such a uniform standard. Under traditional equal protection doctrine, imposing the same shaved cut on both male and female cadets appears to be a facially neutral requirement.\footnote{\textit{Pers. Adm'r v. Feeney}, 442 U.S. 256, 279 (1979); \textit{Case, The Very Stereotype}, supra note 109, at 1485 (explaining that a facially neutral requirement of cadets "can be challenged as discriminatory only to the extent that it has a disparate impact on women and was adopted or maintained because of, and not merely in spite of," its effect on women).} Under \textit{Feeney}, a female cadet could not challenge the shaved cut unless she could prove that the haircut disparately affects women and that the college chose to impose the haircut on women because of, rather than in spite of, its discriminatory effect on them.\footnote{\textit{Lawrence III}, supra note 125, at 320 & n.6 (discussing the difficulty in proving intent to discriminate under existing equal protection doctrine).} While a plaintiff might find evidence that the college chose the haircut to punish or deter women from applying, it is extremely difficult to prove intent.\footnote{\textit{See Brodie, supra note 33, at 218-22.}} VMI did not intend to discriminate against women, the college could argue, because women were not present as cadets when the haircut was adopted. The haircut was chosen as a means to achieve a neutral pedagogical goal to strip the cadets of their individuality.\footnote{\textit{See Susan Brownmiller, Femininity 57} (1984) ("Hair worn in a polarized manner has served to indicate the masculine and the feminine, the slave and the ruler, the young, the old, the virgin, the married, the widowed, the mourning.")} 

In contrast, my remedial proposal would reframe the issue entirely, focusing instead on the social meaning of the haircut as an institutional practice of a formerly all-male institution. Within these military-style colleges, the ritual shaving of the hair of incoming freshmen marks a cadet as male and reinforces masculinity as the institutional norm. To require women to shave their heads is not a gender neutral practice, but stigmatizes women as inferior and unsuited to be cadets.

Hair is not neutral; it has social meaning. Across time and cultures, hair has been a means to express or signify identity.\footnote{\textit{See Case, The Very Stereotype}, supra note 109, at 1447, 1484-85.} Hair is the subject of numerous rites of institution that mark a person as a member of a particular group, simultaneously constructing a person as a member of the group and separating him or her from others outside the group.\footnote{\textit{Rathert}, 903 F.2d at 515-16 (finding police department regulation preventing male police officers from wearing earring studs off-duty was rationally related to preventing loss of respect for police).} Within our society, hair is one of the most powerful markers of femininity and sexuality. Like dress, hair enables us to distinguish the male from female, men from women. Centuries ago, women with short hair inspired revulsion: "[a] woman with cut hair is a filthy spectacle and much like a mon-
While short hair is more common today, female buzz cuts have yet to be accepted by mainstream society. There is a greater range in the length of hair today that is considered socially acceptable; a small (but growing) number of women now shave their heads, although many are media celebrities (like Sinead O'Connor) or fictional characters (Sigourney Weaver in ALIENS or Demi Moore in G.I. JANE). But there is a point at which tolerance yields to rebuke. Women who cut their hair short often are considered masculine or less feminine, “butch” or “dykes,” particularly in the military, where women with short hair have been accused of being lesbians. Outside the military, ordinary women whose heads are bald are subject to censure and ridicule.

Within the culture of The Citadel, a shaved head identifies a cadet as male and reinforces masculinity as the desired norm. Many upperclassmen continue to wear their hair in a nearly shaved style popular with Army Rangers, considered to be a symbol of hypermasculinity. Shaving the heads of female cadets does not have the same social meaning. With their heads shaved, women are stripped of an important symbol that allows them to be socially recognized as women. While they do not look like men, they no longer look like “real women,” either. With their heads shaved, women face social ostracism and censure. The shaved haircut disparately affects women because it stigmatizes them as gender outlaws, women who have transgressed the bounds of gender. While male knobs may feel embarrassed by their haircuts, their social identity as males is not threatened.

401. Id. at 60 (quoting English pamphleteer William Prynne).
402. Manegold, Women Without Hair, supra note 17.
403. Cf., e.g., Judi Addelston, Doing the Full Monty with Dirk and Jane: Using the Phallus to Validate Marginalized Masculinities, 7 J. OF MEN’S STUD. 337 (1999), available at IAC-ACC-NO: 54776377. Addelston analyzes the decision by Moore’s character, Jordan, to shave her own head as an attempt to reveal herself as masculine and find acceptance by her male colleagues: “Jordan, almost dead with fatigue from the brutal training exercises, runs to the barbershop. Her fellow trainees are asleep, but she is determined to remove one of the main things separating her from them. She stands before a mirror, strips down to a white T-shirt, grabs a razor, and gives herself a buzz cut. She is removing perhaps the only body part she can to level the playing field. ... This scene evokes the finale of a drag show, when the performer takes off her wig to reveal his masculinity. Jordan is doing the same thing by shaving off her hair; she is removing her ‘wig’ of femininity to reveal herself as masculine. ... So pivotal is hair, that Jordan thinks if she can look like the men, they will accept her.”
404. See FRANCKE, supra note 289, at 178-179.
405. Margaret Herbig, a New York City comic, lost her hair in 1997 as a result of chemotherapy to treat breast cancer at age thirty-four. Even in the cosmopolitan streets of New York, she experienced harassment and scorn for her appearance. Both men and women felt justified in publicly sanctioning her transgression by expressing outrage. Riding on the subway, a woman who was a complete stranger walked up to her and demanded, “Do you think you look good like that?” While walking in Chelsea, a carload of young men screamed “Faggot!” at her. Margaret Herbig, Meg’s Story, Young Survival Coalition, Survival Stories, at http://www.youngsurvival.org/?f use=about.stories.detail&ssid=20 (last visited Feb. 5, 2002).
407. See Bartlett, supra note 168, at 2572.
Within these institutions, the status of female cadets as outsiders is doubly reinforced by the haircut: they no longer look like women, and they still do not look like men. Their status as outsider is exacerbated, not eliminated. The compulsory adoption of gender camouflage such as the shaved haircut subjects female cadets to public disapproval outside the walls of the barracks. When the first group of female cadets at VMI appeared at a ceremony to dedicate the women’s war memorial in Washington, D.C., the other guests and military women mistook them for men. With her hair cut short, the first woman to graduate from The Citadel, Nancy Mace, was called “Mr. Mace” by some Citadel professors.

Some argue that women should not object to The Citadel or VMI shaving their heads because it simply reinforces the belief that women are vain and weak, rationalizing the preservation of invidious gender distinctions. The underlying premise of this argument is that individual women can overcome such gender stereotypes simply through their will or force of consciousness. That argument, as many feminist scholars assert, ignores the power of gender in our society. “Objective power relations tend to reproduce themselves in symbolic power relations.” These symbols of gender are powerful proscriptions of conduct and behavior, deeply embedded in our social world and within our unconscious. There is a tremendous cost to transgressing gender boundaries—one that is borne disparately by female cadets. When The Citadel and VMI were all-male, shaving the heads of male cadets arguably made them look more similar, the express goal of the Corps. However, shaving women’s heads does not make them appear anonymous but deviant. Giving women the same haircut as men symbolically highlights the difference in gender and

408. See Michael Kimmel, Janey Got Her Gun, THE NATION, June 19, 2000, available at 2000 WL 17718693 (“Cutting the men’s hair takes away their individuality, but not their manhood; for women it takes away their femininity and exaggerates their individuality.”).

409. Cf. Francke, supra note 289, at 210 (describing how female cadets at West Point and other service academies have been placed in “gender limbo,” neither male nor female, forced to camouflage femininity).

410. Brodie, supra note 33, at 279.

411. Cf. Citadel Set to Graduate Its First Female Cadet, BALT. SUN, May 3, 1999, at 6A. Mace reports that she faced “constant taunting” by male cadets, some who called her “bitch.” Id. Mace described the toll the abuse took: “There have been times when I just cried. Separating your emotions all the time is very tiring, and I have broken down in tears. But I have never said that I wanted to quit.” Id.


413. See, e.g., Bourdieu, Masculine, supra note 50, at 103; Bartlett, supra note 168, at 2544; Klare, supra note 387, at 1415.


416. See Kimmel, supra note 408.
simultaneously censures women for transgressing the social expectations of their gender. Sometimes, the same is different. Rather than compel women to abandon their social identity as females as the price of equality, these institutions should choose another means to accomplish their asserted goal. Just as these formerly all-white institutions abandoned “Dixie” as their fight song, recognizing the need to respect and include a racially diverse student body, so courts should require them to modify existing standards that are no longer appropriate or inclusive for a coeducational corps.

B. Physical Fitness Standards

VMI did not modify its physical fitness test after women were admitted. The test requires cadets to perform “five pull-ups, sixty push-ups in two minutes, and a one-and-a-half mile run in twelve minutes.” VMI does not require its cadets to pass the test as a prerequisite for graduation. The fitness test comprises twenty-five percent of cadets’ grades in a required health class, and therefore has the potential to affect cadets’ grade point average Cadets who fail the test must report for remedial fitness training run by other cadets on Tuesday and Thursday mornings. VMI does not require all cadets to take the test; varsity athletes are exempt. Because women on average have less upper-body strength than men, the test disparately affects women: ninety-six percent of men after the first semester passed the pull-up test, compared to thirty percent of the females. While women performed better in the spring semester, women on average scored forty-nine on the test compared to men who scored an average of seventy-eight.

Under formal equality, it would be difficult for a woman to challenge VMI’s physical fitness standards, which are facially neutral. Under Feeney, a plaintiff could prevail if she could find evidence that VMI selected these tests intentionally to discriminate against women. There is some evidence that suggests an intent to exclude women. For example, the college rejected the proposal of its physical education faculty to adopt the Marine Corps fitness standards for women, which substitute flex-hangs

417. Brodie, supra note 33, at 329.
418. Id.
419. Id. at 148.
420. Id. at 329.
421. Id. at 150.
422. Id.
423. Id. at 329.
424. Id. at 329-30.
425. See Pers. Adm’t r v. Feeney, 442 U.S. 256, 281 (1979) (holding that hiring practices that disparately affected women were not unconstitutional because the law did not reflect a purpose to discriminate on the basis of sex); see also Case, The Very Stereotype, supra note 109, at 1485.
for pull-ups and alter the time allotted for the run. In deciding against changing the physical fitness test, VMI expressly considered findings of a 1985 National Children and Youth Fitness Study, which found that eighteen-year-old males could perform an average of 9.7 pull-ups, as compared to 0.6 for eighteen-year-old females. VMI could argue, however, that its fitness tests had been developed before women were admitted, and therefore cannot possibly have been selected because of its discriminatory effects on women, as required under a Feeney analysis. To the extent that the Supreme Court held that the women who are entitled to a VMI education are those who are as qualified as the male cadets, VMI would argue that it was prohibited from creating different standards for women. Arguably, to create different standards would be to treat women differently based on stereotypical views of women’s lack of physical abilities.

Under my remedial analysis, the issue of intent would be irrelevant. Because the physical fitness test is a policy traceable to VMI’s formerly all-male status, VMI would be required to eliminate or replace it with a gender neutral test if it disparately affects females. The purpose of the test is not to ensure that cadets are fit for military combat; only fifteen percent of VMI’s graduates enter military service. Furthermore, the ability to do pull-ups is unrelated to the ability to succeed as a leader in civil society. If the goal is to challenge cadets and push them to their limits, there are a number of tests that would have less discriminatory impact, such as replacing pull-ups with flex-hangs. Alternatively, the test might be weighted or scored differently to eliminate the disparate effect. The fitness test could be designed, for example, to give more weight to sit-ups, which women on average perform better than men. Under my remedial analysis, VMI would be required to eliminate the inherent, but unrecognized, gender bias that permeates apparently “neutral” standards.

C. The Barracks System

My remedial proposal would have implications for the rules and traditions of the Fourth Class (or barracks) system itself. To the extent that some of VMI’s practices stigmatize women as inferior, including the official use of sexualized and derogatory terms for women, they would have

426. BRODIE, supra note 33, at 156.
427. Id.
428. Id. at 147-48.
429. Id. at 148.
431. See United States v. Virginia, 766 F. Supp. 1407, 1433 (W.D. Va. 1991) (noting that women performed as well as men in sit-up physical fitness tests at the United States Military Academy). The current fitness test at VMI could be adjusted to reward women who perform well at sit-ups, thereby reducing the disparate effect of the test as a whole. See also BRODIE, supra note 33, at 329-30.
to be eliminated. The continued use of these practices stigmatizes women as inferior and creates a hostile environment for women. Rather than require women to assimilate into VMI subject to these degrading terms, my remedial proposal would require VMI to adopt truly neutral terms that degraded or sexualized neither men nor women.432 Other aspects of the Fourth Class system could be challenged as well.

CONCLUSION

The Citadel and VMI cases raise critical questions about the obligation of employers and other state actors to accommodate women within traditionally male institutions. Nearly forty years after sex discrimination was banned under Title VII, women still remain underpaid and segregated in the American workplace. Formal equality has eliminated most of the formal barriers to women's full participation in citizenship and the workplace, but formal exclusion has been replaced by informal means of exclusion that operate to police the bounds of gender within these institutions.

Institutions cannot be truly gender neutral unless they eliminate “root and branch” those practices that construct gender to exclude women from formerly male institutions. Framing gender as a social practice would allow courts to require formerly male institutions to eliminate the vestiges of discrimination against women that are embedded within them. In addition to affecting educational institutions such as The Citadel and VMI, my proposal would have implications for policies in the employment context as well. These include employment practices traditionally considered under Title VII, such as physical fitness requirements that disparately exclude women, as well as a range of policies that have been adopted with the assumption that workers are male. For example, my proposal would require employers to examine their failure to offer part-time employment possibilities; such failure is a disadvantage to women who struggle to balance family and work. Employers forced to consider the social meanings of their policies and practices would thereby be required to consider their facially neutral practices that construct or reinforce masculinity as the institutional identity of the workplace, including cultural practices immune from challenge under Title VII.

From a remedial perspective, requiring formerly male institutions to examine their practices rooted in the prior all-male system more fully assures the goal of restoring women to the position that they would have occupied but for the discrimination. Measures like affirmative action do

432. The use of these offensive terms arguably is prohibited as sexual harassment under Title VII. See R.A.V. v. City of St. Paul, 505 U.S. 377, 409 (1992). To the extent that the derogatory terms used by VMI cadets would be actionable harassment, it makes little sense to require women to wait until they are admitted and then harassed before VMI is forced to take remedial action.
not necessarily fundamentally challenge the institutional premise that the ideal worker is male or masculine. By eliminating the presumption that the existing workplace is gender neutral, my proposal shifts the point at which neutrality is measured. Rather than require women to assimilate into the existing male culture, my proposal assumes that the institutional culture and structure would have been materially different had women been included from its inception. More workplaces would have part-time policies, for example, if the needs of both men and women were afforded equal respect and consideration at the time the workplace was structured. Reconceptualizing the meaning of gender as an institution deepens the societal understanding of the means by which gender is produced and women are disadvantaged within our social institutions. Shifting the focus to remedy creates the space to challenge practices that are facially neutral but operate to preserve sex segregation in institutions. It further helps to build the foundation for the reconsideration of the intent requirement in *Feeney*. Sexism, like racism, would better be seen as a consequence as well as a means of the structural oppression of women.