PART I

What Is Sex Discrimination?

"No, Mr. Kurlander, I don't have, nor have I ever had, a recipe for cranberry muffins."

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Can you believe that? A female linesman. Women don't know the offside rule.

(Andy Gray, Sky Sports Presenter)

[Elena Kagan] put on rouge and lipstick for the formal White House announcement of her nomination, but mostly she embraced dowdy as a mark of brainpower.

(Robin Givhan, *Washington Post* staff writer)

At the heart of this collection is a basic question: What is sex discrimination? The answer may seem obvious, but, in truth, it is complicated. Are *all* classifications on the basis of gender discriminatory, or are there times or places when sex differentiation, or even sex segregation, are permissible or desirable? Should seemingly benign classifications be prohibited because they might perpetuate damaging stereotypes and gender subordination? If so, when? Is there anything wrong with Mr. Kurlander's assumption that the one woman in the boardroom would have a recipe for cranberry muffins at the ready?

Consider a simple example: "ladies' night." A New Jersey bar had a typical promotion – it admitted women one night each week without a cover charge and sold them drinks at discounted prices. A male customer filed a complaint, alleging that the practice violated the New Jersey Law Against Discrimination (LAD) because it discriminated on the basis of sex.[1] The director for civil rights issued a ruling, in *Gillespie v. Coastline Restaurant*,[2] agreeing with the plaintiff and ordering Coastline to charge men and women the same prices. The public reaction to the decision was curiously strong. The state's then-governor, James McGreevey, later driven from office by a sexual harassment scandal,[3] issued a written statement denouncing it as "bureaucratic nonsense" and an "overreaction that reflects a complete lack of common sense and good judgment."[4] One television commentator began coverage of the story by asking, "Is nothing sacred?"[5] The complainant's own mother, age 82, told him "there were bigger fish to fry than this."[6]

Is this a form of sex discrimination the law should address? One question raised here is whether sex discrimination laws have built-in "de minimis" exceptions – for practices that, while they differentiate based on gender, seem to do so in relatively innocuous ways. (The expression "de minimis" comes from the saying "De minimis non curat lex" – Latin for "The law does not bother with trifles.") But the applicable statute – like most antidiscrimination statutes – makes no mention of such an exception. The LAD broadly bans discrimination by places of public accommodation on the basis of sex.[7] And prior cases established that this extends not only to equal access or service but also to the furnishing of "accommodations, advantages, facilities or privileges."[8]

Might this type of seemingly benign discrimination mask harmful stereotypes? Coastline argued that its policy did not reflect any animus against men and was justified by its legitimate, nondiscriminatory goal of increasing patronage and revenue. The conventional "theory" of a ladies' night discount is that more women will come

because of the reduced prices, and more men will come because more women will be there. (Although oddly enough, in this case, the owner admitted that 70 percent of the patrons on an average ladies' night were still male, and that men were the main users of the discount, giving women money to buy their drinks.)

It may well be that Coastline bore no ill will toward men, nor embraced negative stereotypes about them – and that, indeed, it did want to attract them, indirectly, with "ladies' night." But might it nonetheless have harmed men with price gouging – and harmed women by setting the stage for them to drink too much and potentially be victimized by the men for whom they had been used as bait? And might harmful stereotypes be embedded in something as simple as a ladies' night discount? Maybe a drink discount perpetuates views about women's purported economic dependence – that they could only afford to go out drinking if someone gives them a discount. Or maybe the discount perpetuates male sexual dominance – by luring men to a bar because of an expectation that they will find a bar full of women who might be drinking more than usual because of the cheaper prices. Maybe, as the complainant also argued, the promotion degrades men as "irresistibly driven" to places where women gather. Or maybe, because it is too hard to know when harmful stereotypes are being perpetuated, it is just easier to prohibit sex-based classifications altogether. The Washington Supreme Court, in a glaring embrace of gender stereotypes, upheld the Seattle Supersonics ladies' night on grounds that lower ticket prices were reasonable given that women "do not manifest the same interest in basketball as men do," and thus might miss out on the attractions they might enjoy like halftime fashion shows and gifts and souvenirs.[9]

Whether or not the New Jersey bar's owners intended, or even were cognizant, of any potential adverse effects is, under standard antidiscrimination doctrine, irrelevant. A formal policy like the rule behind "ladies' night" need not be born of animosity against the disadvantaged group to be illegal.[10] The New Jersey DCR was not persuaded by any of Coastline's arguments.[11] Places of public accommodation, under New Jersey law, cannot vary the price for a good or service based on nothing more than a patron's gender. A sign that had advertised this promotion every Wednesday for twenty-six years came down.[12]

The legality of sex-specific discounts is hardly the most pressing issue of our times, yet it provides a window into important and often unique features of sex discrimination law. After all, no court would countenance a bar's offering of "whites' night" as a legitimate means to entice white customers, nor would any court think that the offering of "blacks' night" on another day of the week would cure its discriminatory impact. Yet courts have entertained both these possibilities for sex-specific discounts.[13] What, if anything, is different about sex discrimination?

Do the questions or answers change when we shift the setting from bars to the workplace? Certainly the questions become both more numerous and more complex – and the answers more important. For rather than resolving the price of a drink, or the terms on which single people in bars negotiate the social landscape,

we are determining people's livelihood and their access to economic security. The chapters in this part explore how legislatures and courts ferret out the types of gender discrimination that impede equal access to the workplace – and where they fall short. The answers may be varied, but the question is clear: What is sex discrimination?

Part I of the book explores this question primarily in the context of Title VII of the Civil Rights Act of 1964, the centerpiece of federal antidiscrimination law, and its state analogs. At the core of Title VII is a prohibition on employment actions based on an individual's "race, color, religion, sex, or national origin."[14] And, as explained in detail in Part III, the ban on sex discrimination was expanded in 1978 to include discrimination on the basis of "pregnancy, childbirth, and related medical conditions."[15] Reciting the statutory language is easy, but figuring out which decisions and actions constitute an unlawful employment practice and how one proves that a decision was based on a protected characteristic in a particular case is hard. More so in the context of sex discrimination because, as already discussed, not all instances of sex-based classification or even segregation are objectionable. The focus of the chapters in this first part is on drawing that line, a process that entails probing beneath the status quo and questioning our common intuitions.

The first three chapters consider cases where there is little or no dispute about what happened, but the parties disagree about whether a decision in which gender clearly played a role constitutes a form of illegal discrimination. Chapters 1 and 2 take up a thorny, but surprisingly common, issue: whether it is unlawful for a man to fire a female subordinate because his wife is jealous. Title VII prohibits employment decisions made "because of" or "on the basis of" sex. But for the sex of the subordinate employees in these cases, the wives would not have been jealous. And if the wives had not been jealous, the female employees would not have been fired. Does that mean they were fired, for Title VII purposes, because of sex? Chapter 3 continues exploring the definition of sex discrimination through a case in which a prominent university admitted it did not hire a male coach for its women's crew team because it preferred a woman for that position. Are there legitimate reasons to prefer a coach of the same sex as the athletes, and should a man be able to sue even though the bulk of the discrimination in coaching falls on women?

Chapter 4 turns to the problem of unadmitted discrimination – when an employer denies, sex was the reason for the adverse employment action. A case in which a woman was seemingly fired both because she had a history of disciplinary problems and because the employer harbored some gender bias provides the perfect occasion to introduce Title VII's proof structures, which guide factfinders (sometimes confusingly) in the determination of whether a prohibited characteristic played an impermissible role in the employer's decision.

Chapters 5 and 6 explore the role of sex stereotyping in discrimination law. The Supreme Court has embraced the idea that the application of sex stereotypes by an employer is a form of unlawful discrimination under Title VII.[16] But, as these chapters show, courts have been at times hesitant to preclude all stereotyping,

particularly as applied to sex-specific dress and grooming codes. They have been more willing, as recent cases illustrate, to recognize the sex stereotyping inherent in transgender discrimination.

Chapter 7 takes up yet another type of discrimination claim, in which a plaintiff argues that an admittedly neutral employment practice violates Title VII because it has a disparate impact on a protected group such as women. This cause of action is explored here in a case brought by a group of women who had sought unsuccessfully to become transit officers in Philadelphia but were thwarted by a requirement that they run 1.5 miles in less than twelve minutes.

Chapter 8 considers the important question of *who* is protected by Title VII. The statute protects employees from discrimination by employers, but in the modern workplace, the line between these two groups is not always clearly demarcated. Are law firm partners "employers"? Or might some, because of a lack of power and control over firm management and profits, be deemed employees? This chapter discusses a case that tries to draw the line and considers the implications for workplace equality of taking too formalistic an approach.

Part I concludes with Chapters 9, 10, and 11, which explore the law's protection against retaliation. Courts have begun to recognize that protecting against retaliation is as important as protecting against discrimination in the first instance, given how common it is for discrimination complainants to be penalized for challenging their employers and what a deterrent the anticipation of those penalties can be. These chapters, respectively, consider whether a coach who complains about discrimination against his female athletes should be protected from retaliation; whether a woman's reassignment to a less desirable position and suspension without pay were sufficiently adverse to be actionable; and, finally, whether a witness who cooperates in an internal harassment investigation is protected from retaliation, or whether such protection is limited to the complainant.

1

Sexual Jealousy

If a man fires his pregnant secretary to appease his jealous wife, can the secretary sue him for discrimination? In the case of *Mittl v. New York State Division of Human Rights*, an appellate court in New York said no.[1] But isn't this a classic case of sex discrimination?

The plaintiff in the New York case worked as a secretary for a physician at Columbia Presbyterian Hospital. About a year after starting work, she announced that she was pregnant. Her boss initially greeted her announcement "in good spirit" and gave her advice about seeking disability benefits during maternity leave.[2] But, as the date grew closer, the tone of his reaction changed. The reason for the change, it turned out, was that his wife was angry because she believed that her husband might have fathered the child.

There was no apparent evidence that the wife's belief was correct; indeed, the appellate court described it as "irrational."[3] Nor was there even any evidence that the doctor-secretary relationship was anything other than professional. Nevertheless, the doctor's wife clung to her belief. She made hostile phone calls to the plaintiff and, at some point, even threatened to fire her, although she had no authority to carry out such a threat. The doctor at first found his wife's reaction humorous, but his efforts to calm her down were ultimately unsuccessful. He thus fired his secretary to placate his wife.

THE LAWSUIT AND THE DECISIONS OF THE AGENCY AND THE APPEALS COURT

The secretary then filed a lawsuit alleging that she had been subjected to pregnancy discrimination, in violation of New York's antidiscrimination law.[4] (That law is roughly coextensive with the federal ban on sex and pregnancy discrimination, embodied in Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978.[5])

Her boss was found liable by the agency charged with implementing this law and ordered to pay nearly $200,000 in damages.[6] However, with little or no analysis, the appellate court reversed the agency's decision. The only facts the court seemed to find relevant were that the doctor had not initially reacted negatively to the secretary's announcement, nor had he given her any initial indication that her condition would jeopardize her employment. Without evidence of animosity toward the pregnancy by itself, the court refused to call the doctor's actions pregnancy discrimination. Rather, the firing was, according to the court, "at worst, disloyalty to a valued secretary."[7]

The court described the husband's decision between firing the secretary and potentially losing his wife as a "Hobson's choice."[8] According to the court's logic, then, the husband had essentially been compelled to fire his secretary and should not be faulted for doing so. Even on its own terms, the court's logic was faulty. It is also contrary to law. A firing may still constitute pregnancy discrimination even if the pregnancy was not the sole factor in the firing.

FIRINGS DUE TO "RATIONAL JEALOUSY"

The New York court that ruled against the secretary also noted that, at least in New York, "[h]usbands presented with just this Hobson's choice have found support in the courts in the face of charges of sex discrimination law."[9] These cases were different, however, for most of them involved an employer who was indeed romantically involved with an employee, whom he then fired to avoid further marital conflict.[10] In *Mittl*, in contrast, the doctor apparently was never involved with the secretary despite his wife's suspicions.

This is a distinction with a difference. It is more convincing to suggest that husbands who truly do have affairs, as compared with those whose wives simply imagine or fear affairs, are put to a true Hobson's choice: fire the employee or lose your wife. Of course, that still leaves the question of why the employee should suffer because of a predicament that the husband, who, after all, is the one who has cheated, largely created for himself.

There is also another problem with citing the "rational jealousy" cases, in which an affair did occur, to support the holding in *Mittl*. To the extent that these cases suggest that a firing due to "rational jealousy" does not constitute sex discrimination, they are themselves poorly reasoned and contrary to controlling discrimination law principles.

Consider, for example, the case of *Kahn v. Objective Solutions, Int'l*, decided in 2000 by a federal district judge in the Southern District of New York. There, the plaintiff alleged that a company president had an affair with her while she was on his staff, broke off the relationship because "his family disapproved," and then fired her.[11] She sued for sex discrimination, but the court rejected her claim on the ground that the termination was based on a sexual relationship but not on sex itself.

This distinction cannot hold water. Granted, a scenario like the one in *Kahn* does not squarely present a problem of sexual harassment. As long as the intimate

relationship was truly welcome and voluntary (i.e., not submitted to because of an implicit or explicit threat of consequences), the relationship itself is not harassment. And as long as the termination was *not* an act of retaliation based on the employee's refusal to continue to submit to sexual conduct, the termination is not harassment either.

But expressly applying different rules to men and women is an obvious example of sex discrimination. And contrary to the suggestion of the *Mittl* court, animosity toward one sex or toward pregnancy is not legally required. It is not the *motivation* for the action but the mere *fact* of disparate treatment that makes these actions illegal. Thus, a "well-meaning" employer who seeks to "protect" women from physically hard work by refusing to hire them or limiting their assignments is just as liable as an employer who refuses to hire women simply because he hates them or believes them incompetent. Similarly, an employer who refuses to hire men because he thinks they are too good for "women's work" is just as liable to discrimination suits by the men as an employer who refuses to hire men because she bears animosity toward them.

Put simply, if a woman is fired when a man in her situation would not have been, that is illegal sex discrimination. Similarly, if a pregnant woman is fired, and a nonpregnant person in an analogous situation would not have been, then that is pregnancy discrimination.

IN *MITTL*, WOULD A MAN, OR A NONPREGNANT WOMAN, ALSO HAVE BEEN FIRED?

Thus, the real question in the "rational jealousy" cases is whether husband-employers who fire their female ex-paramours would have taken a similar action against their male employees. The answer is almost certainly no, save for the rare bisexual employer who has relationships with both men and women and then fires both when he tires of them.[12]

The reason female employees are vulnerable to the jealous insistence of their bosses' wives is precisely, as Title VII prohibits, "because of . . . sex."[13] It is their sex that made them a desirable paramour for the boss in the first instance; their sex that created the predicate for jealousy; and their sex that got them fired.

Similarly, the real question in "irrational jealousy" cases such as *Mittl* is whether husband-employers who fire female employees whom their wives imagine to be sexual competitors would have taken a similar action against their male employees. Again, the answer is almost certainly no.

To see why, imagine that instead of telling his wife his secretary was pregnant, the doctor in *Mittl* instead had told her one of his male employees had contracted a sexually transmitted disease, one from which the doctor himself also, hypothetically, happened to suffer. Solely because the employee was male, the wife's jealousy and suspicions would not have been triggered, and the firing would not have occurred.

COURTS HAVE EFFECTIVELY, AND WRONGLY, GIVEN JEALOUS WIVES HIRE/FIRE AUTHORITY

The consequence of allowing an employer's wife to dictate who gets hired and fired is that women are deprived of equal opportunity to work. This seems almost too obvious to mention. Wifely jealousy, if controlling, may keep women from being hired in the first place. It may also, as the plaintiff in *Mittl* learned, get them fired – and even get them fired at the worst possible moment, when they need health and pregnancy benefits the most.

More subtly, effectively giving wives power to choose and control their husband's female coworkers can also prevent the female coworkers from advancing and enjoying equal work opportunities. For example, the "wife's veto" may deprive female workers of assignments that require travel or close working conditions with male bosses, or even with more senior male coworkers who also have jealous wives. Wives who refuse to have their husbands work with women, and husbands who decline to work with women "so as not to upset my wife," are carrying out sex discrimination. Rather than nodding sympathetically at their domestic woes, we should fault them for putting their relationship troubles above workplace equality and creating limitations on female employees' opportunities that do not apply to men.

No one would think a husband should be able to maintain an all-white workforce because his wife is a bigot. Nor would anyone nod sympathetically if an employer explained that it would just be "easier" for him at home if he declined to hire African Americans. Nor would a husband be taken seriously if he claimed in court that he was put to an impossible Hobson's choice because his racist wife would leave him if he did not fire his black secretary, so the secretary simply had to be fired. Yet courts have no trouble validating parallel situations when sex or pregnancy rather than race is the deciding factor.

In the end, there is no federal law saying husbands need to make their wives happy, while there is one saying they can't unfairly discriminate against their female employees. Perhaps the court in *Mittl*, interpreting New York's analogous law, should have preferred disloyalty to an irrational wife than disloyalty to a secretary at the very point when she needed loyalty – and benefits – most.

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Update: The Mittl *case was later reversed by New York's highest court.*[14] *The lower court had failed to apply the proper standard of review to the agency determination and disregarded substantial evidence that the discharge was in fact discriminatory. The defendant's explanation that his wife – who did not work for him – had fired the plaintiff was "incredible and unsubstantiated." Moreover, the court explained, the lower court should not have relied on the line of cases in which the parties had engaged in a consensual sexual relationship because there was no such relationship here.*

2

Too Hot to Be a Dental Hygienist?

In 2009, the Iowa Supreme Court made national news for its surprising and unanimous decision in *Varnum v. Brien*, in which it held that the state's ban on same-sex marriage violated the state constitution's guarantee of equal protection.[1] Iowa was not the first state to legalize same-sex marriage – Massachusetts came first in 2004,[2] followed by a handful of others in 2008 – but it was the first to do so outside the liberal confines of the Northeast.

Iowa's high court made headlines again in 2010, when three of the justices who joined the Varnum opinion were recalled from the bench because of the decision.[3] The three included the court's only woman, and all three vacancies were filled by men.

Now the court is back in the news, this time for an illogical decision that misinterprets governing civil rights statutes and reaches a preposterous result.[4] In this ruling, *Nelson v. Knight*, the court held that a male dentist did not violate a law banning sex discrimination when he fired his very competent female dental assistant because he found her to be an "irresistible attraction" whose very presence might incite him to commit sexual harassment and, perhaps ultimately, cost him his marriage.[5]

This ruling hearkens back to mistakes of the 1970s, when courts, including the U.S. Supreme Court, struggled to figure out just exactly what "sex discrimination" is. But forty years of antidiscrimination law later, we know it when we see it. And this is definitely it. The Iowa court has done women's workplace equality a colossal injustice by allowing men's inability to control themselves to define women's employment rights.

A DAY IN THE LIFE OF DR. KNIGHT'S DENTAL OFFICE

In 1999, dentist James Knight hired Melissa Nelson to be a dental assistant in his office. She was twenty years old and had just received a two-year college degree. She