The Search for Sex Equality: A Perspective from the Podium on Law and Cultural Change

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The American population, including its law students, believes in sex equality. This in itself is something new. When I began teaching twenty-five years ago, classroom arguments against sex equality were common, and they no longer are. Change has taken place: both legal change and cultural change. While nearly everybody believes in sex equality, there is little understanding about what sex equality means. Indeed, there is confusion about what is meant by "sex." The problem is that we know that women are different—they can make babies—but we do not quite know what to make of that difference. American law bases its equality doctrine on "formal equality," which requires that likes be treated alike, and allows differences to be treated differently. But if women are different from men—and without being an essentialist, that is, one who believes that there is an "essence" to "woman," I will say that most women are different from most men in some important respects—how can equality between the sexes be achieved?[1]

Much legal change has occurred since the passage of the Civil Rights Act of 1965, when Congress outlawed, *inter alia*, sex discrimination in employment.[2] Many of the changes have been designed to protect something about women's differences, but usually only to the extent that these differences can be re-characterized as sameness. For instance, pregnancy is protected in employment by the Pregnancy Disability Act ("PDA") only to the extent that an employer protects other disabilities,[3] while family and medical leave under the Family and Medical Leave

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1. This is one of the enduring questions of feminist jurisprudence, most recently thoroughly addressed to law students in casebook form by CATHARINE A. MACKINNON, SEX EQUALITY (2001).

2. 42 U.S.C. § 2000e-2 (2000).

3. 42 U.S.C. § 2000e(k) (2000); *see infra* note 17 and accompanying text (noting that the Pregnancy Disability Act does not offer special protection to pregnancy in and of itself, but only to the extent that similarly diabled employees receive special protections).

Act is accorded to both mothers and fathers on an equal basis.[4] But some differences are being recognized by law, such as the needs of nursing mothers and the need for pregnancy leave regardless of any other leave provisions.[5]

The interaction between law and culture is a complex one. Does law *cause* cultural change, or can law only *reflect* cultural change? Does legal reform require cultural reform before the legal reform can be effective? Scholars, and other thoughtful people in the legal community have pondered these questions since time immemorial, and of course, there is no clear answer.[6] But the questions are still worth pondering.

I have had the privilege of teaching employment discrimination for twenty-five years. I also teach employment law, where some of the equality issues surface. I have also taught feminist jurisprudence from time to time. From the vantage point of the podium over this period of time, I have come to some conclusions about the perspectives of law students toward sex equality, particularly sex equality in employment, which implicates equality in other spheres of life.

Attitudes are part of the culture. It is clear to me that attitudes have changed about certain legal subjects regarding sex equality, sexuality, and sex itself, both in the classroom and as a microcosm of society as a whole. I believe the changed attitudes have been informed by legislative and judicial change. The law has caused a cultural shift. It is also clear to me that law students, like legal scholars, legislators, judges, and the rest of us, cannot figure out what is meant by sex equality. Indeed, we barely know what we mean by "sex."

I would like to describe briefly the attitudes of law students that I have observed in my classroom—observations tied to legal changes wrought over the last twenty-five years. In trying to disentangle the factors of law and culture, I conclude that the Pregnancy Disability Act and amendments to Title VII of the Civil Rights Act, which prohibit discrimination on the basis of pregnancy,[7] have effected an enormous cultural change. On the other attitudes about sex, sexuality, and gender

4. 29 U.S.C. § 2612 (2000).

5. *See infra* Part 1 (discussing the legal developments that have created special provisions to accommodate working mothers).

6. *See* Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law"*, 101 MICH. L. REV. 2275, 2299 (2003) (arguing that where there is a preexisting and broad culture commitment to the bundle of values called "the rule of law," it makes perfect sense to see the law as an instrument of social change; therefore, changes in the law have helped bring real changes in our society, namely that minorities and women are allowed to participate as equal citizens).

7. 42 U.S.C. §§ 2000e(k), 2000e-2 (2000).

I discuss, I cannot disentangle the factors of law and culture—each is important. The counsel of good employment lawyers has fostered positive cultural change in the direction of sex equality. I believe that the search for sex equality requires an understanding of women's—and society's—needs over the entire life cycle of individuals: from childhood, through education and training, through the work and reproductive years, and on into retirement. I consider sex equality to be a feature of justice that is self-evident, even if its implementation is elusive.

Here is my take on some important attitudes of my law students, self-selected to be in my classes. First, women are entitled to get pregnant and still have a job. This is a sea change since 1978, when the Pregnancy Discrimination Act became effective and when I began teaching. Second, highly educated law students know everything about sex, but nothing about nursing a baby. There is reluctance to even talk about lactation, yet several states have laws protecting the rights of lactating employees.[8] Students recognize this as a workplace issue only if pushed. In 1978, this topic was not on the radar screen, and was typically only addressed if the professor or the students insisted on a discussion. Third, students struggle with the price of motherhood. Public policy addresses this struggle through the laws on employment discrimination and family leave. Yet there is no coherent approach that addresses a woman's life cycle and the societal good of raising children. One reason for this incoherence is that we cannot achieve consensus on maternity and child rearing. And one reason we cannot achieve consensus is the tension between equal treatment (men and women must be treated alike) and special treatment (maternity and child rearing deserve special treatment). This tension reflects, albeit imprecisely, the divide between moms who stay at home to mother full-time and those who remain in the paid labor force. Fourth, discrimination on the basis of sexual orientation is unacceptable. While there is no federal law prohibiting employment discrimination on the basis of sexual orientation, society in general seems opposed to much discrimination on this basis.[9] Many states and localities prohibit such discrimination.[10]

8. *See infra* note 19 and accompanying text (listing jurisdictions that have established workplace requirements for employees who breastfeed their children).

9. *See* Humphrey Taylor, *By More than 2–1 Most Americans Favor Legislation to Prohibit Job Discrimination Against Gays and Lesbians*, Harris Interactive, *at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=236 (June 13, 2001) (discussing a poll finding that fifty-eight to sixty-one percent of Americans favor a federal law to prohibit job discrimination against gays and lesbians); American Counseling Association, *ACA Opposes Discrimination Based on Sexual Orientation: ENDA & PPIA*, *at* http://www.counseling.org/Content/NavigationMenu/PUBLICPOLICY/HOTTOPICSLEGISLATIVEPRIORITIES/ACAOP

Fifth, there is increasing acceptance—even if understanding is elusive—of the transgendered. Within the past few years, several states and localities have passed legislation to protect the rights of the transgendered,[11] as the media and transgender activists have brought the issues of this community into the public consciousness.

1. PREGNANCY, BEING NATURAL AND SOCIALLY NECESSARY, SHOULD NOT BE USED TO SUBORDINATE WOMEN IN THE WORKPLACE

Back in 1978, when I began teaching employment discrimination, my predominantly male students were overwhelmingly appalled and perplexed that Congress should pass legislation defining discrimination on the basis of sex to include discrimination on the basis of "pregnancy, childbirth, or related medical conditions."[12] During this same year, the Pregnancy Discrimination Act amendments to Title VII became effective. Congress passed this amendment to counter United States Supreme Court decisions that pregnancy discrimination was not sex discrimination: while everyone who gets pregnant is female, the class of non-pregnant persons includes both females and males.[13] Thus, there was no sex discrimination under either the Equal Protection Clause of the Fourteenth Amendment or Title VII when an employer excluded normal pregnancy and childbirth under an insurance disability plan.[14]

POSESDISCRIMINATIONBASEDONSEXUALORIENTATIONENDAPPIA/ENDA_PPIA.htm (last modified July 2004) (citing a poll finding that eighty-five percent of respondents favored equal employment opportunity for gays and lesbians).

10. *See infra* note 39 and accompanying text (listing state and local jurisdictions that prohibit discrimination based on sexual orientation).

11. *See* MINN. STAT. ANN. § 363A.03(44) (West 2004) (defining "sexual orientation" to include having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness); R.I. GEN. LAWS § 34-37-1 (1995 & Supp. 2003) (providing that regardless of a person's gender identity or expression, it is the policy of the state to assure equal opportunity to live in decent, sanitary and healthful accommodations anywhere within the state); EVANSTON, ILL. CODE § 5-5-6 (1998) (defining sexual orientation to include having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness); *see also* Jill Pilgrim et al., *Far from the Finish Line: Transexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 495, 545–46 (2003) (discussing how only Minnesota and Rhode Island have enacted legislation prohibiting discrimination based on sexual orientation that is broad enough to include transgendered people).

12. 42 U.S.C. § 2000e(k) (2000).

13. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 133–36 (1976); Gedulig v. Aiello, 417 U.S. 484, 495–97 (1974).

14. *Gilbert*, 429 U.S. at 145–46 (holding there was no sex discrimination under Title VII when an employer excluded normal pregnancy and childbirth under an insurance disability plan); *Geduldig*, 417 U.S. at 497 (holding there was no sex discrimination under the Equal Protection Clause of the Fourteenth Amendment when an employer excluded normal pregnancy and childbirth under an insurance disability plan).

Congress responded rather quickly to these counterintuitive conclusions of the Supreme Court by passing the PDA, which stated: "women affected by pregnancy, childbirth, or related medical conditions shall be treated for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected *but similar in their ability or inability to work*. . . ."[15]

In those early years, students objected strenuously to the idea that pregnancy discrimination was sex discrimination. Pregnancy, most argued, was a *voluntary* condition that rendered all its consequences voluntary, including exclusion from the job market and complete economic dependence. Because pregnancy was voluntary, it was not fit for governmental regulation. The voluntary aspect of pregnancy argument was raised before the Supreme Court,[16] but the Court decisions did not rely on the issue of whether pregnancy is voluntary in its decisions. Yet the argument had a strong hold on the students back in 1978. This argument is rarely mentioned today. Why the change?

Since 1978, leave policies have been fashioned so that a woman disabled by pregnancy is entitled to the same rights as any employee disabled by a broken leg or a heart attack. Note, however, that no special protection is accorded pregnancy by the PDA.[17] Instead, women disabled by a pregnancy, most notably by childbirth and the first few weeks thereafter, are entitled to whatever the employer provides to employees disabled by something other than pregnancy. The PDA did not mandate maternity leave, and arguably prohibited giving any special protection to pregnant employees. Pregnancy gets protected only to the extent that it can be analogized to needs of both men and women, such as the needs of all disabled employees, whether disabled by pregnancy or otherwise, to salary and benefit continuation.

Leave policies covering pregnancy are simply commonplace in the workplace in 2004. By now those young students back in 1978 who objected to a law requiring employees to treat pregnancy like other disabilities most likely have experienced a workplace in which discrimination on the basis of pregnancy is forbidden. Indeed, many of the law students from 1978 have given birth to today's law students who take the concept of pregnancy discrimination for granted. And it is not irrelevant that at least half of today's law students are women.

15. 42 U.S.C. § 2000e(k) (2000) (emphasis added).

16. *See Gilbert,* 429 U.S. at 136–40 (noting the District Court's finding that pregnancy is distinct from diseases or disabilities that are typically covered because it "is often a voluntarily undertaken and desired condition," but ultimately construing pregnancy as a generic physical condition that employers may choose to insure).

17. 42 U.S.C. § 2000e(k) (2000).

I believe that the implementation of the law has caused a sea change in student attitudes toward pregnancy, a change in the view of whether or not women who are or might be pregnant should be entitled to job protection. Since 1978, there has been greater workforce participation of married women.[18] Women with children either want to be employed in the marketplace or have no choice but to earn the money. Thus, we are somewhat overwhelmed by the experience of pregnant workers and employed moms with small children. Moreover, since 1978, people are more openly convinced that sexual activity is a normal part of healthy adulthood, and that planned or not, some of this sexual activity will result in pregnancy, for which the woman should not be punished. As one of my male students—circa 1990—put it: "Sex and pregnancy are part of life; public policy and legislation need to address that fact."

2. STUDENTS KNOW EVERYTHING ABOUT SEX AND NOTHING ABOUT LACTATION.

Lactation is something we Puritanical Americans are pretty queasy about. The topic is rarely discussed except by those who are actually nursing babies. Yet lactation is an important issue for new moms who wish to stay in the workplace and still nurse the baby. The health benefits of mother's milk to the baby are well established,[19] but not well cared for in practice. If a mother wishes to remain employed and to provide breast milk to her baby, it is essential that she have a private and sanitary place at work where she can express her milk and refrigerate it for later use. If the mom does not express the milk, she will cease to produce milk and the baby must be switched to formula.

When I was teaching feminist jurisprudence in 2002, I was privileged to have in my class an older woman (about my age) who had many years experience as an obstetrical nurse. She provided much-needed background material about birth and lactation. After one of these lectures by the nurse, one of my other students remarked with astonishment, "We are highly educated. We are sexually active. We know everything about sex. But we knew nothing about lactation and how it works. We had no idea that you have to keep nursing to keep nursing! We never recognized this as an employment issue!"

18. *See* U.S. BUREAU OF THE CENSUS, MARRIED COUPLES BY LABOR FORCE STATUS OF SPOUSES: 1986 TO PRESENT, *available at* http://www.census.gov/population/socdemo/hh-fam/tabMC-1.pdf (Sept. 15, 2004) (reporting that, since 1986 the number of married women participating in the workforce has steadily increased).

19. Alicia Dermer & Anne Montgomery, *Breastfeeding: Good for Babies, Mothers, and the Planet*, THE MEDICAL REPORTER, *at* http://medicalreporter.health.org/tmr0297/breastfeed 0297.html (Feb. 1, 1997).

Some legislators were ahead of my students and me. Illinois is among a handful of states that provide some protection for nursing mothers.[20] The Nursing Mothers in the Workplace Act provides for both reasonable unpaid break time to express milk and a private place, "other than a toilet stall," where the mother can express her milk in privacy.[21]

Still, the needs of lactating mothers are seldom discussed. One of my male friends, who is a name-partner in a labor law firm, was trying to impress me with the lactation room his firm provided. A young female associate, one of my former students, said that although there was a private and sanitary room, most people thought of it as a joke. For most Americans, breasts are for selling cars, not for feeding babies. Women themselves remain ambivalent about breast-feeding, fearful that mothering in such a physical way will detract from their role as lawyers with intellect.[22]

3. STUDENTS STRUGGLE WITH THE PRICE OF MOTHERHOOD

Our students are elites. They are highly educated and most likely will be highly compensated for their work, at least in the early years. But as child-bearing and child-rearing become actualities, women's work increases, even as their earnings and labor market participation decrease.[23] Although the situation is more difficult for non-elites, my law students, like the rest of us, focus on what will affect them most. When considering the price of motherhood, they are astonished. For twenty-five years, my students have been asking, "How can I balance work and family?"

A typical scenario for a conventional married lawyer who is a new mom is the following: She has married a man who is her age or older,

20. *See* CAL. LAB. CODE § 1030 (West 2003) (providing that every employer shall provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee's infant child); 820 ILL. COMP. STAT. 260/10 (2002) (requiring employers to provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child); VA. CODE ANN. § 2.2-2639 (Michie 2001 & Supp. 2003) (providing that an employee cannot be discharged on the basis of "lactation," which is defined as a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast); WASH. REV. CODE. ANN. § 43.70.640 (West 1998 & Supp. 2004) (providing that an employee may use the designation "infant friendly" on its promotional material if the employer has a Department of Health approved workplace breastfeeding policy that provides flexible work scheduling and sanitary conditions for breastfeeding).

21. Nursing Mothers in the Workplace Act, 820 ILL. COMP. STAT. 260/1-99 (2002).

22. ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 3 (2001).

23. *Id.* at 4.

and who makes as much money as she does, or more. The new mom will take advantage of leave policies to stay home for perhaps three months after the birth of the baby, while the baby's dad will not, at least not for that length of time. As she is home, she will notice that she takes on more and more of the household work, and the major share of the childcare, which is considerable in the early years. She will decide to cut back somewhat on her hours at work, concluding that working a sixty-hour week is not compatible with mothering. She becomes less important at work. Her earnings stagnate or decline. Her earnings are understood by both her and her husband as the marginal earnings, taxed at the marginal rate. From her earnings are deducted childcare costs. These calculations often suggest that working full time or working at all is not economically or personally satisfying, especially if the mom is breast-feeding. This decision is more obvious if the dad's income is greater than the mom's—and it usually is. In the short term, these individual and personal accommodations to motherhood make economic sense and are often exactly what the mother wants to do—stay home with the baby.

But the short-term gain has enormous long-term losses.[24] The mom's lifetime earnings and savings are greatly reduced.[25] In the event of divorce, her commitment to the children is not compensated.[26] She will never regain her rightful place in the workplace.[27] Mom's unpaid work in the home does not count toward Social Security pension benefits, nor does it qualify for disability or survivor benefits.[28] Unpaid household work is not counted in the GNP.[29] Many women report that their power in the marital relationship diminishes with their paychecks.[30] For most couples, life changes after children, and the changes mean more work, less money, less status, and less power for the women.[31]

American law is struggling to account for these facts of life, but it has no coherent approach. The formal equality approach of treating likes alike does not address what women need. Sometimes we can recognize sex discrimination as systemic subordination (unequal outcomes) in the economic and cultural context. But that view is fairly radical. We do not like to talk about the downside of motherhood, and many of us

24. *Id.* at 94–98.
25. *Id.* at 87–93.
26. *Id.* at 153–61.
27. *Id.* at 28–35.
28. *Id.* at 194–96.
29. *Id.* at 65–66.
30. *Id.* at 111–15.
31. *Id.* at 87–93, 111–15, 236–37.

cannot fathom discrimination and motherhood in the same sentence. We do recognize that many women enjoy taking care of their children full time, and we accept that many (such as myself) do not. We are unwilling to admit that motherhood has serious costs to the individual mothers.

Our society, and our law, needs to recognize the social benefit conferred by motherhood. My ideal would be for parenthood to be equally shared, but it is an ideal I do not see realized. My students who are childless commonly believe that all will be done equally, while my students who have children know that just is not true. My women students are deeply concerned about this issue, and recognize that their choices are limited—few dads will truly work on home and children equally, few employers will make necessary accommodations to parenting, and the law will not erase the price of motherhood in their lifetimes.

One of my students was once complaining about another student for having too many children. I asked, "Who do you think is going to pay your social security?" This was a question he had not pondered, and caused him to reconsider. Child-rearing contributes to human capital, something cold-hearted economists can understand. This human capital fuels economic growth and social satisfaction. But our law is a crazy-quilt and incoherent: *unpaid* leave is allowed to parents for childbirth under the Family and Medical Leave Act,[32] which applies to employers with fifty or more employees.[33] *Paid* leave under the PDA is not required unless the employer provides paid leave for other disabilities.[34] There is rarely an obligation to provide any special treatment for the special needs of mothers. We still think of that as discrimination against men.

One of the most perplexing decisions from the Supreme Court on the concept of sex discrimination is *California Federal Savings & Loan Ass'n v. Guerra*.[35] In that case, the Court upheld, against a Title VII pre-emption challenge, a state law that required employers to provide four months unpaid disability leave and reinstatement for pregnancy only, leaving other disabilities unprotected.[36] The Court stopped short

32. 29 U.S.C. § 2612 (2000).

33. 29 U.S.C. § 2611 (2000).

34. *See* 42 U.S.C. § 2000e(k) (2000) (defining the terms "because of sex" or "on the basis of sex" to include, but not limited to, pregnancy, childbirth, or related medical conditions; and stating that women affected by pregnancy, child birth or related medical conditions shall be treated the same for all employment related purposes).

35. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

36. *Id.* at 292.

of calling this law special treatment for pregnancy, but the Court noted that "[b]y 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs . . . ."[37] Even though using the language of sameness, this seems like a step away from formal equality and toward a reality-based concept of sex equality. It remains arguable whether a man denied paternity leave in California could sue an employer under Title VII.[38]

4. DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IS UNACCEPTABLE

In my early days of teaching, there would be a student or two in each class who, in a very emotional way, believed there was good reason for discriminating against homosexuals. The reasons given were not exactly reasons: for example, a student could not tolerate being around a member of the same sex who might sexually desire him or her. In recent years, however, it has become impossible to get any argument from students that discrimination against homosexuals makes sense. In my experience, students believe that sexual orientation is a biological given and that sexual activity is a healthy part of adult life.

Federal law does not prohibit employment discrimination on the basis of sexual orientation—yet. Many states and localities prohibit employment and other discrimination on the basis of sexual orientation.[39] Management lawyers counsel their clients to be sure that they are not discriminating on this basis, even absent a law prohibiting this discrimination. The culture seems to accept gay rights (if not quite gay marriage).[40] The TV shows *Will and Grace* and *Queer Eye for the*

37. *Id.* at 289.

38. *See generally* Kathryn Frueh Patterson, Comment*, Discrimination in the Workplace: Are Men and Women Not Entitled to the Same Parental Leave Benefits Under Title VII?*, 47 SMU L. REV. 425 (1994) (addressing whether providing male and female employees with different parental leave violates Title VII).

39. *See* Lambda Legal, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation*, *at* http://www.lambdalegal.org/cgi-bin/iowa /documents/record?record=217 (June 24, 2004) (providing a summary of state and local laws prohibiting discrimination based on sexual orientation).

40. Exemplified by the unanimous "no" vote in the eleven states holding referenda on the issue in the November, 2004 general election. *See* Sarah Korkshaw, *Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States,* N.Y. TIMES, Nov. 3, 2004, at P9 (reporting on early election results that indicated strong support for constitutional amendments in ten states that defined marriage as between only a man and a woman), *available at* LEXIS, News & Business, The New York Times, http://www.lexisnexis.com. When all the results were in, Oregon would join the list as the eleventh state.

Straight Guy show homosexuality to be fashionable.[41] In the legal realm, the Supreme Court has recognized some rights of gays and lesbians.[42] It is very difficult to say whether the state laws prohibiting discrimination based on sexual orientation have brought about cultural change, or whether it has worked the other way around—cultural change has allowed the promulgation of these laws. Some management lawyers have told me that for many years, before these laws and in jurisdictions where these laws did not apply, they counseled against employment discrimination on the basis of sexual orientation discrimination. Their reasons—it's bad business, and the day will come when it will be outlawed everywhere.

5. THERE IS INCREASING ACCEPTANCE, IF NOT UNDERSTANDING, OF THE TRANSGENDERED

I came to the issues of the transgendered by accident. I was meeting with one of Loyola's philosophers. When he learned that I taught employment discrimination, he asked if I was involved in the transgender community. I barely knew what he was talking about, but with his help and inspiration, I pursued the topic. Chicago is blessed with effective advocates from the transgendered community, and they were invited to my class to present their stories. Almost simultaneously, some Illinois localities passed laws prohibiting employment discrimination on the basis of gender identity,[43] and the popular media, such as the movie *Boys Don't Cry*,[44] brought the topic to public attention. My students, like me, were slow to warm to the topic and completely confused by it. If gender is socially constructed—and most of us believe it is—how can gender identity be biologically based? What would cause one who was born anatomically male wish to be a female? We are still struggling with these questions—deep questions about sex and sexuality—but the exposure to real people who are transgendered has taught us that this community consists of individuals deserving respect, empathy, and support.

41. *Will & Grace* (NBC television), *at* http://www.nbc.com/Will_&_Grace/index.html (last visited Jan. 6, 2005); *Queer Eye for the Straight Guy* (Bravo television), *at* http://www.bravotv.com/Queer_Eye_for_the_Straight_Guy (last visited Jan. 6, 2005).

42. Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a Texas statute criminalizing private, consensual sexual conduct of homosexuals violates the Due Process Clause); Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998) (holding that Title VII prohibits same-sex harassment if the harassment is on the basis of sex).

43. Evanston, Illinois prohibits discrimination against any person "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." EVANSTON, ILL. CODE §§ 5-5-6 (1998).

44. BOYS DON'T CRY (Fox Searchlight Pictures 1999).

Management lawyers frequently face transgender issues, with the big problem being the bathroom issue. Some transgendered people have sex reassignment surgery so that their anatomy matches their identity. During the transition period—before the surgery but while hormones are being taken and the individual is being counseled to live as the sex he or she will become—coworkers predictably object, for example, to the women's bathroom being used by a person who is still anatomically male. Most management lawyers simply counsel their clients to provide a private, unisex bathroom for the transition period. The country is beginning to get accustomed to the demands of the transgendered, and some jurisdictions both state and local, including California, Rhode Island, Minnesota, Cook County Illinois, and the City of Chicago, have begun to pass laws with their interests in mind. As more states and localities enact legislation protecting the transgendered, I expect to see the larger society—not just my students and progressive management lawyers—become more accepting of the transgendered.

CONCLUSION

Over the past twenty-five years, the law has progressively provided rights to women, to gays and lesbians, and to the transgendered. The progress has been uneven and slow, but it is reflected in the classroom. Students, like the law and our culture, are more committed to justice issues that relate to sex and sexuality. Employment lawyers have helped foster this change by the advice they give their clients, particularly their management clients. The increased participation of women in the law school classroom has undoubtedly contributed to this change. There is hope for the future, but understanding issues of sex and sexuality takes hard work: work fit for lawyers, law students, and law professors.