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# Unsexing the Fourth Amendment

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*Although rarely remarked upon in Fourth Amendment jurisprudence, traditional notions of sex and gender matter in a host of areas, from stop and frisks on the streets, to strip searches in schools and prisons, to the pat downs and body scans that have become the new normal at airports. The first goal of this Article is to uncover and draw attention to this aspect of the Fourth Amendment. The second concededly more ambitious goal is to interrogate this reliance on tradition. A Fourth Amendment preference for same-gender searches may comport with notions of modesty and societal norms. But, at what cost to the Fourth Amendment? And, at what cost to true equality?*

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[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.

— *Terry v. Ohio*<sup>1</sup>

To treat men and women as equals does not require that courts ignore that differences exist. Even prisoners, men or women, are entitled to a modicum of privacy and are entitled not to be embarrassed by needlessly requiring that they expose their nakedness and private parts to guards who are of the opposite sex.

— *Timm v. Gunter*<sup>2</sup>

If you touch my junk, I'm gonna have you arrested.

— John Tyner<sup>3</sup>

#### INTRODUCTION

It is hard to overstate the significance of *Mapp v. Ohio*,<sup>4</sup> which made the exclusionary rule binding on the states<sup>5</sup> and has rightfully been called the “most important search-and-seizure decision in history.”<sup>6</sup> It is also hard to overstate the significance of *United States v. Mendenhall*,<sup>7</sup>

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<sup>1</sup> 392 U.S. 1, 17 n.13 (1968) (quoting L.L. Priar & T.F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 481, 481 (1954)).

<sup>2</sup> 917 F.2d 1093, 1103 (8th Cir. 1990) (Bright, J., dissenting).

<sup>3</sup> Chris McGreal, ‘Don’t Touch My Junk’ Passenger Sparks Revolt Against Airport Searches, THE GUARDIAN (Nov. 19, 2010, 11:00 AM), <http://www.guardian.co.uk/world/2010/nov/19/dont-touch-junk-airport-searches> (describing “revolt” resulting from John Tyner’s refusal to submit to a pat down search).

<sup>4</sup> 367 U.S. 643 (1961).

<sup>5</sup> *Id.* at 655. In other words, if the police obtain evidence in violation of a defendant’s Fourth Amendment right to be free from unreasonable searches or seizures, the primary remedy is that the evidence will be excluded at trial.

<sup>6</sup> Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1368 (1983); see also Yale Kamisar, *Mapp v. Ohio: The First Shot Fired in the Warren Court’s Criminal Procedure “Revolution,”* in CRIMINAL PROCEDURE STORIES 45, 45 (Carol S. Steiker ed., 2006) [hereinafter *The First Shot*] (noting that *Mapp* “is generally regarded as having launched the so-called criminal procedure revolution”).

<sup>7</sup> *United States v. Mendenhall*, 446 U.S. 544 (1980).

which introduced the Fourth Amendment's "free to leave" test.<sup>8</sup> In doing so, *Mendenhall* cast most police-citizen encounters as consensual and thus outside the purview of the Fourth Amendment.<sup>9</sup> But there is an aspect of these cases, indeed, of a whole slew of cases, that to date has gone entirely unremarked upon. These cases reveal our concern with traditional notions of sex and gender. More specifically, both cases reveal our concern with what I term "sexy searches," those searches that courts and other decision-makers assume run the risk of sexual impropriety.<sup>10</sup> In *Mapp*, the officers reached into "Miss Mapp's" bosom.<sup>11</sup> In *Mendenhall*, the male DEA agents, rather than searching Sylvia Mendenhall themselves, sought help outside of the DEA, summoning a female "policewoman" to conduct the search.<sup>12</sup>

In fact, traditional notions of sex and gender inform much of Fourth Amendment practice and jurisprudence. These notions matter with respect to *Terry* stop and frisks — those limited detentions and pat downs that officers engage in when they have articulable, reasonable suspicion that someone may be engaged in criminal activity, and that the person may be armed and dangerous. They matter with respect to more thorough searches incident to arrest, and how we monitor prisoners. Beyond the criminal arena, they dictate who conducts searches of students in public schools, and even which TSA employee searches which passenger.

All of this ties in to the first goal of this Article to show traditional notions of sex and gender inform much of what is considered "reasonable" under the Fourth Amendment. The second goal is normative: to ask what we should make of this reliance on traditional notions of sex and gender? A Fourth Amendment preference for same-

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<sup>8</sup> *Id.* at 554.

<sup>9</sup> *See id.* at 553-54. To put it simply, some police stops are beyond the purview of the Fourth Amendment, and require neither reasonable suspicion nor probable cause nor any other justification; if a reasonable, innocent person would feel free to leave, the "stop" will be deemed a consensual encounter, akin to a "friendly exchange[] of pleasantries," *Terry v. Ohio*, 392 U.S. 1, 13 (1968), and thus not subject to the requirements of the Fourth Amendment.

<sup>10</sup> The term I use in this Article, "sexy searches," is in part a play on Duncan Kennedy's well-known book, *Sexy Dressing*. *See generally* DUNCAN KENNEDY, *SEXY DRESSING ETC.* (1993). To be clear, from the perspective of those searched, these searches are anything but sexy. That said, the term "sexy searches" does capture, however problematic, the perspective of the person conducting an inappropriate sexual search, or what in feminist art discourse might be termed the "male gaze." Perhaps more importantly, it captures much of the concern at issue with respect to bodily searches in Fourth Amendment reasonableness determinations.

<sup>11</sup> *See Mapp v. Ohio*, 367 U.S. 643, 644-45 (1961).

<sup>12</sup> *Mendenhall*, 446 U.S. at 548-49.

gender searches may comport with notions of modesty and societal norms. But at what cost to the Fourth Amendment? And, at what cost to true equality?

Look beneath the surface, and a preference for same-gender searches — as reflected in Fourth Amendment decisions and government policies — sends troubling expressive messages. This preference suggests that sexual attraction, as a normative matter, lies in opposite-gender touching, not same-gender touching. It communicates that we must shield women's bodies in particular from prying eyes and hands. The effect is a curious one, proscribing heterosexual touching while eroticizing women's bodies and their purported unavailability.<sup>13</sup> In recent years, scholars such as Laura Rosenbury and Jennifer Rothman, Melissa Murray, Katherine Franke, Deb Tuerkheimer, and Margo Kaplan have observed that much of the law is sex-negative.<sup>14</sup> What an examination of our Fourth Amendment preference for same-gender searches adds is this gloss: it is complicated. Sex is both below the surface, and also front and center. Sexy searches (again, those searches that courts and other decision-makers assume run the risk of sexual impropriety) are fiercely policed, yet, in a way that reveals a preoccupation with the spectacle of sex and that tantalizes with its very forbidden-ness. Our purported concern for modesty, examined more closely, reveals itself as a mechanism for both regulating and eroticizing heterosexual attraction, while closeting other attractions.<sup>15</sup> Our concern for privacy, upon closer inspection, reveals itself to be a polite way of perpetuating the objectification and subordination of female bodies, with hierarchy and protection and paternalism embedded in its predicate — that one sex needs greater protection. Our claim of gender parity — the claim that same-gender searches treat the sexes equally — upon closer inspection reveals itself to be a rhetorical strategy as

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<sup>13</sup> In this sense, our official aversion to cross-gender searches is part of the “pornographic state,” to borrow from Ronald Collins and David Skover. See Ronald K.L. Collins & David M. Skover, *The Pornographic State*, 107 HARV. L. REV. 1374, 1374-75 (1994) (discussing the role sexuality and pornography play in American culture).

<sup>14</sup> Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 91-92 (2014); Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 811 (2010); see Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 182-83 (2001); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 7-8 (2012); Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1467 (2012). My own work is also critical of sex-negativity in the law. See I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 858-59 (2013) [hereinafter *Real Women, Real Rape*].

<sup>15</sup> Cf. Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005) (discussing the Supreme Court's nude dancing cases).

bankrupt as the defense offered to justify separate but equal segregation in the context of race.

This Article proceeds as follows. Part I first provides a fuller discussion of *Mapp* and *Mendenhall*, two cases where the reliance on traditional notions of sex and gender, and fear of sexy searches, is implicit. Part I then provides an overview of the many areas of Fourth Amendment law and practice where we explicitly worry about sexy searches. Against that backdrop, Part II examines the use of sex and gender to inform Fourth Amendment decisions about the reasonableness of various searches. My argument here is three-fold: that a preference for same-gender searches relies on stereotypes about men as predators and women as vulnerable victims and erases sexual difference; that this preference undermines our anti-discrimination principles; and that this preference reifies and, indeed, over-determines gender difference, and in doing so functions as a type of state-imposed sexual discipline. Part III turns to the related issue of segregated restrooms, or what critical theorist Jacques Lacan aptly called “urinary segregation.”<sup>16</sup> Part IV then turns to an issue that I suspect informs much thinking about cross-gender searches: race. Finally, Part V argues that it is time to unsex the Fourth Amendment, and sketches out an alternative.

## I. SEX AND THE FOURTH AMENDMENT

The first goal of this Article is to uncover the role traditional notions of sex and gender play in our Fourth Amendment decisions and practices. I begin with the harder examples, two cases where this role goes unstated, functioning as a type of “white-letter law,”<sup>17</sup> as it does in *Mapp* and *Mendenhall*. I then turn to areas where the proof is indisputable, and the role is visible in black and white: administrative regulations and judicial opinions.

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<sup>16</sup> Jacques Lacan, *The Agency of the Letter in the Unconscious*, in *ÉCRITS: A SELECTION* 146, 151 (Alan Sheridan trans., Norton 1977).

<sup>17</sup> I first introduced the concept “white-letter law” in an earlier article. See I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 7-8 (2006) [hereinafter *The Trial of Bigger Thomas*]. Unlike black-letter law — which suggests “statutory law, the written law, the easily discernible law set forth as black letters on a white page” — “white-letter law” suggests “societal and normative laws that stand side by side with, and often undergird, black-letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye.” *Id.*; see also I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1357 (2010) [hereinafter *The Unintentional Rapist*].

A. *Mapp and Mendenhall*

*Mapp v. Ohio* has rightfully been described as the “most important search-and-seizure decision in history.”<sup>18</sup> However, far beneath the surface is an aspect that has been largely ignored: the role of sex and gender. By this, I am referring not only to the fact that Dollree Mapp was female and that the officers were all male. I am also referring to the events that preceded the search of Mapp’s house. When Dollree Mapp confronted the officers and insisted, “I want to see the search warrant,”<sup>19</sup> the officers responded by flashing what they claimed to be a warrant,<sup>20</sup> which Mapp promptly snatched and placed “in her bosom.”<sup>21</sup> The officers responded by promptly reaching into her bosom and snatching it back. They then arrested her for being “belligerent,”<sup>22</sup> and proceeded to conduct a warrantless search of her house. While it is impossible to know what role these facts played, it seems safe to say that the image of police officers reaching into Dollree Mapp’s bosom was not lost upon the Court. Indeed, it seems likely that this image informed the Court’s determination that it was time, indeed past time, to “close the only courtroom door remaining open to evidence secured by official lawlessness”<sup>23</sup> and hold that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”<sup>24</sup>

Occurring nearly twenty years later, *United States v. Mendenhall* involved concern about propriety and the risk of a sexy search as well, though this aspect of the search is similarly in the background. Here, too, the facts matter. Sylvia Mendenhall — again, a young, black woman<sup>25</sup> — landed at the Detroit Metropolitan Airport after flying from

<sup>18</sup> Stewart, *supra* note 6, at 1368; see also Kamisar, *The First Shot*, *supra* note 6, at 46.

<sup>19</sup> CAROLYN N. LONG, *MAPP V. OHIO: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES* 8 (2006).

<sup>20</sup> *Mapp v. Ohio*, 367 U.S. 643, 644 (1961). No warrant was produced at trial, nor did the prosecutor attempt to explain the absence of a warrant. LONG, *supra* note 19, at 17-22. In fact, both the sergeant and the prosecutor initially insisted to the trial court that there was a search warrant. *Id.* at 17, 19. More than twenty years later, the sergeant admitted that in fact the police did not have a warrant. *Id.* at 13.

<sup>21</sup> *Mapp*, 367 U.S. at 644.

<sup>22</sup> *Id.* The case also involved race, though the Court elided this fact. See I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 7 [hereinafter *Rethinking the Fourth Amendment*] (noting “That Dollree Mapp was a black woman and the police were white men spoke volumes” to the Court about the presumed basis for the officers’ treatment of her).

<sup>23</sup> *Mapp*, 367 U.S. at 654-55.

<sup>24</sup> *Id.* at 655.

<sup>25</sup> *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (identifying Mendenhall

Los Angeles, and immediately caught the attention of two DEA agents.<sup>26</sup> According to the agents, her conduct — apparently in disembarking the airplane last and walking through the terminal — appeared “to be characteristic of persons unlawfully carrying narcotics.”<sup>27</sup> The agents approached her, asked to see her identification and airline ticket, and asked her why the name on her driver’s license did not match the name on her airline ticket.<sup>28</sup> One agent later testified that when they identified themselves as agents with the Drug Enforcement Administration, Mendenhall “became quite shaken, extremely nervous. She had a hard time speaking.”<sup>29</sup> The agent returned Mendenhall’s ticket and driver’s license and asked her to come with them to an office at the airport for further questioning.<sup>30</sup> Once in the office, the agent asked Mendenhall if she would allow a search of her person.<sup>31</sup> According to the agent, Mendenhall said, “Go ahead” and shortly after a female police officer arrived to search her.<sup>32</sup> Mendenhall undressed, eventually removing two small packages from her undergarments.<sup>33</sup> One of the packages appeared to contain heroin.<sup>34</sup> Mendenhall handed the packages to the officer, and the agents arrested her for possessing heroin.<sup>35</sup>

The Supreme Court case resulting from this arrest was based on Mendenhall’s argument that the agents had seized her without first having articulable reasonable suspicion, as required by *Terry v. Ohio*.<sup>36</sup> Justice Stewart, writing for the Court, rejected her argument.<sup>37</sup> In doing so, he also introduced what would come to be known as the “free to leave” test: “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”<sup>38</sup> Per Justice Stewart, because a reasonable person would have

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as “a female and a Negro”).

<sup>26</sup> *Id.* at 547.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 547-48.

<sup>29</sup> *Id.* at 548 (citation omitted in original).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (citation omitted in original).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 549.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See id.*; *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

<sup>37</sup> *Mendenhall*, 446 U.S. at 545.

<sup>38</sup> *Id.* at 554. For more on the impact of the “free to leave” test, see Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 970 (2002), and Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality*,



apparently felt “free to end the conversation in the concourse and proceed on her way,”<sup>39</sup> there was not a seizure. As such, Mendenhall’s consent “to the subsequent search was [not] infected by an unlawful detention.”<sup>40</sup>

The Supreme Court extended and broadened the much criticized<sup>41</sup> “free to leave” test in *Florida v. Bostick*,<sup>42</sup> *United States v. Drayton*,<sup>43</sup> and *INS v. Delgado*.<sup>44</sup> Much has been made of the likely role Mendenhall’s status rather than conduct played in why she was selected for a “consensual encounter” and why she may have not in fact felt free to leave.<sup>45</sup> However, the role played by the other woman in the case, and the care the Court took to emphasize *her* gender, has largely escaped notice:

A female officer then arrived to conduct the search of the respondent’s person. She asked the agents if the respondent had consented to be searched. The agents said that she had, and the respondent followed the policewoman into a private room. There the policewoman again asked the respondent if she consented to the search, and the respondent replied that she did. The policewoman explained that the search would require that the respondent remove her clothing. The respondent stated that she had a plane to catch and was assured by the policewoman that if she were carrying no narcotics, there would

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*Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 515-16 (2001).

<sup>39</sup> *Mendenhall*, 446 U.S. at 554-55.

<sup>40</sup> *Id.* at 558.

<sup>41</sup> See, e.g., Steinbock, *supra* note 38, at 515-16 (criticizing the Court’s notion of a reasonable person in the context of consensual encounters).

<sup>42</sup> 501 U.S. 429, 435-36 (1991).

<sup>43</sup> 536 U.S. 194, 207 (2002).

<sup>44</sup> 466 U.S. 210, 215-16 (1984).

<sup>45</sup> See, e.g., Sherri Sharma, *Beyond “Driving While Black” and “Flying While Brown”:* *Using Intersectionality to Uncover the Gendered Aspects of Racial Profiling*, 12 COLUM. J. GENDER & L. 275, 281-82 (2003) (discussing examples of black women being subject to racial profiling). The particular suspicion black women have faced while flying is well documented. A report released by the U.S. General Accounting Office found that black women traveling internationally were nine times more likely than white women to be subjected to X-rays or strip searches by U.S. Customs officials, even though they were less than half as likely to be carrying contraband. Such targeting prompted a class action suit against officials. John Gibeau, *Marked for Humiliation*, A.B.A. J., Feb. 1999, at 46-47; *Black Women Searched More, Study Finds*, N.Y. TIMES, Apr. 10, 2000, at A17. The suspicion attached to black women illustrates the benefits of an intersectionality analysis to seeing and addressing biases. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1266-69 (1991).

be no problem. The respondent then began to disrobe without further comment. As the respondent removed her clothing, she took from her undergarments two small packages, one of which appeared to contain heroin, and handed both to the policewoman. The agents then arrested the respondent for possessing heroin.<sup>46</sup>

Three things stand out. First, the male agents found it necessary to summon a female officer to conduct the search. Second, in order to ensure a same-gender search, the federal *DEA* agents had to summon the assistance of a female *police* officer. Third, none of this struck the *DEA* agents, or the policewoman, or the Justices (at the time all male) as anything other than proper. Again, though not the lynchpin of the case, it seems more than conceivable that the fact that the search was same-gender, and thus comported with traditional notions of modesty and propriety, was part of what led the Court to conclude that *Mendenhall* was free to leave and not coerced.<sup>47</sup>

That the Court may have been troubled by the cross-gender search of Dollree Mapp's bosom, and reassured by the pains taken to conduct a same-gender search of Sylvia *Mendenhall*, may seem natural. But these likely responses from the Court also have their own provenance. After all, police departments were considered male institutions.<sup>48</sup> As late as 1970, women still made up less than two percent of all officers,<sup>49</sup> in many places the number of women officers was limited by quotas, and their job description — a carry-over from police “matrons” (think *Matron Mama Morton* in the musical *Chicago*) — still consisted of providing custodial care for women and children.<sup>50</sup> Indeed, the rise of

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<sup>46</sup> *United States v. Mendenhall*, 446 U.S. 544, 548-49 (1980).

<sup>47</sup> Even in *Mendenhall* itself, Justice Stewart seemed open to the view that gender mattered, at least with respect to the seizure. He noted that even if *Mendenhall*, “a female and a Negro, may have felt unusually threatened by the [first] officers, who were white males,” that these factors, “[w]hile . . . not irrelevant . . . neither were they decisive.” *Id.* at 558. Indeed, Justice Stewart may have been primed to see *Mendenhall*'s interaction with law enforcement through a gendered lens. Just a few years earlier, he had written the majority opinion in *Dothard v. Rawlinson*, which upheld the exclusion of women from serving as guards in a male prison, finding that gender was a bona fide occupational qualification under Title VII. *Dothard v. Rawlinson*, 433 U.S. 321, 323, 335-37 (1977).

<sup>48</sup> See David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1220 (2006).

<sup>49</sup> See SUSAN EHRlich MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS* 51 (2006).

<sup>50</sup> See *id.* at 52.

female officers beginning in the 1970s is traceable in part to the rise in female criminality and to the fact that police departments assumed that only women could search and monitor females taken into custody.<sup>51</sup> Given this background, that law enforcement officers and courts would consider a same-gender search of Mendenhall perfectly natural and an indicium of the reasonableness of the search, while being troubled by the cross-gender search of Mapp, is not surprising.

### B. Other Sexy Searches

Again, *Mapp* and *Mendenhall* are both examples where traditional notions of sex and gender operate in the background and communicate a type of white-letter disapproval of cross-gender searches. What follows, in perhaps the most prosaic portion of the Article, are areas where the concern for propriety and fear of sexy searches, both in terms of official regulations and judicial decisions, are front and center.

#### 1. Terry Frisks

One reason to begin with *Terry* frisks is their sheer frequency, especially in large cities. Consider New York City. According to its own records, since 2004 the New York City Police Department has stopped more than four million individuals, more than half of whom were frisked.<sup>52</sup> What role does gender play in these stops? Perhaps unsurprisingly, the vast majority of the individuals stopped are male, about 92%; the remainder are “Female, Unknown, or Not Listed.”<sup>53</sup> However, the protocol police departments follow based on the gender of the individual stopped is even more interesting.

When it comes to *Terry* frisks in large cities like New York and Los Angeles, sex and gender matter, but practicalities matter more.<sup>54</sup> Police

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<sup>51</sup> See PETER HORNE, *WOMEN IN LAW ENFORCEMENT* 82 (2d ed. 1980). The larger part of this transformation is attributable to employment discrimination litigation and the persistence of women to gain access to police department jobs.

<sup>52</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556, 667 (S.D.N.Y. 2013) (finding New York City’s stop and frisk practices violative of the Fourth Amendment).

<sup>53</sup> Second Supplemental Report of Jeffrey Fagan at 11 tbl.3, *Floyd*, 959 F. Supp. 2d 540 (No. 08 Civ. 01034 (SAS)).

<sup>54</sup> See, e.g., L.A. POLICE DEP’T, 2014 1ST QUARTER LOS ANGELES POLICE DEPARTMENT MANUAL § 217 (2014) (providing that when “an immediate cursory search for weapons is necessary, it may be conducted by an officer of either sex”), available at [http://www.lapdonline.org/lapd\\_manual/volume\\_4.htm#217](http://www.lapdonline.org/lapd_manual/volume_4.htm#217); N.Y. POLICE DEP’T, PATROL GUIDE § 208-5 (2013) (permitting cross-gender pat downs), available at [https://muckrock.s3.amazonaws.com/foia\\_files/208-05\\_Arrests\\_-\\_General\\_Search\\_Guidelaines.pdf](https://muckrock.s3.amazonaws.com/foia_files/208-05_Arrests_-_General_Search_Guidelaines.pdf).

departments remain overwhelmingly male,<sup>55</sup> and quickly securing a female officer to conduct a pat down is often not feasible.<sup>56</sup> It is partially in deference to this concern about practicalities that courts have rejected claims challenging routine cross-gender police frisks.<sup>57</sup>

By contrast, smaller police departments that conduct fewer *Terry* frisks appear to be more attentive to ensuring that frisks are conducted by an officer of the same gender.<sup>58</sup> For example, Washington State Attorney General's Office advises officers to "be reasonable . . . and try generally to use the same-gender officer [to conduct a pat-down] when same-gender officer is present."<sup>59</sup> Indeed, one reason why courts have declined to place outer *time* limits on *Terry* stops is to allow police departments time to secure a female officer for female suspects.<sup>60</sup>

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<sup>55</sup> LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, WOMEN IN LAW ENFORCEMENT, 1987–2008, at 2-3 (2010), available at <http://www.bjs.gov/content/pub/pdf/wle8708.pdf> (noting that as of 2007, women accounted for approximately 15% of all officers in larger police departments, but just 4–6% of all officers in small police departments).

<sup>56</sup> Wendy Ruderman, *For Women in Street Stops, Deeper Humiliation*, N.Y. TIMES, Aug. 6, 2012, at A1.

<sup>57</sup> See, e.g., *Stokes v. City of New York*, No. 05-CV-0007, 2007 WL 1300983, at \*12 n.9 (E.D.N.Y. May 3, 2007) (noting that other states have "repeatedly found" cross-gender pat downs constitutional); *Martin v. Swift*, 781 F. Supp. 1250, 1254 (E.D. Mich. 1992) (observing that to prohibit cross-gender pat downs would require "every police car to carry two officers, one male and one female, so that misdemeanants would be searched by officers of the same sex"); cf. *Ziegler v. Doe*, No. 01-10377-BC, 2003 WL 21369254, at \*3 (E.D. Mich. June 11, 2003) ("[P]laintiff alleges a generalized right to a non-invasive pat-down search by an officer of the same sex, a rule that would not only be impractical, but also has no support in the jurisprudence."); *Greiner v. City of Champlin*, 816 F. Supp. 528, 543 (D. Minn. 1993) ("[Plaintiffs imply] that the fact that a male officer rather than a female officer conducted the [pat down] means a per se constitutional violation occurred. The Court disagrees.").

<sup>58</sup> See, e.g., ARK. ASS'N OF CHIEFS OF POLICE, LEGAL & LIABILITY RISK MGMT. INST., STOP, ARREST, & SEARCH OF PERSONS 5 (2012), available at [http://www.arkchiefs.org/Portals/0/portal%20files/Model%20Policies/Model%20Policies/Stop%20Arrest%20and%20Search%20of%20Persons\\_Rev%204.23.13.doc](http://www.arkchiefs.org/Portals/0/portal%20files/Model%20Policies/Model%20Policies/Stop%20Arrest%20and%20Search%20of%20Persons_Rev%204.23.13.doc) ("When possible and practicable . . . pat-downs . . . will be conducted by an authorized person of the same sex as the arrestee."); MINNEAPOLIS POLICE DEP'T, CITY OF MINNEAPOLIS, POLICY & PROCEDURE MANUAL § 9-200 (2013), available at [http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy\\_9-200\\_9-200](http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_9-200_9-200) ("When practical, persons should be searched by an officer of the same gender if such an officer is on the scene or can arrive within a reasonable period of time.").

<sup>59</sup> WASH. ATT'Y GEN. OFFICE, LAW ENFORCEMENT LEGAL UPDATE OUTLINE 13 (2014), available at [https://fortress.wa.gov/cjtc/www/images/LE\\_Legal\\_July%201%202014.pdf](https://fortress.wa.gov/cjtc/www/images/LE_Legal_July%201%202014.pdf).

<sup>60</sup> See, e.g., *United States v. Gil*, 204 F.3d 1347, 1349, 1351 (11th Cir. 2000) (finding detention of female suspect for seventy-five minutes was not unreasonable under *Terry*, where investigation was ongoing and time was needed to secure a female officer to conduct a pat down of the suspect).

In short, while there is some variation for reasons of practicality, in the end, traditional notions of gender and sex are controlling: the clear preference is for a same-gender frisk.

## 2. Searches Incident to Arrest

The balance between the needs of law enforcement and intrusiveness — the classic test for reasonableness under the Fourth Amendment<sup>61</sup> — shifts when it comes to full-scale arrests, and more specifically searches incident to arrest. Here, where an officer makes a determination of probable cause that the suspect has committed a criminal offense, a more complete search is permitted.<sup>62</sup> By this point, the suspect has likely already been patted down for weapons in order to ensure the safety of the arresting officers; officers can be more thorough in conducting a search for evidence. Under these circumstances, many police departments, including those that allow cross-gender pat downs for reasons of practicality, require an officer who is the same gender as the arrestee conduct the more thorough searches incident to arrest.<sup>63</sup> Again, New York City provides a useful example. There, where 80% of the officers on patrol are male, cross-gender stop and frisks on the street are permitted, but a female officer is summoned to conduct a “thorough search” if a woman is arrested and brought to a precinct.<sup>64</sup>

## 3. School Searches

Traditional notions about sex and gender play a role in school search cases as well. Consider *New Jersey v. TLO*,<sup>65</sup> which held that searches conducted by public school authorities comport with the Fourth

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<sup>61</sup> *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

<sup>62</sup> *See, e.g., United States v. Robinson*, 414 U.S. 218, 225 (1973) (“The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.”); *Chimel v. California*, 395 U.S. 752, 756-57 (1969) (setting forth the parameters for a search incident to arrest).

<sup>63</sup> N.Y. POLICE DEP’T, *supra* note 54, § 208-5 (requiring that searches “at precinct of arrest or other Department facility, the arresting officer (if he/she is of the same gender as prisoner) . . . shall conduct a thorough search of the prisoner’s person and clothing”). *See* L.A. POLICE DEP’T, *supra* note 54, § 217 (providing for an “immediate search” in the field by “an officer of either sex,” but a “thorough” search “as soon as practicable”).

<sup>64</sup> *Ruderman*, *supra* note 56, at A1.

<sup>65</sup> 469 U.S. 325 (1985).

Amendment so long as they are reasonable.<sup>66</sup> In expounding on what it meant by “reasonable,” the Court specifically noted that one factor should be the gender of the student:

Under ordinary circumstances, a search of a student by a teacher or other school official will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.<sup>67</sup>

This concern about gender — at bottom a concern that a routine search might metastasize into a sexy search — was far from incidental. After all, the searched student in *New Jersey v. TLO* was a 14-year-old girl; the school official was a male assistant vice-principal.<sup>68</sup> As Justice Stevens observed in his dissent, the Court’s language was “obviously designed to prohibit physically intrusive searches of students by persons of the opposite sex for relatively minor offenses.”<sup>69</sup> This concern is just beneath the surface of other school search cases as well. In *Vernonia School District 47J v. Acton*,<sup>70</sup> the Court ruled that a school’s policy of conducting random urinalysis testing of student athletes did not violate the Fourth Amendment, noting, among other things, that monitoring was conducted by an adult the same sex as the student.<sup>71</sup> “Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.”<sup>72</sup> A few years later, in *Board of Independent School District No. 92 of Pottowatomie County v. Earls*,<sup>73</sup> the Court approved an even broader testing policy, noting that the procedure for testing was “virtually identical” to that in *Acton*.<sup>74</sup> Finally, in the Court’s most recent foray into school searches, *Safford Unified School District No. 1 v. Redding*,<sup>75</sup> the Court again stressed

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<sup>66</sup> *Id.* at 341.

<sup>67</sup> *Id.* at 341-42.

<sup>68</sup> *Id.* at 328-29.

<sup>69</sup> *Id.* at 381 (Stevens, J., dissenting).

<sup>70</sup> 515 U.S. 646 (1995).

<sup>71</sup> *Id.* at 646, 650.

<sup>72</sup> *Id.* at 658.

<sup>73</sup> 536 U.S. 822 (2002).

<sup>74</sup> *Id.* at 825, 832.

<sup>75</sup> 557 U.S. 364 (2009).

the importance that a search be conducted by someone of the same gender as the student, mentioning this preference no less than three times in the majority opinion alone.<sup>76</sup>

#### 4. Jails and Prisons

The issue of sex also crops up in cases addressing the monitoring of inmates. As with stop and frisks vis-à-vis searches incident to arrest, the intrusiveness of the search matters. Cross-gender pat downs are mostly permitted; by contrast, cross-gender strip searches are generally disallowed. For example, the Prisoner Rape Elimination Act (“PREA”) now permits cross-gender pat downs,<sup>77</sup> but prohibits cross-gender strip searches or the cross-gender visual inspect of anal or genital body cavities.<sup>78</sup>

Relying on the pat down/strip search distinction in responding to challenges grounded in the Fourth Amendment, the Eighth Amendment, and substantive due process, several courts have ruled that inmates do not have the right to be free from cross-gender pat downs.<sup>79</sup> By contrast, some courts have deemed cross-gender strip searches unconstitutional.<sup>80</sup>

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<sup>76</sup> See *id.* at 370, 375, 379. Interestingly, the school meeting this requirement was insufficient to render the search constitutional. While the search of the 13-year-old honor student’s bookbag would have been constitutional, the school’s actions in strip-searching the student were facially unreasonable. *Id.* at 373-77.

<sup>77</sup> 28 C.F.R. § 115.15(f) (2014).

<sup>78</sup> The prohibition of cross-gender strip searches does not apply to searches conducted by medical practitioners; such strip searches may also be excused in “exigent circumstances.” See National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 37,106, 37,130 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115).

<sup>79</sup> See, e.g., *Oliver v. Scott*, 276 F.3d 736, 746 (5th Cir. 2002) (finding prison’s policy on cross-gender surveillance passed the *Turner* test and thus did not violate the Fourth Amendment); *Timm v. Gunter*, 917 F.2d 1093, 1101 (8th Cir. 1990) (deferring to prison administrators’ decision “to allow pat searches on a sex-neutral basis”); *Grummett v. Rushen*, 779 F.2d 491, 495 (9th Cir. 1985) (“[R]outine pat-down searches, which include the groin area, and which are otherwise justified by security needs, do not violate the fourteenth amendment because a correctional officer of the opposite gender conducts such a search.”); *Forde v. Zickefoose*, 612 F. Supp. 2d 171, 183-84 (D. Conn. 2009) (finding no Fourth Amendment violation where prison’s policy permitted cross-gender pat downs).

<sup>80</sup> As the Supreme Court recently noted in *Florence v. Board of Chosen Freeholders of Burlington*, the “term [strip search] is imprecise” and may refer to different things. *Florence v. Board of Chosen Freeholders of Burlington*, 132 S. Ct. 1510, 1515 (2012). That said, the description used in another case, *Dodge v. County of Orange*, 282 F. Supp. 2d 41 (S.D.N.Y. 2003), serves as a useful template. Quoting from the relevant prison manual, the case described a prison strip search as involving:

[A] visual inspection of the inmate’s naked body. This should include the

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*Byrd v. Maricopa County Sherriff's Department*,<sup>81</sup> a recent decision by the U.S. Court of Appeals for the Ninth Circuit, is a case in point. In response to several fights and the suspicion of contraband in a housing unit, jail officials ordered the search of all of the unit's inmates (approximately ninety). Cadets from a detention center training academy, together with their supervisors, carried out the searches.<sup>82</sup> O'Connell, the cadet assigned to strip search inmate Charles Byrd, happened to be female.<sup>83</sup> The opinion describes the search this way:

O'Connell ordered him to turn away from her, spread his feet and raise his arms above his head. Wearing latex rubber gloves, she pulled out Byrd's waistband a few inches and felt the waistband to make sure nothing was hidden in it. O'Connell did not look inside Byrd's boxer shorts.

Next, O'Connell placed her hand on Byrd's lower back holding the back part of the boxer shorts and, with her other hand, searched over his boxer shorts, his outer thigh from his hip to the bottom of the shorts. She then moved her hand from his outer thigh to the bottom of the shorts on his inner thigh and applied slight pressure to feel his inner thigh for contraband. Using the back of her hand, O'Connell moved Byrd's penis and scrotum out of the way applying slight pressure to search the area. O'Connell then searched the other side using the same technique.<sup>84</sup>

Tellingly, the Ninth Circuit found that a strip search itself was reasonable under the Fourth Amendment given the circumstances.<sup>85</sup> However, the court concluded *this* strip search was unreasonable

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inmate opening his mouth and moving his tongue up and down and from side to side, removing any dentures, running his hands through his hair, allowing his ears to be visually examined, lifting his arms to expose his arm pits, lifting his feet to examine the sole, spreading and/or lifting his testicles to expose the area behind them and bending over and/or spreading the cheeks of his buttocks to expose his anus. For females, the procedures are similar except females must in addition, squat to expose the vagina.

*Id.* at 46 (internal citation omitted). A visual depiction of a strip search can be found on the ACLU's website. See *Prison Strip Search is Sexually Abusive*, ACLU, <http://www.aclu.org/prisoners-rights-womens-rights/prison-strip-search-sexually-abusive> (last visited Aug. 23, 2014).

<sup>81</sup> 629 F.3d 1135 (9th Cir. 2011).

<sup>82</sup> *Id.* at 1136-37.

<sup>83</sup> *Id.* at 1137.

<sup>84</sup> *Id.*

<sup>85</sup> See *id.* at 1143.



because it was cross-gender.<sup>86</sup> The Ninth Circuit accordingly ruled for the petitioner, finding that the cross-gender strip search was unreasonable, and thus violated his Fourth Amendment rights, “as a matter of law.”<sup>87</sup>

There are three more points to be made about sexy searches in the context of jails and prisons. One, preferences for same-gender searches sometimes conflict with the obligation of employers to not discriminate on the basis of sex.<sup>88</sup> For the most part, when female correctional employees have presented claims that policies prohibiting them from searching male inmates limit their job advancement prospects, courts have urged accommodation.<sup>89</sup> For example, in *Hardin v. Stynchcomb*,<sup>90</sup> the U.S. Court of Appeals for the Eleventh Circuit directed a jail to accommodate female deputy-sheriffs so that they could be excused from conducting strip searches of male inmates without it adversely impacting evaluations of their job performance.<sup>91</sup>

Two, prison seems to be the area where a preference for same-gender searches is the weakest and in fact gender-dependent. Notwithstanding

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1142.

<sup>88</sup> 42 U.S.C. § 2000e-2(a) (2013).

<sup>89</sup> See, e.g., *Canedy v. Boardman*, 16 F.3d 183, 188 (7th Cir. 1994) (concluding that respect for inmate privacy is a “constitutional mandate”); *Smith v. Fairman*, 678 F.2d 52, 55 (7th Cir. 1982) (noting that the “resulting conflict between [the privacy rights of inmates and equal employment right of guards] has normally been resolved by attempting to accommodate both interests through adjustments in scheduling and job responsibilities for the guards”); *Bowling v. Enomoto*, 514 F. Supp. 201, 204 (N.D. Cal. 1981) (allowing prison officials to propose procedure to accommodate both privacy interests and equal employment interests); see also Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 182 (2004) (observing that “courts often require prisons to restructure jobs to permit women to do them without violating inmate privacy”).

<sup>90</sup> 691 F.2d 1364 (11th Cir. 1982).

<sup>91</sup> See *id.* at 1373-74. Other courts have also required, or approved of, accommodation to avoid the conflict between the equal employment rights of prison employees, and the “right” to same-gender privacy of inmates. E.g., *Gunther v. Iowa State Men’s Reformatory*, 612 F.2d 1079, 1087 (8th Cir. 1980) (finding that “administrative changes have allowed plaintiff to perform . . . functions without unduly disrupting the system or invading inmate privacy”); *Forts v. Ward*, 621 F.2d 1210, 1216 (2d Cir. 1980) (“In protecting the inmates’ privacy at the prison hospital, the judge prohibited the stationing of male guards at locations where inmates could be viewed completely or partially unclothed.”); *Everson v. Mich. Dep’t of Corr.*, 222 F. Supp. 2d 864, 899 (E.D. Mich. 2002) (encouraging the creation of “gender specific task assignments”); *Griffin v. Mich. Dep’t of Corrs.*, 654 F. Supp. 690, 705 (E.D. Mich. 1982) (federal courts have resolved the conflict by “ordering the inmates or employees to alter their daily routines” or “required the employer to alter work assignment policies . . .” (internal citations omitted)).

the Ninth Circuit's concern in *Byrd*, the fact is that many courts have held that inmates do not have the right to be free from cross-gender searches, especially male inmates.<sup>92</sup> As Teresa Miller succinctly put it, because "women are precisely the group that judges seek to protect when they determine the scope of privacy in the context of cross-gender searches,"<sup>93</sup> men are treated differently. "When male prisoners invoke privacy doctrine for protection against unwanted intrusions upon their bodies by guards of the opposite sex, they frequently run into doctrinal roadblocks."<sup>94</sup>

Three, while the issue of cross-gender searches in jails and prisons may be of little concern to most citizens, two Supreme Court cases make clear that this issue is not as remote as many citizens might assume. In *Atwater v. Lago Vista*,<sup>95</sup> the Court ruled that the Fourth Amendment did not bar an officer from handcuffing, arresting, and holding a mother of two in jail for failing to secure her children in seatbelts, a traffic violation. So long as "an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."<sup>96</sup> And more recently, in *Florence v. Board of Chosen Freeholders*,<sup>97</sup> the Court ruled that jails may conduct strip searches and visually inspect the body cavities of *all* arrestees committed to the general population, including inmates arrested for minor offenses.<sup>98</sup> In combination, these cases suggest that even a traffic violator may one day find herself being arrested and strip searched.

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<sup>92</sup> See, e.g., *Jordan v. Gardner*, 986 F.2d 1521, 1526 (9th Cir. 1993) (concluding that a different result was justified because "women experience unwanted intimate touching by men differently from men subject to comparable touching by women"); *Madyun v. Franzen*, 704 F.2d 954, 961-62 (7th Cir. 1983) (explaining that female correction officers' rights for equal employment support them doing searches on male prisoners); *Bagley v. Watson*, 579 F. Supp. 1099, 1103-04 (D. Or. 1983) (holding that male inmates had no constitutional right to be free from bodily observation from female guards).

<sup>93</sup> Teresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 865 (2001).

<sup>94</sup> *Id.* at 863.

<sup>95</sup> 532 U.S. 318 (2001).

<sup>96</sup> *Id.* at 354.

<sup>97</sup> 132 S. Ct. 1510 (2012).

<sup>98</sup> *Id.* at 1518-23.

## 5. Airports

Even if being arrested for a traffic violation and strip searched still seems remote to most citizens, there is another Fourth Amendment search that is decidedly gendered and that many Americans are subjected to on a routine basis: airport searches.<sup>99</sup> Relying on the Fourth Amendment's "special needs" doctrine, which permits suspicionless searches where the primary purpose is something other than traditional criminal law enforcement,<sup>100</sup> courts have routinely upheld airport security checks as permissible searches.<sup>101</sup>

Although much of the initial concern about search procedures instituted post-9/11 involved racial profiling,<sup>102</sup> the more recent complaint, especially with the introduction of whole body scanners in

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<sup>99</sup> By statute, TSA is required to screen passengers and property entering security controlled area of airports. See 49 U.S.C. § 44901 (2013).

<sup>100</sup> On special needs searches generally, see JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 18.05 (4th ed. 2006).

<sup>101</sup> STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE CASES AND COMMENTARY 423 (9th ed. 2010). As Stephen Saltzburg and Dan Capra put it in their discussion of airport searches:

[Airport security searches have been] found reasonable because: 1) the state interest in protecting the safety of air travel was high; 2) the state interest could not be accommodated by limiting the searches to those who were reasonably suspected of presenting a safety risk—suspicionless searches were required because some travelers may pose a safety risk even though they have no intent to violate the law (e.g., a security officer carrying a weapon that might be stolen on board by a hijacker), and because some people might not look suspicious on a cursory view but in fact may be intending to hijack or blow up an airplane; and 3) the searches are minimally intrusive, because a) all travelers are searched (minimizing the humiliation), b) travelers are notified in advance, and c) travelers are free to refuse the search and choose some other form of travel.

*Id.* Courts have applied the "special needs" doctrine to specifically find pat down and similar individualized searches constitutional. See, e.g., *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007) (upholding a wand search when "No ID" written on boarding pass); *United States v. Hartwell* 436 F.3d 174 (3d Cir. 2006) (upholding wand search); *United States v. Marquez*, 410 F.3d 612 (9th Cir. 2005) (upholding random wand search and pat down); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) (acknowledging the constitutionality of airport searches if certain conditions are met, such as consent or implied consent).

<sup>102</sup> See, e.g., Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003) (recognizing that enhanced surveillance of Arab looking men occurs at airports); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (arguing that racial profiling has contributed to the removal of many Middle Eastern looking men from airline flights).

2010,<sup>103</sup> has been about risk of searches becoming sexual. Early on, critics described whole body scans as “a virtual strip search” producing “naked” pictures of passengers.<sup>104</sup> That TSA regulations required passengers refusing scans to undergo a more probing pat down<sup>105</sup> — the new procedures involve touching areas on the thigh and groin area, as well as buttocks<sup>106</sup> — increased privacy concerns.<sup>107</sup> The procedures even sparked a “Don’t Touch My Junk” movement after a passenger posted a YouTube video of himself refusing a body scan and telling a TSA screener, “If you touch my junk, I’m gonna have you arrested.”<sup>108</sup> Responding to public pressure, in early 2013 TSA announced that it would phase out its naked-body scanners,<sup>109</sup> and replace them with machines that use privacy-protecting Automated Target Recognition software.<sup>110</sup>

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<sup>103</sup> BART ELIAS, CONG. RESEARCH SERV., RL41502, CHANGES IN AIRPORT PASSENGER SCREENING TECHNOLOGIES AND PROCEDURES: FREQUENTLY ASKED QUESTIONS 2 (2011), available at <http://fas.org/spp/crs/homesecc/R41502.pdf>. TSA refers to the body scan procedures as advanced imaging technology and describes it as capturing an image of what lies underneath an individual’s clothing. *Id.* at 1. Passengers who decline the scans may opt for a pat-down search instead. *Id.*

<sup>104</sup> See, e.g., Jessica Ravitz, *Airport Security Bares All, or Does It?*, CNN (May 18, 2009, 1:36 PM), <http://www.cnn.com/2009/TRAVEL/05/18/airport.security.body.scans/index.html> (“Homeland Security to suspend use of ‘whole-body imaging,’ the airport security technology that critics say performs ‘a virtual strip search’ and produces ‘naked’ pictures of passengers.”).

<sup>105</sup> See ELIAS, *supra* note 103, at 5.

<sup>106</sup> *Id.*

<sup>107</sup> Susan Stellan, *Too Close for Comfort*, N.Y. TIMES, Nov. 19, 2010, at B1 (noting, among other things, that male and female passengers seemed equally bothered by searches).

<sup>108</sup> McGreal, *supra* note 3 (describing “revolt” resulting from John Tyner’s refusal). A video of Tyner’s refusal has been viewed over 350,000 times on YouTube. O0stonedagain0o, *DON’T TOUCH MY JUNK’ John Tyner – ORIGINAL TSA FULL encounter*, YOUTUBE (Nov. 15, 2010), <http://www.youtube.com/watch?v=-UqM56e-kRA>, available at <http://web.archive.org/web/20130531063858/http://www.youtube.com/watch?v=-UqM56e-kRA>. Other videos of the encounter have been viewed over 13,000 times. See, e.g., CNN, *CNN: John Tyner to TSA Security: “Don’t Touch My Junk,”* YOUTUBE (Nov. 17, 2010), <https://www.youtube.com/watch?v=Laxmx4cE3aE>.

<sup>109</sup> Mike M. Ahlers, *TSA Removing ‘Virtual Strip Search’ Body Scanners*, CNN (Jan. 19, 2013, 1:08 PM), <http://www.cnn.com/2013/01/18/travel/tsa-body-scanners>.

<sup>110</sup> *Id.*; see Bart Jansen, *TSA Dumps Near-Naked Rapiscan Body Scanners*, USA TODAY (Jan. 18, 2013, 3:48 PM), <http://www.usatoday.com/story/travel/flights/2013/01/18/naked-airport-scanners/1845851/>; Ron Nixon, *Unpopular Full-Body Scanners to Be Removed from Airports*, N.Y. TIMES, Jan. 19, 2013, at A11.

But even with the phasing out of naked body scanners, the issue of pat downs remains, and with it the issue of cross-gender pat downs. TSA policy prohibits, absent passenger consent, cross-gender pat downs.<sup>111</sup>

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As the foregoing should make clear, when it comes to searches — from *Terry* frisks to school searches to prison surveillance to airport security — traditional notions of gender and sex matter. They matter in that they inform official policy, and they matter in that they inform Fourth Amendment reasonableness determinations.

For many, if we are going to permit bodily searches at all, they should be same-gender searches. This accords with intuition and normatively seems right. The next Part challenges this view.

## II. THE PROBLEM WITH SEX

That traditional notions of sex and gender should play a role in whether a search is reasonable may strike many as perfectly logical and natural. After all, the thinking might go, the sexes *are* different.<sup>112</sup> More than that, we are used to gender segregation, so much so that it often goes unquestioned. If we segregate restrooms along the line of gender, after all, then should not we also segregate how we conduct searches? According to this point of view, this language from the Ninth Circuit seems right: “The desire to shield one’s unclothed figure from [the] view

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<sup>111</sup> See Joe Sharkey, *Business Travel: Despite a Longstanding Policy of Same-Sex Screenings, Charges of Airport Groping Continue*, N.Y. TIMES, Mar. 20, 2002, at C11. A similar same-gender preference seems to be reflected in border searches. See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (emphasizing that a “female inspector” conducted the strip search of Hernandez, a female traveler from Colombia suspected of smuggling narcotics).

<sup>112</sup> That the sexes are biologically different, and that this difference explains a host of other characteristics (such as reasoning) and outcomes (job advancement), has been the argument of several legal scholars, including Richard Posner and Richard Epstein. See RICHARD A. POSNER, *SEX AND REASON* 91 (1992); Richard A. Epstein, *Gender is for Nouns*, 41 DEPAUL L. REV. 981, 985 (1992); see also CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 7 (1982). At least one court has relied on biological differences in its consideration of same-sex searches. As the court put it, “The biological difference between men and women which in turn [produces] psychological differences are the facts that justify limiting personal contact under intimate circumstances to those of the same sex.” *Phila. v. Pa. Human Relations Comm’n*, 300 A.2d 97, 103 n.7 (Pa. Commw. Ct. 1973).

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of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”<sup>113</sup>

From the point of view of many women, even disparate treatment — in the form of having a strong aversion to cross-gender searches of women, but a weak aversion to cross-gender searches of men — makes sense.<sup>114</sup> For many women, a cross-gender pat down of a woman is by definition sexual,<sup>115</sup> and thus raises the threat of being sexually assaultive.<sup>116</sup> From this point of view, it is one thing to allow women to search men. It is another thing entirely to permit men to search women. This viewpoint informs current policy in many prisons,<sup>117</sup> and has informed how courts have analyzed the reasonableness of searches under the Fourth Amendment.<sup>118</sup>

The goal of this Part is to trouble this way of thinking. My argument is unconventional, to be sure, invoking not only Fourth Amendment jurisprudence, but also employment discrimination law and feminist theory. My argument is also unconventional insofar as it ranges from gender-based preferences on maternity wards and airplanes to counter-stereotypical sexual assaults in the military and in prisons.

That said, the argument I make in this Part can be stated succinctly. One, to regulate cross-gender searches is to engage in sex stereotyping and to erase sexual difference. Two, the sex stereotyping is not even accurate stereotyping. Three, it caters to sex-based individual preferences and undermines our anti-discrimination principles. As I

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<sup>113</sup> *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011) (quoting *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963)).

<sup>114</sup> For example, in *United States v. Virginia*, 518 U.S. 515 (1996), the Independent Women's Forum filed an amicus brief defending the Virginia Military Institute's right to refuse admission to women, arguing that differences between men and women are “real and substantial.” See Brief for Independent Women's Forum et al. as Amici Curiae Supporting Respondents, *Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107), 1995 WL 745003, at \*3.

<sup>115</sup> As one woman who was stopped and frisked in New York put it, “A male officer should not have a right to touch me in any sort of manner, even if it's on the outside of my clothing . . . We're girls. They are men. And they are cops. It feels like a way for them to exert power over you.” Ruderman, *supra* note 56, at A1 (internal quotation marks omitted).

<sup>116</sup> See generally Cathy Pereira, *Strip Searching as Sexual Assault*, 27 HECATE 187 (2001), available at <http://www.d.umn.edu/cla/faculty/jhamlin/3925/Readings/stripsearches.pdf>.

<sup>117</sup> See, e.g., Yuracko, *supra* note 89, at 182 (noting that courts “are more permissive of attempts by women's prisons to exclude male guards” than male prisons to exclude female guards). Yuracko adds, “This is probably the case both because the combined privacy and safety concerns of the female inmates seem stronger than the privacy concerns of the male inmates and because the threatened loss of overall job opportunities for men is less severe.” *Id.*

<sup>118</sup> See *infra* notes 159–76 and accompanying text.

demonstrate below, each of these arguments standing alone should merit reconsideration of the reliance on traditional notions of sex and gender in Fourth Amendment reasonableness determinations and government policy more broadly. But it is their collective valence that is even more important. Collectively, these arguments demonstrate that reliance on gender categories as proxies obscures very real power imbalances. They suggest as well that a consideration of sex and gender in determining reasonableness undermines bedrock notions of equality.

#### A. Sex Stereotyping

One of the main arguments raised in support of barring cross-gender searches is that it is particularly harmful to women, who may experience cross-gender searches as sexual violations.<sup>119</sup> As a recent *New York Times* headline put it, “*For Women in Street Stops, A Deeper Humiliation.*”<sup>120</sup> The argument is raised in a range of searches, from *Terry* frisks to airport pat downs to prison strip searches and school searches. As Justice Ginsburg famously remarked about her fellow Justices after the Court decided *Redding*, “They have never been a 13-year-old girl. . . . It’s a very sensitive age for a girl.”<sup>121</sup> The language used in prison searches is particularly revealing. For example, one article describes the strip-searching of female inmates as “state sanctioned sexual assault,”<sup>122</sup> a claim it supports by quoting several female inmates:

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<sup>119</sup> Amy Kapczynski makes a similar point in her discussion of employment discrimination cases involving attempts to limit employment to one sex to ensure the privacy of customers. Kapczynski notes, “In all same-sex privacy cases, I would contend, anxiety about cross-sex bodily contact and viewing in some sense reflects fears and realities of sexual abuse or harassment.” Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 *YALE L.J.* 1257, 1280 (2003).

<sup>120</sup> Ruderman, *supra* note 56, at A1.

<sup>121</sup> Joan Biskupic, *Ginsburg: Court Needs Another Woman*, *USA TODAY*, May 6, 2009, at 1A (internal quotation marks omitted); Adam Liptak, *Strip Search of Girl by School Officials Seeking Drugs Was Illegal, Justices Rule*, *N.Y. TIMES*, June 26, 2009, at A16. By contrast, Justice Scalia has assumed that boys, at least those who play sports, are more comfortable with “communal undress.” See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (observing that there is “an element of ‘communal undress’ inherent in athletic participation”). Judge Posner would appear to have a similar feeling about manly men. See *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 436 (7th Cir. 2000) (“Male linemen have never felt any inhibitions about urinating in the open, as it were. They do not interrupt their work to go in search of a public restroom. Women are more reticent about urinating in public than men.”). Of course, the Justices and the judge are engaging in stereotypes here and conflating nature with culture. Even more troubling, there is a disturbing normative message: girls ought to be demure and traumatized by the thought of exposing their bodies and “real boys” should be boys and not mind at all.

<sup>122</sup> Pereira, *supra* note 116, at 187.

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I honestly felt the only way to prevent the search becoming more intrusive or sexual was to remain as quiet and docile as possible. I later wondered why I was so passive. All I could answer was that it was an experience similar to sexual assault. I felt the same helplessness, the same abuse by a male in authority, the same sense of degradation and lack of escape.

\*

I was never allowed to forget that, being a prisoner, even my body was not my own. . . . I was compelled to submit to be undressed and searched.

\*

I have reluctantly tolerated strip searching whenever I have had to . . . . It is utterly degrading, humiliating and frankly disgusting . . . . I cannot imagine what it feels like for women who have been abused.

\*

On the one hand you would feel great about [having a] visit but really raped and angry about the strip search afterwards. It was impossible to “get used to it” or “switch off from it” or be objective to it. In fact some women preferred not to have a visit because they couldn’t handle the strip search afterwards.<sup>123</sup>

These concerns are not without merit. However, they do deserve further scrutiny. Perhaps most problematic, this line of thinking engages in precisely the same type of sex stereotyping that feminists have fought hard to eradicate. It stereotypes women as vulnerable victims, reifying a trope that many feminists have long fought to retire. It casts women “as constitutively vulnerable to sexualized attack, and as essentially and necessarily modest in a way that resonates with tendencies to propertize women and deny them sexual agency.”<sup>124</sup>

To be clear, the sexual assault of women is real. But the leap from the observation that women are subject to sexual assault to the conclusion that cross-gender searches should be prohibited is a large leap indeed. It is also a retrogressive one. It casts women not only as likely targets of sexual harassment, but also as likely *victims*. By this, I mean that it stereotypes women as likely to *experience* cross-gender searches as sexually assaultive, debilitating, and paralyzing. It evokes the image of

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<sup>123</sup> *Id.* at 188.

<sup>124</sup> Kapczynski, *supra* note 119, at 1262.



woman as the archetypal victim,<sup>125</sup> as the weaker sex, and trades on her designation as sexual object.<sup>126</sup> It relies on the trope of female trauma, once invoked by feminists to secure legal reforms, but as Jeannie Suk recently observed, is now co-opted by others to paternalistically cabin women's sexuality.<sup>127</sup> It brings to mind the outdated thinking of cases like *Muller v. Oregon*,<sup>128</sup> which deemed women as fragile beings "needing especial care,"<sup>129</sup> and *Bradwell v. Illinois*,<sup>130</sup> which touted the "natural and proper timidity and delicacy which belongs to the female sex."<sup>131</sup> This thinking is of a piece with Justice Scalia's recasting the modern woman, in the Fourth Amendment case *Kyllo v. United States*,<sup>132</sup> as "the lady of the house tak[ing] her daily sauna and bath,"

<sup>125</sup> Cynthia Godsoe, Punishing to Protect: The Pitfalls of Punitive Paternalism 39 (unpublished manuscript) (on file with author).

<sup>126</sup> JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 346 (2006). In an exchange with other writers, Halley adds:

So much feminist rape discourse insists on women's object-like status in the rape situation: man fucks woman — subject verb object. Could feminism be contributing to, rather than resisting, the alienation of women from their own agency in narratives and events of sexual violence?

Brenda Cossman & Janet Halley et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 610-11 (2003).

<sup>127</sup> Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1195-97 (2010); see also Victoria Baranetsky, *Aborting Dignity: The Abortion Doctrine After Gonzalez v. Carhart*, 36 HARV. J.L. & GENDER 123, 127 (2013) (observing that Justice Kennedy's majority opinion in *Gonzalez v. Carhart*, 550 U.S. 134 (2007) relies on the idea that women are by nature maternal and thus likely to suffer trauma when they lose an offspring, and on "Victorian notions of women as the weaker sex").

<sup>128</sup> *Muller v. Oregon*, 208 U.S. 412 (1908). In *Muller*, the Court upheld as constitutional an Oregon statute that limited to ten hours a day the working hours of women employed in any mechanical establishment, factory, or laundry. *Id.* at 423. It made no difference that the Court had recently, and quite famously, decided *Lochner v. New York*, invalidating an analogous statute involving men on the ground that it violated the due process right and liberty of individuals to contract their labor. *Lochner v. New York*, 198 U.S. 45, 62-64 (1905). The *Muller* Court observed:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious . . . . [As such], she has been looked upon in the courts as needing especial care that her rights may be preserved.

*Muller*, 208 U.S. at 421.

<sup>129</sup> *Muller*, 208 U.S. at 421.

<sup>130</sup> 83 U.S. (16 Wall.) 130 (1872) (upholding a law that forbade women to practice law).

<sup>131</sup> *Id.* at 141 (Bradley, J., concurring).

<sup>132</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

and thus in need of protection from the eyes of G-Men.<sup>133</sup> Indeed, this thinking brings to mind antiquated notions about a woman's value being in her sexual purity; quite literally, in the fact that she has not been touched by the opposite sex.<sup>134</sup>

Second, any policy or judicial preference for same-gender searches, in order to protect women, stereotypes men. To borrow from Amy Kapczynski, it is nothing short of "sexual profiling."<sup>135</sup> It prefigures men as sexual predators, incapable of controlling their sexual urges, and incapable of conducting an authorized search within the parameters of the law. It buys into the notion that all men are potential rapists,<sup>136</sup> and indeed adds to its currency. Two things are particularly troubling about such stereotyping. One, we apply this stereotype not only to men in general, but also to men who are police officers, school officials, corrections officers, and TSA employees. Stated differently, it seems strange that we paint with the same broad-brush individuals who are ethically and professionally obligated to protect us, and in whom we have entrusted such protection.<sup>137</sup> Two, it is particularly troubling that

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<sup>133</sup> *Id.* at 38. For discussion, see Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 487-91 (2009) [hereinafter *Is Privacy a Woman?*]. In concluding that the use of a thermal imaging device to detect heat emanating from a private home was a search within the meaning of the Fourth Amendment, Justice Scalia expressly relied on the home as castle metaphor before pivoting to his imagining "the lady of the house" in the sauna. *Kyllo*, 533 U.S. at 38. As I have noted previously, "[f]ollowing the home as a castle metaphor, one wonders why Justice Scalia did not simply invoke the figure of the master sitting on the proverbial throne." I. Bennett Capers, *Home Is Where the Crime Is*, 109 MICH. L. REV. 979, 984 (2011).

<sup>134</sup> See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 77 n.127 (2002) (collecting cases discussing the chastity of women); Capers, *Real Women, Real Rape*, *supra* note 14, at 829; Godsoe, *supra* note 125, at 8; see also Corey Rayburn, *Better Dead than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1165 (2004). It also brings to mind Hebraic and Muslim teachings requiring that women keep their bodies covered, which too, stand in tension with progressive notions of unconditional gender equality.

<sup>135</sup> Kapczynski, *supra* note 119, at 1274.

<sup>136</sup> See, e.g., Aviva Orenstein, *No Bad Men! A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 692 (1998) (suggesting that feminists view rape as "a crime of opportunity as much as a test of character" of all men); see also Patricia Searles & Ronald J. Berger, *Why Men Rape*, in RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT 1, 51 (Patricia Searles & Ronald J. Berger eds., 1995); Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CALIF. L. REV. 827, 839-40 (1999).

<sup>137</sup> That such searches normally occur in public or semi-public areas should also reduce the risk of impropriety. Cf. *United States v. Drayton*, 536 U.S. 194, 204 (2002) (noting that "a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus [surrounded by fellow passengers] than in other

so many of us who have fought against the reliance on gender-based stereotypes — in education,<sup>138</sup> in employment,<sup>139</sup> in criminal law<sup>140</sup> — would so casually stereotype men.<sup>141</sup> If it is wrong, as a matter of law, to use sex as a proxy for physical strength<sup>142</sup> — think *UAW v. Johnson Controls*;<sup>143</sup> think *United States v. Virginia*<sup>144</sup> — then it should also be wrong to use sex as a proxy for vulnerability in the case of women, or sexual aggressiveness in the case of men.

In the end, though, this stereotyping of men as sexual predators and women as vulnerable victims only begins to capture the range of stereotype harms associated with juridical and policy preferences for same-gender searches. For starters, this preference renders transgender individuals invisible, failing to consider the special issues that attend a same-gender requirement for transgender individuals.<sup>145</sup> It also assumes

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circumstances”); *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (noting that “[t]he regularized manner in which established [traffic] checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest”).

<sup>138</sup> See, e.g., *Faulkner v. Jones*, 66 F.3d 661 (4th Cir. 1995) (refusing to grant a stay on a case dealing with a Citadel as a co-educational institution).

<sup>139</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that gender played a role in petitioner’s employment); see also I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1158 (1991).

<sup>140</sup> See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (ruling it impermissible to strike jurors on the basis of sex or sex-based stereotypes).

<sup>141</sup> For me, this is on par with feminists who insist that gender should have no role in employment decisions, and yet in their own lives chafe at the notion of hiring a male nanny or giving birth in a maternity ward where there are male nurses.

<sup>142</sup> David Cruz observes, “[T]here are exceptionally physically strong women and physically weak men, sensitive men and tough-as-nails women, men and women who are superb chefs, and men and women who cannot manage to boil water.” David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1003 (2002).

<sup>143</sup> 499 U.S. 187, 202 (1991) (discussing the narrow exception to discrimination based on gender because of potential security concerns).

<sup>144</sup> 518 U.S. 515 (1996) (holding that physical training is not sufficient to prevent women from attending VMI).

<sup>145</sup> For a discussion of such issues, see Margaret Colgate Love & Giovanna Shay, *Gender and Sexuality in the ABA Standards on the Treatment of Prisoners*, 38 WM. MITCHELL L. REV. 1216, 1236-38 (2012); and Darren Rosenblum, “Trapped” in Sing Sing: *Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 500-03 (2000). Thinking about same-gender searches in the case of transgender individuals also shows its limitations. Given the continuum of genders, which “gender” should search RuPaul, or Chastity Bono, or the rapper Big Freedia? Cf. Will Oremus, *Here Are All the Different Genders You Can Be on Facebook*, SLATE (Feb. 13, 2014, 3:03 PM), [http://www.slate.com/blogs/future\\_tense/2014/02/13/facebook\\_custom\\_gender\\_options\\_here\\_are\\_all\\_56\\_custom\\_options.html](http://www.slate.com/blogs/future_tense/2014/02/13/facebook_custom_gender_options_here_are_all_56_custom_options.html) (describing over fifty gender options). Or consider the case of the transgender male fired from his job monitoring men urinating at a drug treatment center because he was not born male. See Richard Perez-Pena, *In*

that both the person conducting the search, and the person being searched, are heterosexual, effectively erasing sexual difference,<sup>146</sup> dismissing the sexual fluidity Lisa Diamond has written so eloquently about,<sup>147</sup> and furthering a type of “gender imperialism.”<sup>148</sup>

Along similar lines, creating policy or determining Fourth Amendment reasonableness on the basis of notions of male aggressiveness and female vulnerability erases other victims. Consider the claim that permitting cross-gender surveillance of women is comparable to sexual assault and re-traumatizes sexual assault victims.<sup>149</sup> While this claim is valid, it fails to acknowledge mounting evidence about male sexual victimization. Although male sexual victimization is usually confined to “the margins, the footnotes, and indeed the closet,”<sup>150</sup> in fact “while rape is often done by men, it is also done to men.”<sup>151</sup> Reports further suggest that one in thirty-three men in the United States has been the victim of rape or attempted rape.<sup>152</sup> Even in the military, where sexual assaults on women

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*New Jersey, a Job Discrimination Lawsuit’s Unusual Question: Who is a Man?*, N.Y. TIMES, Apr. 11, 2011, at A18.

<sup>146</sup> As one court observed in discussing the same-sex privacy defense in an employment discrimination case, the regulation of intimate contact between genders appears “to assume that all of the relevant actors are heterosexual.” *Canedy v. Boardman*, 16 F.3d 183, 185 n.1 (7th Cir. 1994). Kapczynski makes a similar point:

Same-sex sexual privacy doctrine participates in the closeting of homosexuality because it presumes everyone to experience their gender, their sexuality, and their bodies in the same way, the “right” way. The insistent heterosexual presumption behind the same-sex-as-private norm is insensible to the history and mechanics of homophobia, and also to any interests in cross-sex sexual privacy that individuals might have.

Kapczynski, *supra* note 119, at 1287. Indeed, the assumption of heterosexuality is just one of the many ways in which the law has contributed, at least historically, to what Adrienne Rich famously called a type of “compulsory heterosexuality.” Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 633 (1980).

<sup>147</sup> LISA M. DIAMOND, SEXUAL FLUIDITY: UNDERSTANDING WOMEN’S LOVE AND DESIRE 202-03 (2008). It also dismisses the possibility of bisexuality, thus participating in what Kenji Yoshino calls the “epistemic contract of bisexual erasure.” See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 361-62 (2000).

<sup>148</sup> The term “gender imperialism” comes from Katharine Bartlett. See Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL’Y 1, 16-17 (1994). I use it here to reference feminist thinking that assumes, and gives primacy to, heterosexuality.

<sup>149</sup> See *supra* notes 112-44 and accompanying text.

<sup>150</sup> I. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1308 (2011) [hereinafter *Real Rape Too*].

<sup>151</sup> *Id.* at 1278.

<sup>152</sup> See MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ-227777, CRIME VICTIMIZATION, 2008, at 4 (Sept. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv08.pdf>.

have gained much attention, male victimization is significant. In fact, of the 26,000 reports of unwanted sexual assault in the military in 2012, 53% involved sexual attacks on men, mostly by other men.<sup>153</sup> As the *New York Times* has reported, the “majority of service members who are sexually assaulted each year are men.”<sup>154</sup> In short, the fact that a growing number of men have been sexually victimized, mostly by other men, undercuts part of the rationale for same-gender searches. Given this background, it is not surprising that, as Paul Butler has written, many men experience even same-sex searches as sexual,<sup>155</sup> or that the “Don’t Touch My Junk” movement was initiated by a searched male,<sup>156</sup> or that even Justice Scalia has expressed unease with the “indignity” suffered by men during a pat-down.<sup>157</sup>

All of these problems involve stereotypes of one sort or another. More significantly, all of these problems show how same-gender searches reify gender distinctions at a time when we aspire to gender equality. Rather than undoing gender, these preferences are constitutive in the production and reproduction of gender distinctions.

### B. Sex Stereotyping Contradicted by Reality

There is a related problem to that of stereotyping. The stereotype — that casts men as sexual aggressors and women as vulnerable victims — falsely simplifies interactions that are far more complex. Indeed, when

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<sup>153</sup> James Dao, *In Debate Over Military Sexual Assault, Men Are Overlooked Victims*, N.Y. TIMES, June 24, 2013, at A12.

<sup>154</sup> *Id.*

<sup>155</sup> Paul Butler, *Stop and Frisk: Sex, Torture, Control*, in LAW AS PUNISHMENT/LAW AS REGULATION 155, 166 (Austin Sarat et al. eds., 2011); see also Kristen Gwynne, *How ‘Stop and Frisk’ Is Too Often a Sexual Assault by Cops on Teenagers in Targeted NYC Neighborhoods*, ALTERNET (Jan. 21, 2013), <http://www.alternet.org/civil-liberties/how-stop-and-frisk-too-often-sexual-assault-cops-teenagers-targeted-nyc>.

<sup>156</sup> See McGreal, *supra* note 3.

<sup>157</sup> See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., dissenting) (expressing doubt whether “the fiercely proud men who adopted our Fourth Amendment” would have allowed themselves to be subjected “to such indignity” as being frisked on mere suspicion of being armed and dangerous). It is also telling that in *Powell v. Barrett*, 511 F. App’x 957, 963-64 (11th Cir. 2013), *cert. denied sub nom. Matkin v. Barrett*, 134 S. Ct. 513, 514 (2014), the case holding that jail officials may strip search any admitted inmate as part of a routine intake process, Petitioner Evans complained that his same-gender body cavity search made him feel “less than a man.” Petition for Writ of Certiorari at 6, *Matkin*, 134 S. Ct. 513 (No. 13-108), 2013 WL 3856377, at \*6; see Adam Liptak, *Supreme Court Ruling Allows Strip Searches for Any Arrest*, N.Y. TIMES, Apr. 2, 2012, at A16. For an interesting take on how male victims feel “less than a man,” see Mary Anne Franks, *How to Feel Like a Woman, or Why Punishment Is a Drag*, 61 UCLA L. REV. 566, 569-72 (2014).

examined closely, such assumptions about male-female interactions are often wrong. Consider a *Terry* stop, or better yet, an airport security pat down of a traveler. In favoring same-gender searches, we conveniently sidestep the fact that men may be sexually victimized by other men, and that women may be sexually victimized by other women. This is particularly evident when it comes to limiting cross-gender pat downs and surveillance in prison. As noted earlier, although inmates are arguably the least protected from cross-gender searches, the trend has been to discourage such searches, especially of female inmates.<sup>158</sup> Simply put, in determining whether a search is “reasonable” within the meaning of the Fourth Amendment, courts continue to rely on stereotypes about “how men are” (sexually aggressive) and “how women are” (vulnerable victims). But as a growing number of scholars are demonstrating, actual data contradict these assumptions.

Consider the evidence from women’s prisons. The assumption for women’s prisons is that, like a scene from the *Orange is the New Black* in which an officer dubbed “Pornstache” gropes a female inmate, “the main threat of sexual abuse comes from male guards.”<sup>159</sup> Data contradict this assumption. While sexual abuse from male staff does exist, recent data reveal that the far greater threat of sexual abuse comes other women, specifically female inmates.<sup>160</sup> Surveys uniformly show that women inmates report twice as much female-on-female sexual victimization as victimization by male staff.<sup>161</sup>

The evidence of sexual abuse from men’s prisons and jails is equally counter-stereotypical. To be sure, there is male-on-male sexual violence.<sup>162</sup> This alone throws a wrench into the narrative that women, not men, are vulnerable. Mounting evidence complicates this picture even more. Growing evidence suggests that women can be, and often are, sexually aggressive, too. Kim Shayo Buchanan observes:

[D]espite the focus of prison rape discourse on fellow inmates as the source of sexual threat in men’s prisons, these surveys found that incarcerated men report much higher rates of sexual abuse by staff than by fellow inmates, and found that a large majority of staff perpetrators of sexual abuse are women. . . . In

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<sup>158</sup> See *supra* notes 95–98 and accompanying text.

<sup>159</sup> Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1635 (2012).

<sup>160</sup> *Id.* at 1639; see also ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ-231169, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–2009, at 12 tbl.6 (Aug. 2010), available at <http://www.bjs.gov/content/pub/pdf/svpjri0809.pdf>.

<sup>161</sup> Buchanan, *supra* note 159, at 1639 n.15.

<sup>162</sup> Capers, *Real Rape Too*, *supra* note 150, at 1278-88.

total, 85 percent of male inmates who had had sex with staff reported a female perpetrator.<sup>163</sup>

Quite simply, “since the publication of the first methodologically rigorous victimization surveys in 2007 and 2008, the results have consistently pointed to women staff as the main perpetrators of sexual victimization in jails and prisons for men.”<sup>164</sup> Of course, sexual victimization may take many forms, as female soldier Lynndie England’s sexual torture of male Abu Ghraib prisoners should remind us.<sup>165</sup>

In short, there is an abundance of data that should call into question societal stereotypes about how men are and how women are, stereotypes which are then used to justify an aversion to cross-gender searches. Still, I can imagine the hesitation. So allow me to conclude this section with an area of Fourth Amendment law that is likely familiar to most of us: traffic stops. Traffic stops provide a useful discussion point in the Fourth Amendment context in part because they occur so frequently and, in part, because officers have almost unfettered discretion in how to conduct the stop. So long as an officer has probable cause to believe there is a traffic violation — for example, driving six miles above the speed limit,<sup>166</sup> or failing to signal a lane change<sup>167</sup> — that officer can conduct a traffic stop. What is most important here is

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<sup>163</sup> Buchanan, *supra* note 159, at 1646-47. More than 40% of the surveyed inmates described their sexual encounters with female staff members as “unwilling” on their part. See ALLEN J. BECK & CANDACE JOHNSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ-237363, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008, at 15 tbl.7 (May 2012), available at <http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf>. More than 35% of men in prisons said that sex with staff involved either force or the threat of force. BECK & HARRISON, *supra* note 160, at 23 tbl.17. Indeed, even among the inmates who described their sexual encounters with staff as willing, many acknowledged that they had been “pressured” into it. As such, “survey data provide considerable evidence of coercion in both ‘willing’ and ‘unwilling’ sex between staff and inmates of all genders.” Buchanan, *supra* note 159, at 1655.

<sup>164</sup> Buchanan, *supra* note 159, at 1673.

<sup>165</sup> See Jamie R. Abrams, *The Collateral Consequences of Masculinizing Violence*, 16 WM. & MARY J. WOMEN & L. 703, 719-20 (2010); Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib*, 11 UCLA J. ISLAMIC & NEAR E. L. 1, 8-9 (2012). For more on this sexual torture and the firestorm that ensued, see Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42-47.

<sup>166</sup> This was the basis for the stop in *Illinois v. Caballes*, 543 U.S. 405, 421 (2005). See also *United States v. Roberson*, 6 F.3d 1088, 1089 (5th Cir. 1993) (driving three miles per hour over the speed limit).

<sup>167</sup> It should be noted that finding a traffic violation on which to justify a stop is relatively easy. As David Harris has observed, “no driver can avoid violating some traffic law during a short drive, even with the most careful attention.” David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545 (1997).

that the officer has full discretion to conduct a pat-down, so long as the officer, *ex post*,<sup>168</sup> can articulate a basis to believe an occupant (driver or passenger) of the car might be armed or dangerous. This could amount to as little as the fact that you are traveling at night, or driving through an area where, known to you or not, a violent crime recently occurred.<sup>169</sup> Alternatively, if the traffic offense is an arrestable offense — again, in some jurisdictions this may be as little as a failing to wear a seatbelt<sup>170</sup> — *Atwater v. City of Lago Vista* makes clear that the officer can make an arrest,<sup>171</sup> which in turn automatically permits the officer to conduct a search of an individual's person incident to arrest.<sup>172</sup> For many women, the idea of being personally searched following traffic stops may conjure images from the Oscar-winning film *Crash*,<sup>173</sup> in which a male officer (played by Matt Dillon) conducts a pat down search of a female passenger that is clearly, and disturbingly, sexual.<sup>174</sup> But again, the gender of the person conducting a bodily search may say very little about whether a search will or will not be sexual. *Crash*, after

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<sup>168</sup> Although the officer is supposed to have reasonable, articulable suspicion *ex ante*, the requirement is an empty one since the officer will not be required to formally explain the basis of his stop until after the stop is over, and often not in full until a suppression hearing. Unfortunately, this *ex post* process enables, rather than frustrates, after the fact rationalizations and, even more unfortunately, lies by the police. See I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 *IND. L.J.* 835, 858 (2008).

<sup>169</sup> See, e.g., *United States v. Michelletti*, 13 F.3d 838 (5th Cir. 1994) (upholding frisk of man holding an open can of beer in light of the fact that it was night and a high crime area).

<sup>170</sup> In fact, this was the basis for the arrest in *Atwater*, in which the Court ruled that the officer did not violate the Fourth Amendment when he made a custodial arrest. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 326-36 (2001). For criticism of *Atwater*, see Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 *FORDHAM L. REV.* 329, 331 (2002); Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 *ST. JOHN'S L. REV.* 535, 559-63 (2002).

<sup>171</sup> See *Atwater*, 532 U.S. at 354.

<sup>172</sup> *United States v. Robinson*, 414 U.S. 218, 226 (1973); *Chimel v. California*, 395 U.S. 752, 762-63 (1969). In addition, the Supreme Court has ruled that subjecting the arrestee to a strip search, including a visual inspection of body cavities, before admitting the suspect to jail is not “unreasonable” under the Fourth Amendment. See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012); *Robinson*, 414 U.S. at 226.

<sup>173</sup> *CRASH* (Lions Gate Films 2004). The film won the 2005 Oscar for Best Picture. For the scene in question, see *Crash (3/9) Movie CLIP — Pat Down by the Police (2004) HD*, *YOUTUBE* (Mar. 15, 2012), <https://www.youtube.com/watch?v=ÉtvbEtPIGiA>.

<sup>174</sup> *CRASH*, *supra* note 173. Others may think of the far more disturbing, independent film *Compliance*, in which a fast-food restaurant employee is strip-searched at the direction of someone posing as a law enforcement officer. See *COMPLIANCE* (Magnolia Pictures 2012). For the scene in question, see *Dreama Walker Strip Search in Compliance*, *YOUTUBE* (Oct. 20, 2013), <https://www.youtube.com/watch?v=wLZLODeq3c4>.



all, is a film, and a fictional one at that. For reality, consider an encounter between a Texas state trooper and two female occupants of a car. The encounter was captured on tape, thanks to the police car's video camera.<sup>175</sup> On the tape, the trooper pats down and then gropes the two women in a manner that is clearly, and disturbingly, sexual. The trooper, Kelly Helleson, is female.<sup>176</sup>

Of course, one response to this counter-stereotypical evidence is that, notwithstanding empirical evidence that contradicts the reliability of sex stereotyping, perception matters.<sup>177</sup> Put differently, if nothing else, requiring that bodily searches be same-gender searches at least provides the perception that the search will be non-violative. The thinking here is that same-gender searches provide peace of mind that cross-gender searches cannot. However, to raise this argument is to reveal its flaw. After all, such thinking is likely to lull potential victims into a false sense of security, much in the same way that the typical rape script — “a male stranger who jumps out of the bushes, preferably black and wielding a knife”<sup>178</sup> — lulls potential victims into not recognizing that they are far more likely to be sexually assaulted by someone of the same race, and indeed someone they know such as a co-worker, a neighbor, or friend.<sup>179</sup> Again, consider the tape of an actual police officer conducting

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<sup>175</sup> See Kelly Helleson, *Texas Trooper Suspected of “Humiliating” Body Cavity Search, Faces Firing (Video)*, HUFFINGTON POST (Jan. 30, 2013, 11:22 AM), [http://www.huffingtonpost.com/2013/01/30/kelly-helleson-texas-trooper-body-cavity-fired\\_n\\_2581779.html?utm\\_hp\\_ref=crime](http://www.huffingtonpost.com/2013/01/30/kelly-helleson-texas-trooper-body-cavity-fired_n_2581779.html?utm_hp_ref=crime).

<sup>176</sup> *Id.* This is not to suggest that male officers do not conduct inappropriate bodily searches of women. Indeed, a male officer in Florida was recently captured on video requiring a woman to lift her shirt and shake her breasts following a car stop, claiming that he suspected she may be concealing drugs. See *Video: Woman’s “Bra Shake” at Traffic Stop Criticized*, POLICEONE (June 26, 2013), <http://www.policeone.com/investigations/articles/6294368-Video-Womans-bra-shake-at-traffic-stop-criticized>. Rather, the point is that the gender of the police officer is not determinative as to whether a bodily search will be sexually inappropriate.

<sup>177</sup> There is the related argument that power imbalances matter (i.e., that a woman in particular might feel vulnerable not because she is the “weaker sex,” but because the officer represents authority). But here too, to articulate the argument is to reveal its flaw. This power imbalance exists whether the person being searched is male or female. In other words, it is the uniform and the concomitant apparent authority of the state that create the power imbalance, not gender.

<sup>178</sup> Capers, *Real Women, Real Rape*, *supra* note 14, at 829.

<sup>179</sup> MICHELE C. BLACK ET AL., NAT’L CTR. FOR INJURY PREVENTION & CONTROL OF THE CTRS. FOR DISEASE CONTROL & PREVENTION, NAT’L INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY 22 tbl.2.5 (2010), available at [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf); LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ-163392, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 4 (1997), available at <http://www.bjs.gov/content/pub/>

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a pat down, versus the tape of a fictional officer in *Crash*. Any bodily search, regardless of the gender of the searcher, carries a risk of being a sexy search.

To be clear, I am not suggesting that the risk of being sexually assaulted is distributed equally among men and women. Nor am I suggesting that women are as likely to be perpetrators of sexual assault as are men. What I am suggesting, however, is that the trope of male perpetrator/female victim — or as Janet Halley might put it, “M > F”<sup>180</sup> — is essentialist and under-inclusive insofar as it obscures other combinations of victimization, such as men being victimized by other men or women, or women being victimized by other women. More problematic, to focus exclusively on gender tropes obscures the power imbalance that lies at the heart of sexual assault, a power imbalance that may overlap with gender, but is not coterminous with it. If the real source of sexual threat stems from power imbalances, we do ourselves a disservice when we substitute gender-based proxies for actual power. We do ourselves a disservice, and we do a disservice to the goal of gender equality.

### C. Individual Preferences

Basing Fourth Amendment reasonableness determinations regarding bodily searches on the gender of the participants is deeply problematic for another reason: it caters to individual sex-based preferences. Again, for many, it may seem perfectly natural that a woman might personally prefer that another woman conduct any search of her person. Similarly, many of us would assume that, notwithstanding the popularity of websites like Chatroulette or politicians like Anthony Weiner, most men do not relish the thought of exposing their bodies to female strangers. These aversions, after all, are of a piece with the fact that, outside of the home at least, men and women are often segregated to accommodate privacy concerns. At school, at work, at the gym, at Starbucks, we use gender-segregated restrooms for the most part. For many, these gender-segregated spaces are also homosocial spaces, providing a sanctuary where one can be among like individuals.<sup>181</sup>

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pdf/soo.pdf; see also CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-126826, FEMALE VICTIMS OF VIOLENT CRIME 10 (1991) (seven out of every ten white rape victims were raped by white offenders).

<sup>180</sup> HALLEY, *supra* note 126, at 17-20.

<sup>181</sup> The homosocial function of restrooms cannot be overstated, and I thank Adrienne Davis for urging me to consider this issue. As Molotch notes:

While these individual preferences may seem relatively harmless, they should still trouble us, especially to the extent these individual sex-based preferences are incorporated in and affected through government policy and regulations. For starters, endorsing such preferences is inconsistent with the notion of true gender equality. Indeed, it is out of this concern for gender equality that we prohibit businesses from hiring on the basis of gender as a way to cater to the gender preferences of its customers. For example, Title VII of the 1964 Civil Rights Act<sup>182</sup> bans

There are women who use the women's room as a respite from male supervision, a place where "the girls" can let their hair down and exercise solidarity. Some women report that the ladies' room is where they learned as girls how to do their hair, hold their bodies, use menstrual products, and adjust their clothes — with pals and relatives fussing around them in real time.

Harvey Molotch, *Introduction: Learning from the Loo*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 1, 7 (Harvey Molotch & Laura Norén eds., 2010) [hereinafter *Learning from the Loo*]. Mary Anne Case makes a similar point:

[Women] see it as a place to escape from a browbeating boss or importunate suitor, a place where they can cry without being seen and gossip with one another without being overheard by any man, a place where they can literally and figuratively let their hair down.

Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra*, 211, 221 [hereinafter *Why Not Abolish*]. While I do not dispute this homosocial function, I cannot help but note that this function has incredible costs. In Molotch's description, and to a lesser extent in Case's, gendered restrooms help girls learn how to be girls and women and serve as a place of retreat. But neither of these benefits does much for advancing gender equality; quite to the contrary since they reify gender ("how to do their hair"). Molotch, *Learning from the Loo*, *supra*, at 7. It also fails to take into consideration the costs associated with men's room. To what extent does having men's rooms enable "locker room" conversation to thrive? Isn't it in men's locker rooms (usually attached to men's rooms) that men once (and maybe still do) hang pinups of scantily clad women, objectify women, and exchange ribald jokes about women? While restrooms have homosocial functions, it also pays to remember that restrooms (the jokes told inside them and images tossed about) also figure heavily in sex discrimination claims brought by women. *See, e.g., Hurley v. Atl. City Police Dep't*, 174 F.3d 95 (3d Cir. 1999) (discussing a sexual discrimination claim involving sexually explicit graffiti drawings in the bathroom).

<sup>182</sup> 42 U.S.C. § 2000e-2(a) (2013). The statute provides, in relevant part:

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

sex discrimination in employment unless the employer can demonstrate that sex is a “bona fide occupational qualification [(“BFOQ”)] reasonably necessary to the normal operation of that particular business or enterprise.”<sup>183</sup> As courts have made clear, the BFOQ is “meant to be an extremely narrow exception.”<sup>184</sup>

Consider *Diaz v. Pan American World Airways*,<sup>185</sup> involving Pan Am’s refusal in the early 1970s to hire men as airline attendants solely on the basis of their sex. When sued for violating Title VII’s non-discrimination policy, Pan Am argued that the performance of female attendants “was better in the sense that they were superior in such non-mechanical aspects of the job as ‘providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations.’”<sup>186</sup> To further buttress its BFOQ defense, Pan Am offered expert testimony that the “psychological needs” of air passengers “are better attended to by females.”<sup>187</sup> The U.S. Court of Appeals for the Fifth Circuit held that none of these findings could justify discrimination in violation of Title VII. As the court put it:

While we recognize that the public’s expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences

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opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

*Id.*

<sup>183</sup> *Id.* § 2000e-2(e)(1); see also Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 205 (1992) (positing that hiring only women as strippers would be permissible as a BFOQ); Yuracko, *supra* note 89, at 157 (observing that “it seems likely that courts would permit such sex-based hiring as a BFOQ”). For example, to permit only women to audition for the role of Lady Macbeth would qualify as a BFOQ. As would only interviewing women to work in a strip club. Cf. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981) (observing in dicta that a BFOQ would exist in “jobs where sex or vicarious sexual recreation is the primary service provided, e.g., [a] social escort or topless dancer . . . [since] the employee’s sex and the service provided are inseparable”).

<sup>184</sup> *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (“[T]he bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.”); see also *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (noting BFOQ is a narrow exception).

<sup>185</sup> 442 F.2d 385 (5th Cir. 1971).

<sup>186</sup> *Id.* at 387 (quoting *Diaz v. Pan Am. World Airways, Inc.*, 311 F. Supp. 559, 563 (S.D. Fla. 1970)).

<sup>187</sup> *Id.* at 387.

and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.”<sup>188</sup>

*Wilson v. Southwest Airlines*<sup>189</sup> also involved the issue of customer preferences. Hoping to distinguish itself from other airlines, and noting that its commuter market consisted primarily of male businessmen, Southwest Airlines launched a campaign to market itself as the “love airline,”<sup>190</sup> and hired only women in ticket agent and flight attendant positions.<sup>191</sup> In short, the airline sold opposite-sex appeal.<sup>192</sup> Notwithstanding its success and its claim, supported by customer preference surveys, that having only women ticket agents and attendants increased business, the court concluded that Southwest’s hiring practice violated Title VII.<sup>193</sup>

Recognition of a sex BFOQ for Southwest’s public contact personnel based on the airline’s “love” campaign opens the door for other employers freely to discriminate by tacking on sex or sex appeal as a qualification for any public contact position where customers preferred employees of a particular sex. In order not to undermine Congress’ purpose to prevent employers from “refusing to hire an individual based on stereotyped characterizations of the sexes,” . . . a BFOQ for sex must be denied where sex is merely useful for attracting customers of the opposite sex, but where hiring both sexes will not alter or undermine the essential function of the employer’s business.<sup>194</sup>

While lower courts have not been entirely consistent in adhering to Title VII’s “uncompromising”<sup>195</sup> language — for example, allowing

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<sup>188</sup> *Id.* at 389.

<sup>189</sup> 517 F. Supp. 292 (N.D. Tex. 1981).

<sup>190</sup> *Id.* at 294-95.

<sup>191</sup> *Id.*

<sup>192</sup> Southwest’s television commercials featured attractive flight attendants in fitted outfits and promised “in-flight love.” A passenger at the airline could use a “quickie machine” to secure a ticket and thus receive “instant gratification.” On board, the attendants wore hot-pants and served “love bites (toasted almonds)” and “love potions (cocktails).” See *id.* at 294 n.4 (internal quotation marks omitted).

<sup>193</sup> *Id.* at 304.

<sup>194</sup> *Id.* Similarly, there is no BFOQ in hiring only male waiters to create an ambience of Old World traditions. See *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1294 (11th Cir. 2000). Nor is there is a BFOQ in only hiring male waiters in a “high-class” restaurant. See *Levendos v. Stern Entm’t, Inc.*, 723 F. Supp. 1104, 1107 (W.D. Pa. 1989).

<sup>195</sup> Kapczynski, *supra* note 119, at 1257.

hospitals to decline to hire male nurses for labor and delivery rooms<sup>196</sup> — and while the Supreme Court has intimated that a preference for same-sex privacy, as opposed to rank customer preference,<sup>197</sup> could be the basis for a BFOQ,<sup>198</sup> the take away remains the same: we should be troubled by concessions to such preferences.<sup>199</sup> As Amy Kapczynski observed over a decade ago, the “problem is the same one that attends all concessions to customer preference: They exactly reproduce the prejudices that generate gendered stratification and hierarchy in the

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<sup>196</sup> See *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1354 (D. Del. 1978). For a discussion of the tension between Title VII’s rejection of customer preference and deference to customer privacy concerns, see Miriam A. Cherry, *Exercising the Right to Public Accommodations: The Debate over Single-Sex Health Clubs*, 52 ME. L. REV. 97 (2000) (discussing privacy and the BFOQ defense in the context of single-sex health clubs); Michael R. Evans, *The Case for All-Female Health Clubs: Creating a Compensatory Purpose Exception to State Public Accommodation Laws*, 11 YALE J.L. & FEMINISM 307 (1999) (proposing a new standard for states to use in amending public accommodation laws to allow sex classifications); and Kapczynski, *supra* note 119, at 1257. See also *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1416 (N.D. Ill. 1984); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1131 (S.D. W. Va. 1982); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1194 (E.D. Ark. 1981); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 25-27 (2000); Yuracko, *supra* note 89, at 204; Rachel L. Cantor, Comment, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. CHI. LEGAL F. 493, 502-03 (1999); Katie Manley, Note, *The BFOQ Defense: Title VII’s Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL’Y 169, 188-90 (2009). The issue has also been discussed in the context of public accommodation laws.

<sup>197</sup> Of course, as several scholars have observed, privacy concerns are simply customer preference stated another way. Cantor, *supra* note 196, at 505-09; Yuracko, *supra* note 89, at 163-66. Even the privacy argument is wanting, especially when courts intimate a constitutional right to privacy that is gender-based. As Amy Kapczynski observes:

Once one begins to ask why it is less private to be seen in a state of undress by one sex rather than the other, the foundational logic of the same-sex privacy cases rapidly breaks down. . . . [For example], how can it be more or less private — as opposed to comfortable, intuitive, pleasing, or embarrassing — to be seen in a state of undress by a male nurse rather than by a male doctor?

Kapczynski, *supra* note 119, at 1269-70.

<sup>198</sup> *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 n.4 (1991).

<sup>199</sup> Of course, some scholars may disagree. For example, Lex Larson, in his treatise on employment discrimination, opines that “giving respect to deep-seated feelings of personal privacy involving one’s own genital areas is quite a different matter from catering to the desire of some male airline passengers [to have a little diluted sexual titillation from] the hovering presence of an attractive female flight attendant.” 3 LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 43.02[3][b] (2d ed. 2002).

work force in the first place.”<sup>200</sup> For those of us who consider ourselves feminists, the rub is even greater: there is something Janus-faced about being opposed to sex discrimination in the context of hiring airline stewardesses, while embracing similar sex-based preferences in the context of airline travelers and TSA employees.

And here is the thing. The problem is graver in cases involving police interaction with citizens, TSA interaction with travelers, prison officials’ interaction with inmates, and public school officials’ interaction with students. This is because when the government accedes to customer preferences, much more is at stake. Not only does the government accession to customer preferences “reproduce the prejudices that generate gendered stratification and hierarchy,”<sup>201</sup> to again borrow Kapczynski’s language, it also sends the expressive message that such preferences are both acceptable and right.<sup>202</sup> Far from disrupting gendered stratification, government action entrenches it.<sup>203</sup>

Allow me to go a step further. We should be as troubled by government accommodation and enforcement of individual sex-based preferences as we would be of government accommodation and enforcement of individual race-based preferences, a matter I will return to in some detail in Part IV. But first, it is useful to lay the groundwork for this discussion by turning to the paradigmatic site of gender

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<sup>200</sup> Kapczynski, *supra* note 119, at 1264. For example, Kapczynski notes that the “same hospitals that refused to allow male nurses to provide intimate care for female patients regularly allowed male doctors to provide such care for female patients,” thus replicating a gendered hierarchy in hospitals. *Id.* at 1264-65. Deborah Calloway makes a similar point, noting that allowing concerns about privacy to trump Title VII’s goal of gender equity “expressly maintains the status quo. Intimate contact [is acceptable when] females fill their traditional role as nurses and males fill their traditional role as doctors, police officers, and prison guards. Privacy interests are asserted and prevail when men or women attempt to break into the traditionally segregated professions.” Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 *FORDHAM L. REV.* 327, 329-30 (1985).

<sup>201</sup> Kapczynski, *supra* note 119, at 1264.

<sup>202</sup> On the importance of attending to law’s expressive message, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U. PA. L. REV.* 1503, 1571 (2000); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 *HARV. L. REV.* 413, 419-25 (1999); Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. CHI. L. REV.* 943, 944-49 (1995); Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2021-25 (1996).

<sup>203</sup> It also communicates a norm of modesty: that decent women should be ashamed to display parts of their bodies to men and that real men should balk at the idea of being groped by women. In this sense, it communicates what it means to be male or female, a component part of which includes having a certain desire for privacy. As such, it is a norm that instantiates something akin to what Anita Allen has described as “coercing privacy.” Anita L. Allen, *Coercing Privacy*, 40 *WM. & MARY L. REV.* 723, 728-29 (1999).

segregation, segregated restrooms, and what Lacan famously called “urinary segregation.”<sup>204</sup>

### III. A RESTROOM BREAK

Women need to start measuring their degree of equality by public toilets.

— Taunya Lovell Banks<sup>205</sup>

It may seem odd that an article on unmooring the Fourth Amendment from traditional notions of sex and gender would pause to take a restroom break.<sup>206</sup> But in fact, societal discomfort with cross-gender searches is likely traceable, and shares much in common with, ingrained notions of sexual difference and sexual propriety. This Part accordingly examines restrooms as the paradigmatic site of sexual difference and sexual modesty, and as the quintessential “separate sphere.”<sup>207</sup> The point here is two-fold. One, restrooms too are sites that produce and reproduce gender difference. Two, understanding gender segregation in restrooms can help us better understand, and interrogate, the role of tradition in determining the reasonableness of Fourth Amendment searches.

For many, to talk about restrooms, or rather what happens in restrooms, is alone a cause for embarrassment. Indeed, when the subject of restrooms comes up, we tend to engage in circumlocutions and evasions. Clara Greed, a professor of urban planning, reminds us:

The very terms commonly in play — *restrooms*, *comfort stations*, *public conveniences* (to name a few of them) — are redolent with cultural embarrassment. Americans say they are “going to the bathroom” when they are heading to a room wherein, curiously, there is no bathtub. Similarly, Brits say they are about to “go to the loo” — from the French term for water, *l’eau*. Other euphemisms are also associated with water and washing, such

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<sup>204</sup> Lacan, *supra* note 16, at 151.

<sup>205</sup> Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 BERKELEY WOMEN’S L.J. 263, 267 (1991).

<sup>206</sup> Indeed, as Professor Taunya Lovell Banks discovered, merely writing about restrooms and restroom inequality can subject one to accusations of focusing on trivial things. *See id.* at 269-71.

<sup>207</sup> By “separate sphere,” I am of course referring to the notion, widely accepted in the nineteenth century, that men properly occupy the sphere of public life, while women’s proper sphere is that of the home and domesticity. For more on this notion, see Linda K. Kerber, *Separate Spheres, Female Worlds, Woman’s Place: The Rhetoric of Women’s History*, 75 J. AM. HIST. 9, 11 (1988).



as *lavatory*, or when people say they will “go wash up” or “wash my hands,” activities that occur *after* the event that is the actual purpose of the trip.<sup>208</sup>

We are loath to discuss restrooms as places where the body, quite literally, reasserts its primacy.<sup>209</sup> Sociologist Harvey Molotch observes as much in his book *Toilet*:

The toilet is a foundational start point where each of us deals directly with our bodies and confronts whatever it provides, often on a schedule not of our own making. The animal in us comes to the fore, and we must accommodate to its tendencies and demands. It is “bare life,” as it surfaces in social existence.<sup>210</sup>

Indeed, it is perhaps because excretion is “bare life” that, as a society, we have historically gone to great lengths to both conceal what we do, and to make sure that we only do it around certain types of people. In other words, restrooms are one way we have enforced “who will be with whom, where and when.”<sup>211</sup> Restrooms have been regulated along lines of religion,<sup>212</sup> along lines of race,<sup>213</sup> and to a certain extent continue to

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<sup>208</sup> Clara Greed, *Creating a Nonsexist Restroom*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 181, at 117, 119. One could add to the list of evasions the expression, “I’m going to powder my nose.” Even the architect Alexander Kira, in his groundbreaking monograph, *The Bathroom*, felt the need to invent new terminology around bathroom activities. Toilets become “hygiene facilities,” urinating and defecating become “elimination.” ALEXANDER KIRA, *THE BATHROOM: CRITERIA FOR DESIGN* 3, 93 (2d ed. 1976).

<sup>209</sup> This was especially true during the late-Victorian period, when human bodily functions were intertwined with notions of morality. See Terry S. Kogan, *Sex Separation: The Cure-All for Victorian Social Anxiety*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 181, at 145, 145; see also JOHN F. KASSON, *RUDENESS & CIVILITY: MANNERS IN NINETEENTH-CENTURY URBAN AMERICA* 124 (1990) (noting that in “public especially, but also in private, one sought particularly to stifle all activities that might draw attention to the internal workings of the body, such as coughing, sneezing, yawning, scratching, tooth picking, throat clearing, and nose blowing. More intimate functions were generally beneath discussion”).

<sup>210</sup> Molotch, *Learning from the Loo*, *supra* note 181, at 2.

<sup>211</sup> *Id.* at 8.

<sup>212</sup> See Zena Kamash, *Which Way to Look? Exploring Latrine Use in the Roman World*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* 181, at 47, 60-62; see also MARTIN SCHOENHALS, *INTIMATE EXCLUSION: RACE AND CASTE TURNED INSIDE OUT* 203-05 (2003) (discussing the effects of a caste system on daily activities such as going to the bathroom).

<sup>213</sup> C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 98 (3d rev. ed. 1974). On the history and extent of the laws regarding segregation in public accommodations, see generally *id.* at 1-65.

be regulated along lines of class and position,<sup>214</sup> notwithstanding the fact that what we do in restrooms — excrete and urinate, to speak without circumlocution — are precisely the activities where class and race are irrelevant. In this sense, restrooms are part of the “technologies of division and separation,”<sup>215</sup> that divide “the population into high and low, and control of the lower orders.”<sup>216</sup> The most pervasive regulation, however, has been that of gender.

Most restrooms, after all, by words or signs, divide people into two unchanging genders, a form of segregation that “is at once immensely naturalized and immensely policed, the most taken-for-granted social categorization and the most fiercely regulated.”<sup>217</sup> Indeed, one of the first things children learn outside of the home is the social code of restrooms. More than whether they must wear the color blue or pink, or wear their hair long or short, we impress upon them that at bottom, literally and figuratively, gender matters, and that there is one restroom for “Ladies” and another restroom for “Gents.”<sup>218</sup> This, too, is toilet training.

Indeed, as early as 1887, there was a law mandating separate restrooms. A Massachusetts statute, entitled “An Act to Secure Proper Sanitary Provisions in Factories and Workshops,” required that “water-closets” be provided for female employees and that the water closets be separate and apart from those used by males.<sup>219</sup> By 1920, similar legislation existed in the overwhelming majority of states.<sup>220</sup> Much of

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<sup>214</sup> For example, airlines tend to segregate restrooms by coach and business; many universities continue to have separate restrooms for faculty members and students; and many businesses continue to have executive restrooms. Indeed, a *Seinfeld* episode, “The Revenge,” begins with George Costanza quitting after being banned from the executive washroom. *Seinfeld: The Revenge* (NBC television broadcast Apr. 18, 1991).

<sup>215</sup> Ruth Barcan, *Dirty Spaces: Separation, Concealment, and Shame in the Public Toilet*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 181, at 25, 29; see also SHEILA L. CAVANAGH, *QUEERING BATHROOMS: GENDER, SEXUALITY, AND THE HYGIENIC IMAGINATION* 28 (2010) (describing the modern lavatory as “part and parcel of the biopolitical regulation of the body, its gender, and its sexuality”).

<sup>216</sup> Barcan, *supra* note 215, at 29 (quoting Alan Hyde, *Offensive Bodies*, in *THE SMELL CULTURE READER* 53, 53 (Jim Drobnick ed., 2006)) (internal quotation marks omitted).

<sup>217</sup> *Id.*; see also Joel Sanders, *Introduction*, in *STUD: ARCHITECTURES OF MASCULINITY* 10, 17 (Joel Sanders ed., 1996) (observing that the architecture of the public bathroom “naturalizes gender by separating ‘men’ and ‘women’”).

<sup>218</sup> Of course, “Ladies” and “Gents” are just one of several options. Mary Anne Case adds a few more: “Stallions” and “Fillies”; “Pointers” and “Setters.” Case, *Why Not Abolish*, *supra* note 181, at 211.

<sup>219</sup> Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass. Acts 668-69.

<sup>220</sup> George Martin Kober, *History of Industrial Hygiene and Its Effects on Public Health*, in *A HALF CENTURY OF PUBLIC HEALTH* 361, 376-77 (Mazyck P. Ravenel ed., 1921).

this legislation was transparently paternalistic and moralistic.<sup>221</sup> For example, North Dakota's law mandating sex-segregated restrooms was entitled, "An Act to Protect the Lives and Health and Morals of Women and Minor Workers."<sup>222</sup>

My point here is not to provide a history of sex-segregated restrooms in this country, but rather to show that such segregation originated with so-called scientific assumptions that "women were inherently different from men in their anatomy, physiology, temperament, and intellect."<sup>223</sup> Terry Kogan makes a similar observation in his exploration of the legal history of segregated restrooms: The historical and social justifications for segregated restrooms were not based on gender-neutrality; rather, they were "adopted as way to vindicate early-nineteenth-century moral ideology concerning the appropriate role and place for women in society."<sup>224</sup> In doing so, they exaggerated gender difference.<sup>225</sup> The need to protect women's modesty was considered so important that an inspection of factory facilities could be deemed inadequate if stall doors did not reach the floor and "the feet and lower parts of the skirts of females occupying the water-closets [could] be seen from the workrooms."<sup>226</sup> As Kogan notes, it was a violation of Victorian modesty "for any part of a woman's anatomy to be subjected to public scrutiny while she perform[ed] intimate bodily functions. . . . Victorian modesty was threatened if a woman could even be seen entering the facility."<sup>227</sup>

All of this is connected to how we have been disciplined, in the Foucauldian sense,<sup>228</sup> to view gender difference and modesty. The existence of one room for "Ladies" and another for "Gents" does not just tell us where to go to excrete and urinate. It tells us that there is a difference between men and women, and that this difference matters,

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<sup>221</sup> See Kogan, *supra* note 209, at 156.

<sup>222</sup> Act of Mar. 6, 1919, ch. 174, 1919 N.D. Laws 317-22.

<sup>223</sup> CYNTHIA EAGLE RUSSETT, *SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD* 11 (1989).

<sup>224</sup> Kogan, *supra* note 209, at 163.

<sup>225</sup> CAVANAGH, *supra* note 215, at 28.

<sup>226</sup> Kogan, *supra* note 209, at 159 (citing CHAS P. NEILL, *REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS IN THE UNITED STATES: VOLUME I: COTTON TEXTILE INDUSTRY*, S. REP. NO. 61-645, at 371 (1910), available at <http://sul-derivatives.stanford.edu/derivative?CSNID=00003814&mediaType=application/pdf>).

<sup>227</sup> Kogan, *supra* note 209, at 159.

<sup>228</sup> According to Foucault, through a host of policies and regulations, the state ensures the internalization of self-discipline and the creation of "obedient subjects." See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 128-29 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME I: AN INTRODUCTION* 85 (Robert Hurley trans., Vintage Books 1990) (1976).

“with each swing [of the door] reinforcing the binary.”<sup>229</sup> It also tells us how gender should be performed.<sup>230</sup> For example, that it is manly to stand to urinate.<sup>231</sup> And it is normative, telling us that gender *should* matter.<sup>232</sup> Much like the Biblical story of Adam and Eve, or for that matter the story of Susanna and the Elders,<sup>233</sup> segregated restrooms

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<sup>229</sup> Harvey Molotch, *On Not Making History: What NYU Did with the Toilet and What It Means for the World*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 181, at 255, 256 [hereinafter *On Not Making History*]. Erving Goffman makes a similar point. “[O]ne does not so much deal with segregation as with segregative punctuation of the day’s round, [thus] ensuring that subcultural differences can be reaffirmed and reestablished in the face of contact between the sexes.” Erving Goffman, *The Arrangement Between the Sexes*, 4 *THEORY & SOC’Y* 301, 316 (1977).

<sup>230</sup> The architect Alex Schweder makes a similar observation. “Contemporary bathrooms are designed to be stages on which reductive gender roles are played out and reinforced. By going into separate rooms, we are choosing which role we will play in the performance of gender. Alex Schweder, *Stalls Between Walls: Segregated Sexed Spaces*, in *LADIES AND GENTS: PUBLIC TOILETS AND GENDER* 182, 183-84 (Olga Gershenson & Barbara Penner eds., 2009).

<sup>231</sup> On gender as performance and as a mode of enacting and reenacting received gender norms, see JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* xviii-xxiii (2d ed. 1999). Turning to *how* gender should be performed, men’s rooms communicate that it is manly for men to urinate standing, not sitting as most women do. It is telling that when there was a move in Germany to encourage men to sit when they urinate, many men resisted on the ground that there was something essential to masculinity to urinate while standing. The scholar Klaus Schwerma was so offended by the movement that he wrote a book in opposition. The book, *STEHPINKELN: DIE LETZTE BASTION DER MÄNNLICHKEIT?*, loosely translates into “Peeing Standing Up — The Last Bastion of Masculinity?”. KLAUS SCHWERMA, *STEHPINKELN: DIE LETZTE BASTION DER MÄNNLICHKEIT?* (2000) (Ger.). Men’s rooms also communicate that it is manly to avoid eye contact with other men, and to stand apart from other men. For more on men’s rooms and their role in setting forth the normative parameters of masculinity, see Craig Heimbuch, *7 Rules of Men’s Bathroom Etiquette*, GOOD MEN PROJECT (Apr. 24, 2012), <http://goodmenproject.com/good-feed-blog/7-rules-of-mens-bathroom-etiquette>.

<sup>232</sup> Indeed, restrooms segregated along gender lines have the effect of dismissing those who do not easily fit within the prescribed binary as irrelevant, much in the same way a judicial or policy requirement of same-gender searches does. As one scholar has remarked, “Sex segregated restrooms force people to choose ‘male’ or ‘female’ — those who refuse to accept the dichotomy become defined out of existence. People who do not identify with their socially assigned sexual category represent the remainder of sexual division — the leftovers, sexuality’s refuse.” Alex More, Note, *Coming Out of the Water Closet: The Case Against Sex Segregated Bathrooms*, 17 *TEX. J. WOMEN & L.* 297, 303 (2008). On the role the state plays in policing gendered boundaries through the active harassment and exclusion of gender nonconforming individuals from restrooms, see Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 *WM. & MARY J. WOMEN & L.* 187, 246 (2013).

<sup>233</sup> See Suk, *Is Privacy a Woman?*, *supra* note 133 at 490-91; Cheryl Smith Blum, Comment, *The Place of Art in Catherine MacKinnon’s Feminist Legal Theory*, 19 *J. CONTEMP. L.* 445, 461-69 (1993). See generally Carol Weisbrod, *Susanna and the Elders: A Note on the Regulation of Families*, 1998 *UTAH L. REV.* 271 (discussing what Susanna

discipline girls and women to consider their bodies “sacred temples” that must be kept hidden from the male gaze, and to think that a gendered designation on the restroom door, or in some cases a somatic sign (e.g., the ubiquitous skirted woman),<sup>234</sup> will insulate them from sexual attack from men.<sup>235</sup> But this is only part of what women’s rooms do. They are one of the places where women learn the rituals of femininity: how to do their hair, how to measure themselves against other women, how to put on make-up, indeed how to make themselves up. Viewed this way, the euphemism “going to the Ladies to powder my nose” (in lieu of “I’m going to take a leak”) becomes, in part, literally true. In this sense, the Women’s Room, with its conveniently placed mirrors, functions not just as a place for eliminating bodily wastes, but also a place where females make themselves feminine and inhabit femininity, which as Beverly Skeggs has argued, is often one of the few forms of capital available to women in our scopoc economy.<sup>236</sup>

And men are disciplined too.<sup>237</sup> Restrooms, after all, function not only as heteronormative, homosocial spaces, but also as spaces where men are homosocialized in ways that are decidedly masculinist and often sexist.<sup>238</sup> It is here, after all, where girls and women are most objectified

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and the Elders imparts about the law and family governance). Visual representations of the story in fact mimic our preoccupation with sex and its tantalizing forbiddenness. Paintings condemn the lecherous elders for looking while simultaneously offering the nude Susanna to the viewer. For more on this dynamic, see JOHN BERGER, *WAYS OF SEEING* 45-64 (1972). The story of Susanna and the Elders tells the story of the virginal Susanna who is bathing nude in the garden when she is espied, and sexually propositioned, by two elders. The story has not only been the subject of numerous paintings, it has also served as a frequent subject in feminist legal thought. Suk, *Is Privacy a Woman?*, *supra* note 133, at 490 & n.38.

<sup>234</sup> For an interesting discussion of gendered bathroom signs, see Marissa, *Go Where? Sex, Gender, and Toilets*, SOC’Y PAGES (Sept. 2, 2010, 10:07 AM), <http://thesocietypages.org/socimages/2010/09/02/guest-post-go-where-sex-gender-and-toilets/>.

<sup>235</sup> That gender segregated restrooms are safer is certainly questionable. Having a greater number of individuals in a restroom, including men, may in fact make restrooms safer for everyone. Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us About Equality*, 9 J. CONTEMP. LEGAL ISSUES 1, 5 (1998) (noting that “sexually segregated bathrooms are, arguably, more dangerous than unisex facilities would be, since a would-be assailant has a reasonable expectation that he will find potential victims, and only potential victims, in a ladies’ room”); Molotch, *On Not Making History*, *supra* note 229, at 271.

<sup>236</sup> Beverley Skeggs, *The Toilet Paper: Femininity, Class and Mis-Recognition*, 24 WOMEN’S STUDIES INT’L F. 295, 303-04 (2001).

<sup>237</sup> As Lee Edelman succinctly observes, “The design of the men’s room, simply put, has palpable designs on men; it aspires, that is, to design them.” Lee Edelman, *Men’s Room*, in *STUD: ARCHITECTURES OF MASCULINITY*, *supra* note 217, at 152, 152.

<sup>238</sup> Barcan, *supra* note 215, at 39. Men’s rooms are also places where boys learn to engage in behavior associated with hegemonic masculinity. As David Cohen observes:

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— via graffiti, via jokes — in the face of their physical absence. And it does all of this in a way that is by necessity deeply hierarchical, since differentiating along lines of sex invariably works to maintain a system in which those differences matter.

As Mary Anne Case reminds us, it is telling that a recurring argument of opponents of the Equal Rights Amendment was that passage would mean the end of segregated restrooms.<sup>239</sup> Or consider more recent language of conservative commentator Rush Limbaugh: “Feminism supports equality. . . . Look what has to happen to institutions in order for these people to secure equality. You have to weaken the institution, in this case male and female bathrooms.”<sup>240</sup> In other words, segregated restrooms are an institution, the final site of gender inequality.

Of course, the anticipated response to this observation is that having separate restrooms for men and women is not unequal, at least where men and women have “potty parity,”<sup>241</sup> a phrase used to denote equitable provision of separate toilet facilities.<sup>242</sup> An equally likely response is that

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[W]hen men are in sex-segregated environments, they often engage in behavior that creates, reinforces, and exacerbates negative attitudes about women that contribute to men’s oppression of women. This occurs in a variety of ways, such as perceiving women as inferior, as sex objects, or as threats to male privilege. When these attitudes are created, reinforced, or exacerbated, men further their dominance over women.

David S. Cohen, *Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 544 (2010) [hereinafter *Keeping Men “Men”*]; see also David S. Cohen, *Sex Segregation, Masculinities, and Gender-Variant Individuals*, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 167, 168-69 (Frank Rudy Cooper & Ann C. McGinley eds., 2012) (noting “sex segregation contributes to an essentialized view of what it means to be a man” and that restrooms are sex segregated). Given this masculinist socialization, it is perhaps not surprising that, as architect Alexander Kira observed, urinals for men are often shaped like vaginas. See KIRA, *supra* note 208, at 106.

<sup>239</sup> Case, *Why Not Abolish*, *supra* note 181, at 211; see also Antony, *supra* note 235, at 2.

<sup>240</sup> Case, *Why Not Abolish*, *supra* note 181, at 212 (quoting Rush Limbaugh, *Feminist Groups Can’t Choose Bathrooms*, RUSH LIMBAUGH SHOW (Nov. 26, 2003) at 2:12–2:25, available at [http://mfile.akamai.com/5020/wma/rushlimb.download.akamai.com/5020/clips/03/11/112603\\_6\\_feminists.aspx](http://mfile.akamai.com/5020/wma/rushlimb.download.akamai.com/5020/clips/03/11/112603_6_feminists.aspx)).

<sup>241</sup> *Id.* at 212. Of course, determining what is equal is problematic since many believe that equality in number is not the ideal metric. For example, in January 2009, a public interest lawyer at George Washington University Law School threatened to sue President Obama’s Presidential Inaugural Committee, arguing that its plan to provide an equal number of portable toilets for men and women expected to attend the inauguration would in effect be unequal, since women take longer to use restrooms. See Emily Cahn, *Law Professor Threatens Lawsuit over Inauguration Toilets*, GW HATCHET (Jan. 15, 2009), <http://www.gwhatchet.com/2009/01/15/law-professor-threatens-lawsuit-over-inauguration-toilets/>.

<sup>242</sup> Case, *Why Not Abolish*, *supra* note 181, at 212.

this is how things have always been. Neither response is satisfying. As Erving Goffman observed in his discussion of the practice, just a generation ago, of placing boys and girls in separate lines after recess:

As in the case of the parallel organization which occurs with respect to other binary social divisions — white/black, adult/child, officer/enlisted man, etc. — parallel organization based on sex provides a ready base for the elaboration of differential treatment, these adumbrative elaborations to be seen as consonant and suitable given the claimed difference in character between the two categories. Thus, to revert to the simple example, once children are made to form sex-segregated files, it is a simple matter to rule that the female file enters before the male file, presumably because the “gentler” sex should be given preference in the matter of getting out of the raw outdoors first, and both sexes should be given little lessons on proper regard for gender.<sup>243</sup>

This is only one of several counter-arguments. If restrooms are where business — and here I mean real business — gets conducted, with men discussing work and making gentlemen’s agreements, then segregated restrooms have the effect of perpetuating hierarchies of power and access along gendered lines, much in the same way that all-male eating clubs and country clubs did.<sup>244</sup> But more than this, as a matter of government policy and law, can gender really be irrelevant when we insist, with each swing of the door, on its salience? It is easy to imagine restrooms that are gender neutral, with private stalls and a common area for hand-washing and hand-wringing, mirror gazing and mirror avoidance, and doing real business.<sup>245</sup> Indeed, there is a growing trend for gender-neutral restrooms on college and university campuses.<sup>246</sup> If

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<sup>243</sup> Goffman, *supra* note 229, at 306.

<sup>244</sup> Cohen, *Keeping Men “Men,” supra* note 238, at 543; Kelly Levy, Note, *Equal, But Still Separate?: The Constitutional Debate of Sex-Segregated Public Restrooms in the Twenty-First Century*, 32 WOMEN’S RTS. L. REP. 248, 264-65 (2011); see also Michael M. Burns, *The Exclusion of Women from Influential Men’s Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 HARV. C.R.-C.L. L. REV. 321, 325-34 (1983).

<sup>245</sup> Such a gender-neutral restroom was often a focal point of the popular late 1990s TV show *Ally McBeal*, set in a law firm. For a compilation of clips, see Foxabulous, *Ally McBeal and the Unisex Bathroom*, YOUTUBE (Oct. 12, 2009), <http://www.youtube.com/watch?v=AYUavFaQwEw>. One may think as well of the liberatory aspect on the 1990s television show *My So Called Life*, in which the openly gay character Rickie Vasquez was always welcome in the girls’ room. For a discussion of this aspect of the show, see Caitlin, *Policing Gender: Gender-Segregated Restrooms*, FEMINIST LEGAL THEORY BLOG (Nov. 9, 2011, 1:56 PM), <http://femlegaltheory.blogspot.com/2011/11/policing-gender-gender-segregated.html>.

<sup>246</sup> See Christine Lagorio, *If You Go . . .*, N.Y. TIMES, Apr. 18, 2010, at ED4.

the message conveyed by this vision of gender-neutral restrooms is equality-enhancing, then what message is communicated by restrooms that insist on gender difference? Is it not more likely, as Mary Anne Case has speculated, that “somewhat perversely,” the opponents to the equal rights for women were right about this one thing: that “the achievement of equal rights for women may entail an end to sex segregation in the public toilet”?<sup>247</sup> And if that is true, then Ian Ayres is right when he asserts that it is time to cross the gender line in restrooms.<sup>248</sup> As Ayres puts it: “It actually furthers civil rights. It’s refusing to accept separate but equal — particularly when it serves no purpose.”<sup>249</sup>

One final note before I turn to a related observation. One of the most popular “feminist” books during the heady 1970s, when the women’s movement thought true equality might be obtainable, was Marilyn French’s *The Women’s Room*.<sup>250</sup> The book cover made the title even more interesting, since it depicted a sign reading “The Ladies Room,” but with the word “Ladies” scratched out and replaced, in lipstick no less, with the word “Women’s”: “The Women’s Room.”<sup>251</sup> But scratching out Ladies and replacing it with Women is still substituting one gendered description for another. It is still doing gender.<sup>252</sup>

All of this brings me back to gender and the Fourth Amendment. Although I have used this Part to focus on gender-segregated restrooms, it is because gender-segregated restrooms seem to inform, and indeed give license to, government policy and judicial preferences for gender-sameness in Fourth Amendment searches. Or to put it more bluntly, one seems to follow the other. Gender-segregated restrooms, and gender-segregated Fourth Amendment searches, are after all predicated on many of the same arguments, and lead to the same results. We are marking gender as a distinction with significance. We are saying that gender matters beyond biological differences, and that it should matter.

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<sup>247</sup> Case, *Why Not Abolish*, *supra* note 181, at 225.

<sup>248</sup> Ian Ayres, *Looking Out for No. 2: A Modest Proposal for Single-Use Toilets*, SLATE (Mar. 7, 2005, 5:01 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2005/03/looking\\_out\\_for\\_no\\_2.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2005/03/looking_out_for_no_2.html).

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

<sup>250</sup> See generally MARILYN FRENCH, *THE WOMEN’S ROOM* (1977) (a novel following the feminist awakening of a young woman living in the 1950s).

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

<sup>252</sup> Although he touches only briefly on restrooms, David Cruz makes a similar argument about the role the government plays in underwriting and perpetuating gender difference. Ultimately, he argues for the government to disestablish itself from sex and gender distinctions, much in the way that the government disestablishes itself, at least nominally, from religion. In short, the government should have a “respectful indifference to sex difference.” See Cruz, *supra* note 142, at 1009.



In short, we are imbuing biological difference with meaning.<sup>253</sup> And for those of us who care about true gender equality, that meaning should be very troubling.

#### IV. RACE MATTERS

All of this leads me to ask: Would we condone government policies that favored same-race bodily searches? Can we imagine Fourth Amendment reasonableness determinations that considered whether the person being physically searched and the person conducting the search were of the same race?<sup>254</sup> While the likely response is a ready “no” — because such favoring would offend the Equal Protection Clause and would offend our notions of the type of society in which we want to live<sup>255</sup> — the reality is far more complex. It is complex because, to a large extent, we do in fact accede to individual race-based preferences. And it is complex because our history of racial segregation has always been intertwined with, and inseparable from, sex segregation.

Notwithstanding official pronouncements that we are a post-racial society, or at least aspire to be one, we in fact permit individuals to discriminate along lines of race in their personal lives. Thus, as Elizabeth Emens reminds us,<sup>256</sup> we are now officially nonpartisan when it comes to

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<sup>253</sup> It recalls Camille Paglia’s risible assertion that “[m]ale urination really is a kind of an accomplishment, an arc of transcend[e]nce. A woman merely waters the ground she stands on.” CAMILLE PAGLIA, *SEXUAL PERSONAE: ART AND DECADENCE FROM NEFERTITI TO EMILY DICKINSON* 21 (1990). Paglia also claims that if civilization had been left in women’s hands, “we would still be living in grass huts.” *Id.* at 38.

<sup>254</sup> What “race” would even mean under such a regime is questionable, especially since race, as a matter of biology, has little if any inherent meaning. Rather, race is largely a social construct. See, e.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 55 (2d ed. 1994) (describing racial formation as the “sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed”); Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (“Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.”); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 774 (1994) (“[R]ace’ is neither a natural fact simply there in ‘reality,’ nor a wrong idea, eradicable by an act of will.”). But even this social construct can present difficulties. Would the golfer Tiger Woods, the singer Mariah Carey, or the reporter Soledad O’Brien, each of whom is mixed raced, be searched by someone black, or white, or another mixed raced individual, and would the particular admixture matter?

<sup>255</sup> Such a regime would also be problematic insofar as it reifies race, a problem I discuss elsewhere. See Capers, *Rethinking the Fourth Amendment*, *supra* note 22, at 22–23.

<sup>256</sup> Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1308 (2009); see also Russell K. Robinson, *Structural*

individual racial preferences in whom to date or marry or engage in sexual intimacies with.<sup>257</sup> Even in less intimate areas, we tend to tolerate some racial preferences and racial discrimination. For example, although we prohibit racial discrimination in employment and housing, we expressly exclude from that prohibition employers with fewer than fifteen employees,<sup>258</sup> and individual homeowners and landlords.<sup>259</sup>

While these examples are familiar to many, there is another, less familiar example which has particular relevance to the issue of same-race/same-gender bodily searches, since it too involves physical contact: which health care professionals we allow to treat us.

Consider a recent incident from 2013. Tonya Battle, a neonatal nurse with twenty-five years' experience, filed a lawsuit against the Michigan hospital where she worked after discovering a note on an assignment clipboard that read, "No African-American nurse to take care of baby."<sup>260</sup> In fact, a hospital supervisor who was acceding to the request of the white father, who preferred that no blacks handle his newborn, wrote the note.<sup>261</sup> Although the case, which the hospital quickly settled, generated significant media attention,<sup>262</sup> the father's request and the

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*Dimensions of Romantic Preferences*, 76 *FORDHAM L. REV.* 2787, 2787-88, 2793 (2008) (arguing that many racial preferences "rest on nothing more substantial or legitimate than rank stereotyping"); cf. Katie Eyer, *Constitutional Colorblindness and the Family*, 162 *U. PA. L. REV.* 537 (2014) (comparing the Supreme Court's stringent standards for using race in affirmative action cases to less stringent standards applied by lower courts for considering race in resolving family law disputes).

<sup>257</sup> At least this is the case officially. As I have examined in some of my previous work, unofficially, we continue to police interracial sexual intimacy in ways large and small. See, e.g., Capers, *The Trial of Bigger Thomas*, *supra* note 17 (discussing cases that influenced RICHARD WRIGHT, *NATIVE SON* (1940), which racialized and sexualized black defendants and was the first African American-authored novel to be selected for the Book-of-the-Month Club); Capers, *The Unintentional Rapist*, *supra* note 17 (examining the "sexualization of race and racialization of rape").

<sup>258</sup> See 42 U.S.C. § 2000e(b) (2013) (defining covered employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person").

<sup>259</sup> See *id.* § 3603(b)(1) (2013) (excluding from the Fair Housing Act bona fide private individual owners selling or renting three or fewer units).

<sup>260</sup> Jeff Karoub, *Some Patients Won't See Nurses of a Different Race*, ASSOCIATED PRESS (Feb. 22, 2013, 8:00 PM), [http://www.apnewsarchive.com/2013/Some\\_patients\\_won%27t\\_see\\_nurses\\_of\\_different\\_race/id-062fe21c417b4da98986901ce7be8c3f](http://www.apnewsarchive.com/2013/Some_patients_won%27t_see_nurses_of_different_race/id-062fe21c417b4da98986901ce7be8c3f).

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

<sup>262</sup> The story received attention in several media outlets, including CNN, USA Today, Huffington Post, and NPR. See Ben Brumfield, *Lawsuit: Race-Based Request Sidelined Michigan Nurse*, CNN (Feb. 17, 2013, 3:00 PM), <http://www.cnn.com/2013/02/16/us/michigan-hospital-discrimination>; Robin Erb, *Hospital Settles Nurse's Discrimination Suit*, USA TODAY (Feb. 22, 2013, 10:45 PM), <http://www.usatoday.com/story/news/nation/>

hospital's response were far from unusual. As Kimani Paul-Emile has observed based on her review of several studies, such discrimination occurs "quite frequently, and healthcare providers actively and routinely facilitate it."<sup>263</sup> In ways small and large, we quietly permit some racial preferences.

The question of whether we could imagine a regime that favored same-race bodily searches — much in the way that we favor same-gender searches for airport passengers, for arrestees and prisoners, and for students — is also complicated by the fact that our history of racial segregation has always been undergirded by a concern about cross-sex commingling. The "separate but equal" doctrine that enabled de jure racial segregation of public schools — the practice of which was famously ruled violative of the Equal Protection Clause in *Brown v. Board of Education*<sup>264</sup> — was predicated not only on the notion that the races should be kept separate, but also on the specific fear of sexual intimacy between white women and black men.<sup>265</sup> Nor was the concern merely social. Laws punished interracial cohabitation more severely than intraracial cohabitation,<sup>266</sup> and expressly prohibited interracial marriage.<sup>267</sup>

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2013/02/22/hospital-settles-discrimination-suit/1940575/; Sara Gates, *Tonya Battle, African American Nurse, Sues Michigan Hospital for Racial Discrimination*, HUFFINGTON POST (Feb. 16, 2013, 4:51 PM), [http://www.huffingtonpost.com/2013/02/16/tonya-battle-hurley-medical-center-race-discrimination\\_n\\_2702373.html](http://www.huffingtonpost.com/2013/02/16/tonya-battle-hurley-medical-center-race-discrimination_n_2702373.html).

<sup>263</sup> Kimani Paul-Emile, *Patients' Racial Preferences and the Medical Culture of Accommodation*, 60 UCLA L. REV. 462, 465 (2012). The sitcom *All in the Family* even made a laugh line out of this preference. Asked why it is so hard for black students to become doctors, Archie Bunker responds, "Because nobody wants to see a black guy coming at them with a knife." See Matt Zoller Seitz, *Why "All in the Family" Still Matters*, SALON (Jan. 12, 2011, 3:01 PM), [http://www.salon.com/2011/01/12/all\\_in\\_the\\_family/](http://www.salon.com/2011/01/12/all_in_the_family/).

<sup>264</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>265</sup> For a discussion of this dynamic, see I. Bennett Capers, *The Crime of Loving: Loving, Lawrence, and Beyond*, in *LOVING v. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE* 114, 121-24 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012). See also Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 192-96 (2006).

<sup>266</sup> See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964) (invalidating the conviction, on equal protection grounds, of interracial couple convicted under Florida's adultery and lewd cohabitation laws where the law imposed harsher punishments on interracial couples). A century earlier, the Court upheld a similar law from Alabama. See *Pace v. Alabama*, 106 U.S. 583, 585 (1882), *overruled in part by McLaughlin*, 379 U.S. at 188 ("In our view . . . Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.").

<sup>267</sup> At one time, as many as thirty states banned interracial marriage. See RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 17 (2001). In 1967, when the Court invalidated anti-miscegenation statutes as violative of equal protection and due process, sixteen states had such statutes. See *Loving v. Virginia*, 388

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Our history of sex-dependent racial segregation is not limited to the well-known education and sexual intimacy cases. Two other histories are equally revealing: our history of sex and race segregated rail cars, and our history of sex and race segregated public pools.

For many, the mention of segregated rail cars will bring to mind the racial segregation challenged in *Plessy v. Ferguson*,<sup>268</sup> in which the Court ruled that Louisiana's separate-coach law did not violate the Thirteenth or Fourteenth Amendment, and ushered in the "separate but equal" doctrine. In fact, the history of segregated rail travel in the United States began not with racial segregation, the type *Plessy* challenged in 1896, but with gender segregation. As early as the 1840s, rail cars, which were divided into parlor cars for "ladies" and smoking cars for "gentlemen."<sup>269</sup> The historian Barbara Young Welke describes the difference this way:

Based on the assumption that a railroad car for ladies should match the comfort and safety of a lady's parlor, a ladies' car might be equipped with a comfortable sofa or at the least seats covered with "plush." Ladies' cars often included an ice-water dispenser and, more important, had two water closets, one at each end of the car, so that women did not have to choose between waiting or suffering the embarrassment and sexual suggestion of using the same water closet as men riding in the car.<sup>270</sup>

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U.S. 1, 6, 11 (1967).

<sup>268</sup> *Plessy v. Ferguson*, 163 U.S. 537, 541-42 (1896), *overruled by Brown*, 347 U.S. 483.

<sup>269</sup> BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920*, at 254 (2001). Gender segregation was the result of custom, and not legally required. *Id.* at 327. Nonetheless, it often received a judicial stamp of approval. A Wisconsin Supreme Court opinion illustrates this approval:

The use of railroads for the common carriage of passengers has not only vastly increased travel generally, but has also specially led women to travel without male companions. To such, the protection which is a natural instinct of manhood towards their sex, is specially due by common carriers. And, in view of the crowds of men of all sorts and conditions and habits constantly traveling by railroad, it appears to us to be not only a reasonable regulation, but almost if not quite a humane duty, for railroad companies to appropriate a car of each passenger train primarily for women and men accompanying them; from which men unaccompanied by women should be excluded . . . so as to group women of good character on the train together, sheltered as far as practicable from annoyance and insult. It is a severe comment on our civilization that such a regulation should be necessary, but the necessity is patent to all experience and intelligence.

*Bass v. Chi. & Nw. Ry. Co.*, 36 Wis. 450, 460 (1874) (citation omitted).

<sup>270</sup> WELKE, *supra* note 269, at 254.

By contrast, the smoking car was the:

[E]quivalent to the tavern or the men's club. . . . The appointments — wooden seats at most covered with leather, broadcloth, or cane; bare floors; and spittoons — embodied the assumption of male ruggedness.<sup>271</sup>

In short, gender segregation took center stage; racial segregation, to the extent it made an appearance at all — usually in the form of slaves or servants traveling with their masters or mistresses — was an afterthought.<sup>272</sup> The racial dynamics necessarily changed after the Civil War, first with Southern states passing “Black Codes” in an attempt to circumscribe the Thirteenth Amendment, and then with passage of the Fourteenth Amendment, as well as the Civil Rights Acts of 1866 and 1875. Although there was little consistency<sup>273</sup> — railroads were privately owned, mostly intrastate, and regulated only by common law — in general, railroads began to limit black men and women to the smoking car. Sometimes, rail carriers partitioned the smoking car so that black men and women would be separate from white men, and other times was not. The widespread passage of Jim Crow laws further solidified segregation along race lines, with some railroads even adding “emigrant cars” to keep newly arrived Irish, Italians and other immigrants separate from “first class” travel.<sup>274</sup> By 1901, there was not a state in the South that did not require that black and white passengers be separated on railroads.<sup>275</sup>

Although there is more, much more, to this history than can be adequately covered here, two things stand out. One, that the naturalness of gender segregation was often used to defend the naturalness of racial segregation. And two, that what was crucial to racial segregation, from its inception, was inseparable from gender segregation.

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<sup>271</sup> *Id.* at 255.

<sup>272</sup> Welke notes that the status was sufficiently clear prior to the Civil War that whites tolerated some flexibility in access. *See id.* at 255-56 (“In the South before the Civil War, formal separation was less important; slavery cast its shadow over all blacks. In rail travel, slaves accompanied their masters and mistresses.”). These clear lines also permitted flexibility when it came to some middle-class free blacks. *See id.* at 256 (“A select few among free blacks North and South — because of lightness of skin, lack of ‘negro features,’ wealth, and culture — were allowed to enjoy some of the privileges of first-class ladies’ and gentlemen’s accommodations.”).

<sup>273</sup> A conductor of one train might permit a black woman to ride in the ladies’ parlor, while a conductor on the next train on the same line might refuse. *Id.* at 261.

<sup>274</sup> *Id.* at 265.

<sup>275</sup> *Id.* at 348.

*West Chester and Philadelphia Railroad Co. v. Miles*,<sup>276</sup> a decision of the Pennsylvania Supreme Court, is one of several cases that relied on the gender segregation analogy. The question, the court wrote, “is, whether a public carrier may, in the exercise of his private right of property, and in the due performance of his public duty, separate passengers by any other well-defined characteristic than that of sex.”<sup>277</sup> The court concluded that since segregation by gender was acceptable, segregation by race was acceptable too.<sup>278</sup> *Hall v. DeCuir*,<sup>279</sup> a case before the Supreme Court, involved a similar argument:

Passengers on steamboats are not huddled together, male and female, in the same apartments[;] *separation on the basis of sex is a requirement of common decency*. . . . No one pretends . . . that this uniform separation violates the law of equality; nor can it be tortured into an assertion of the superiority of one sex or the other. . . . A male passenger, basing his right on the laws of the United States, might have complained that he was not allowed a stateroom in the ladies’ cabin, with as much force and propriety as a colored passenger could have complained that he was furnished apartments and accommodations not inferior to, but different in locality, from those furnished to white passengers.<sup>280</sup>

*Miles* also points to the second observation: that gender segregation and race segregation worked in tandem. In language that early anti-miscegenation cases repeated, the court noted that God had separated the races on the globe for a reason, and that “all social organizations which lead to their amalgamation are repugnant to the law of nature.”<sup>281</sup> The concern was not primarily with white men “amalgamating” with black women; after all, in the period between the end of the Civil War and the widespread adoption of Jim Crow laws, it was common to assign black women and black men to the smoking car where white men were present.<sup>282</sup> Rather, the concern was with black men “amalgamating” with white women. The concern was so acute that

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<sup>276</sup> *West Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209 (1867).

<sup>277</sup> *Id.* at 211.

<sup>278</sup> *Id.*

<sup>279</sup> *Hall v. DeCuir*, 95 U.S. 485, 488 (1878) (holding that a Louisiana law that sought to *prohibit* racial discrimination on its railroads was unconstitutional because it infringed upon Congress’s power to regulate commerce).

<sup>280</sup> WELKE, *supra* note 269, at 328 (emphasis added) (internal quotation marks omitted).

<sup>281</sup> *Miles*, 55 Pa. at 213.

<sup>282</sup> WELKE, *supra* note 269, at 260-61. Indeed, black women were left unprotected from white and black men by these arrangements. *Id.* at 284-85.

white women often brought suits against railroads for allowing black men in their proximity. The language of one plaintiff was rather typical: “I was rendered nervous and apprehensive by the presence of a negro man, as any Southern lady would be.”<sup>283</sup>

Our history of segregated public pools tells a similar story. As the historian Jeff Wiltse details in his book *Contested Waters: A Social History of Swimming Pools in America*, public swimming pools, which were popular in the North in the beginning in the late 1800s, initially functioned as public baths.<sup>284</sup> Blacks, recent immigrants, and white laborers swam and bathed together; men and women, however, used the pools on separate days.<sup>285</sup> In other words, gender and class, not race, separated municipal pools.<sup>286</sup> All of this changed around the 1920s, when the social division shifted from gender to race. It was one thing to permit blacks and whites to enjoy the same pool when they were segregated by gender. It was another thing entirely when pools began to allow men and women to swim together. The rise in gender-integrated pools directly led to the decline of race-integrated pools,<sup>287</sup> with whites in some cases “quite literally beat[ing] blacks out of the water at gender-integrated pools because they would not permit black men to interact with white women at such intimate public spaces.”<sup>288</sup> This de jure racial segregation persisted until the 1950s, when federal courts began to invalidate laws and regulations that segregated pools along racial lines.<sup>289</sup> This is not to say that segregation ended, but rather that de facto segregation replaced de jure segregation in many areas, especially as many whites moved to the suburbs and installed private backyard pools.<sup>290</sup>

I began this Part by asking why it is that we allow gender-based preferences to dictate policy and factor into Fourth Amendment

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<sup>283</sup> *Id.* at 316.

<sup>284</sup> JEFF WILTSE, *CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA* 8-10 (2007).

<sup>285</sup> *Id.* at 1, 48.

<sup>286</sup> Wiltse observes that Northerners’ use of municipal pools throughout the Progressive Era reinforced class and gender divisions but not racial distinctions. Cities strictly segregated pools along gender lines. By contrast, black and working-class whites commonly swam together. *Id.* at 48.

<sup>287</sup> *Id.* at 85. It is perhaps not a coincidence that Fairground Park Pool in St. Louis, Missouri was both the first sex-integrated pool and the first pool to segregate blacks. *Id.* at 82-85.

<sup>288</sup> *Id.* at 4.

<sup>289</sup> *Cf. Palmer v. Thompson*, 403 U.S. 217, 219 (1971) (discussing desegregation of public school facilities).

<sup>290</sup> WILTSE, *supra* note 284, at 183-85.

reasonableness determinations, but disallow race-based preferences. One answer is that we should not allow either. But what our history of gender segregation and race segregation suggests is that the answer is more complex, especially since the two segregations have often worked in tandem. This history suggests something else too. It suggests that maybe the initial question — why do we allow gender-based preferences and disallow race-based preferences to inform the Fourth Amendment — is flawed in its premises.

Consider again the most common Fourth Amendment areas where gender matters: stop and frisks, searches incident to arrest, school searches, jails and prisons, and airport security. While government policy and judicial decisions interpreting the Fourth Amendment favor same-gender searches in all of these areas, in some areas this same-gender preference can be categorized as strong; in other areas it can be categorized as weak. In fact, we are most insistent about prohibiting cross-gender searches when it comes to airport searches conducted by the TSA,<sup>291</sup> and we are least insistent in the prison context.<sup>292</sup> It is quite possible that this is because we say prisoners, as breakers of the law, are entitled to less protection than non-prisoners. We certainly say that they are entitled to fewer, if any, privacy rights.<sup>293</sup> Or as Amy Kapczynski posits, it may be that prisoners' bodies "are seen as less sacrosanct."<sup>294</sup> It may also explain why, on the continuum of cross-gender searches, stop and frisks fall somewhere in the middle. Although those subject to stop and frisks have not necessarily done anything wrong, in theory at least they have done something to justify an officer's reasonable suspicion that they have engaged in criminal activity and may be armed. Hence, courts and policy makers, though favoring same-gender searches, permit cross-gender *Terry* frisks. Lastly, this notion of a scale of criminality, with convicted felons at one end and stop-and-frisk suspects in the middle, may also explain the exacting preference we give to same-gender searches in the airport security context, where the TSA explicitly prohibits cross-gender screening.<sup>295</sup> We imagine the airline

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<sup>291</sup> See *supra* notes 104–11 and accompanying text.

<sup>292</sup> See *infra* notes 301–02 and accompanying text.

<sup>293</sup> See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984) (holding that prisoners lose all reasonable expectations of privacy by virtue of incarceration); *Bell v. Wolfish*, 441 U.S. 520, 557 (1979) (“[G]iven the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope.”).

<sup>294</sup> Kapczynski, *supra* note 119, at 1273.

<sup>295</sup> See *Pat-Downs: What to Know Before You Go*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/traveler-information/pat-downs> (last updated July 16, 2014).



passenger as the prototypical good citizen, entitled to full protection. For the airline passenger randomly singled out for a pat down, we insist on a screener of the same sex; of the individual stopped and frisked by a police officer, we assume she might be engaged in criminal activity, so she receives a little less protection; of the convicted felon, who has been judicially marked as bad, we give the least protection.

This is one way to understand the range of our judicial and policy preference for same-gender searches, from strong to weak. But it is not the only way.<sup>296</sup> I want to offer another, more troubling explanation, one that calls into question the assumption that we tolerate preferences that are gender-based, but not those that are race-based. Consider, once again, the area of Fourth Amendment protection where we have the strongest preference for same-gender searches (airport security) and the area where we extend the least protection (prisons). Now consider how those areas map onto our preconceptions and implicit biases about race.<sup>297</sup> In the public imagination, we prefigure the typical prisoner, regardless of sex, as black or Hispanic; and prefigure prison guards as white.<sup>298</sup> The situation is reversed when it comes to airline travel. We imagine the typical airline passenger, regardless of sex, as white, and imagine the typical TSA employee as a person of color.<sup>299</sup> Is it possible

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<sup>296</sup> For example, it may be that we have the strongest aversion to cross-gender searches in the TSA context and the weakest aversion in the prison context for a practical reason: that given the gender demographics of staff in the respective areas, same-gender searches are relatively easy to accommodate in the TSA context and less so in the prison context.

<sup>297</sup> On the prevalence of implicit biases about race, see Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506-14 (2005); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2035-56 (2011).

<sup>298</sup> More than 60% of inmates incarcerated in state and federal prisons are racial and ethnic minorities. *Racial Disparity*, SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=122>. (last visited Oct. 12, 2014, 4:01 PM). By contrast, correction officers tend to be whites. See Melvina Sumter, *The Correctional Work Force Faces Challenges in the 21st Century*, CORRECTIONS TODAY, Aug. 2008, at 100, available at [https://www.aca.org/research/pdf/ResearchNotes\\_Aug08.pdf](https://www.aca.org/research/pdf/ResearchNotes_Aug08.pdf) (based on data from the American Correctional Association, the “typical correctional employee is a white, non-Hispanic, moderately educated male who is in his mid-30s”). There is even the familiar joke: What do you call one white guy with five black guys? “Coach.” What do you call one white guy with 100 black guys? “Warden.”

<sup>299</sup> According to one study, domestic airline passengers are overwhelmingly white. Among the various carriers examined, Delta Airlines had the largest percentage of black passengers at 9%. See Jamie Peltier, *Delta Research: Demographics* (Dec. 10, 2011), <http://www.tc.umn.edu/~pelti044/Delta%20Demographics.pdf>. In terms of TSA employees, over 40% are minorities, with blacks and Hispanics making up more than a

that race partially explains why we have the strongest preference for same-gender searches in the context of airline travel, and the weakest preference in the context of jails and prisons? In other words, is it possible we are comfortable with whites searching people of color, but less comfortable with people of color searching whites? Allow me to further complicate the question by reinserting gender and sex. Is it possible that part of our strong preference for same-gender pat downs in the TSA context is the concern that, to allow otherwise would result in black and brown male TSA screeners touching white women?<sup>300</sup> Is it possible that part of our general indifference in the prison context is traceable to our lack of discomfort when the situation is reversed, and we imagine white correction officers touching black and Hispanic women,<sup>301</sup> whom we already view as hypersexual, and indeed “unrapeable”?<sup>302</sup>

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third of the workforce, a percentage far in excess of their representation in the civilian workforce. See U.S. OFFICE OF PERS. MGMT., DATA, ANALYSIS AND DOCUMENTATION: FEDERAL EMPLOYMENT REPORTS, TABLE 1 — RACE/NAT'L ORIGIN DISTRIBUTION OF FEDERAL CIVILIAN EMPLOYMENT: EXECUTIVE BRANCH AGENCIES, WORLDWIDE, SEPTEMBER 30, 2006 (2006), available at <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/demographics/2006/table1mw.pdf>.

<sup>300</sup> On the continued discomfort many Americans have with this particular dyad, see ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY 121-55 (2013).

<sup>301</sup> Indeed, there is a long history of white access, both visually and physically, to black female bodies; from the access white men had to black women during American slavery, to the circus-like traveling display throughout Europe of Sarah Bartmann (an African woman with a large posterior who was called the “Hottentot Venus”), to the inspection of racially ambiguous women during race trials, to pop star Miley Cyrus’s slapping the particularly rotund buttocks of a black woman during her performance at the MTV Video Music Awards. On the access to black women during slavery, see Adrienne Davis, “Don’t Let Nobody Bother Yo’ Principle”: *The Sexual Economy of American Slavery*, in *SISTER CIRCLE: BLACK WOMEN AND WORK* 103, 105-21 (Sharon Harley & The Black Women and Work Collective eds., 2002). On the inspection of racially ambiguous women in court, see ONWUACHI-WILLIG, *supra* note 300, at 13-14. On the “Hottentot Venus,” see Sander L. Gilman, *Black Bodies, White Bodies: Toward an Iconography of Female Sexuality in Late Nineteenth-Century Art, Medicine, and Literature*, in “RACE,” WRITING, AND DIFFERENCE 223, 225-48 (Henry Louis Gates ed., 1986). On Miley Cyrus’s performance, see Jacob Bernstein, *The Pro-Miley Backlash*, N.Y. TIMES, Oct. 3, 2013, at E1; and Tressie McMillan Cottom, *Brown Body, White Wonderland*, SLATE (Aug. 29, 2013, 8:04 AM), [http://www.slate.com/articles/double\\_x/doublex/2013/08/miley\\_cyrus\\_vma\\_performance\\_white\\_appropriation\\_of\\_black\\_bodies.html](http://www.slate.com/articles/double_x/doublex/2013/08/miley_cyrus_vma_performance_white_appropriation_of_black_bodies.html).

<sup>302</sup> For more on how women of color are often assumed to be hypersexual, see Capers, *Real Women, Real Rape*, *supra* note 14, at 866; Crenshaw, *supra* note 45, at 1266-69; and Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598-99 (1990). See generally MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* (2011) (discussing persistent stereotypes that black women encounter in present-day America).

While these questions may be difficult to answer, what I am certain of is this: they are worth asking, especially for those of us committed not just to gender equality, but to racial equality as well.

V. UNSEXING THE FOURTH AMENDMENT

[U]nsex me.

— Lady Macbeth<sup>303</sup>

Some years ago, in *Johnson v. Phelan*,<sup>304</sup> two jurists took opposing sides on the issue of whether a male inmate's rights were violated where female guards were assigned to monitor male prisoners' movements and could "see men naked in their cells, the shower, and the toilet."<sup>305</sup> For his part, Judge Richard Posner viewed cross-gender surveillance as a threat to tradition, and even to "civilized" society:

There are radical feminists who regard "sex" as a social construction and the very concept of "the opposite sex," implying as it does the dichotomization of the "sexes" (the "genders," as we are being taught to say), as a sign of patriarchy. For these feminists the surveillance of naked male prisoners by female guards and naked female prisoners by male guards are way stations on the road to sexual equality. If prisoners have no rights, the reconceptualization of the prison as a site of progressive social engineering should give us no qualms. Animals have no rights to wear clothing. Why prisoners, if they are no better than animals? There is no answer, if the premise is accepted. But it should be rejected, and if it is rejected, and the duty of a society that would like to think of itself as civilized to treat its prisoners humanely therefore acknowledged, then I think that the interest of a prisoner in being free from unnecessary cross-sex surveillance has priority over the unisex bathroom movement and requires us to reverse the judgment of the district court throwing out this lawsuit.<sup>306</sup>

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<sup>303</sup> WILLIAM SHAKESPEARE, *MACBETH* act 1, sc. 5 (Burton Raffel ed., Yale University Press ed. 2005).

<sup>304</sup> *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995).

<sup>305</sup> *Id.* at 145. Though the court decided the case on Eighth Amendment grounds, their arguments are informative. For an insightful discussion of the exchange and Judge Posner's opinion in particular, see Mary Anne Case, *All the World's the Men's Room*, 74 U. CHI. L. REV. 1655, 1657 (2007).

<sup>306</sup> *Johnson*, 69 F.3d at 151-52 (Posner, J., concurring and dissenting).

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Judge Easterbrook, writing for the majority, disagreed:

Physicians and nurses of one sex routinely examine the other. In exotic places such as California people regularly sit in saunas and hot tubs with unclathed strangers. . . . [T]he Constitution does not require prison managers to respect the social conventions of free society. . . . More to the point, the clash between modesty and equal employment opportunities has been played out in sports. Women reporters routinely enter locker rooms after games. How could an imposition that male athletes tolerate be deemed cruel and unusual punishment?<sup>307</sup>

It should come as no surprise that I think Judge Easterbrook is closer to the truth. There is something old-fashioned and prudish in Judge Posner's suggestion that the sexes should be kept separate, and that for a woman to see a man in the nude is inhumane, or at least in his suggestion that it is social engineering for the law to trump these concerns to further some goal of equality. Indeed, his argument recalls earlier arguments used to justify racial segregation and distinctions.<sup>308</sup> Not only is tradition alone insufficient to justify disparate treatment. Given its history, tradition is ground for viewing disparate treatment with special scrutiny.

One of the goals of this Article has been to unmoor the Fourth Amendment from tradition by putting forth an argument *against*. I have argued that while there may be "benefits" associated with government policies and Fourth Amendment reasonableness determinations that favor same-gender searches — for example, compliance with societal norms — there are great costs, including the entrenchment of those norms. Such policies and judicial decisions entrench stereotypes about men as sexual aggressors and women as vulnerable victims; they erase, indeed closet, sexual difference; and they are racially inflected. Perhaps most importantly, they undermine our anti-discrimination principles, functioning as a barrier to our goal of gender indifference. If the true objective is gender parity, gender equality, and gender indifference, then having official policies and judicial decisions predicated on

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<sup>307</sup> *Id.* at 148 (majority opinion).

<sup>308</sup> See WOODWARD, *supra* note 213, at 69-74.

traditional notions about gender modesty and privacy thwarts that goal.<sup>309</sup> It is that simple.<sup>310</sup>

That is part of my argument against blind adherence to gender-based assumptions in how we conduct searches. Another part is based on the Fourth Amendment. Quite simply, when we incorporate traditional notions of gender into our Fourth Amendment analysis, we diminish the Fourth Amendment. If the Fourth Amendment has an equality component — as I have argued,<sup>311</sup> as Yale Kamisar has argued,<sup>312</sup> as Akhil Amar has argued<sup>313</sup> — then it degrades the Fourth Amendment

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<sup>309</sup> Of course, some may still counter that gender and bodily searches are relatively inconsequential. But they are wrong. To borrow from Louise Antony:

[I]t is the ubiquity and banality of the linguistic and social practices . . . that accounts for their effectiveness in communicating the message that gender hierarchy is both natural and inevitable. Moreover, the insignificance of each particular custom considered on its own misleads as to the total effect of there being a system of gendered practices.

Antony, *supra* note 235, 3-4 (1998).

<sup>310</sup> When I have presented this argument at workshops, a few commentators have initially found it hard to imagine such a cultural shift from a norm of same-gender searches to a norm of gender-indifferent searches. However, one has only to think of how the norm of mid-wives (to preserve the modesty of women giving birth) shifted into a norm of male obstetricians (largely due the medicalization of childbirth and the exclusion of women from medical schools) to a norm now that is more gender neutral. At each point, there were likely many who found it hard to imagine a cultural shift, and yet a cultural shift indeed happened.

<sup>311</sup> Capers, *Rethinking the Fourth Amendment*, *supra* note 22, at 36-37.

<sup>312</sup> Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME* 1, 68-69 (A.E. Dick Howard ed., 1965).

<sup>313</sup> Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 808-09 (1994). Other scholars have similarly argued that equal protection concerns should inform Fourth Amendment analysis. *See, e.g.*, Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 193-94 (arguing courts should not bifurcate Equal Protection analysis from Fourth Amendment analysis); Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 STAN. L. REV. 987, 1037 (2014) (“[P]urposeful discrimination against protected classes is almost always constitutionally prohibited, but plenty of room for mischief (unconscious or otherwise) remains between the limits of the Fourth Amendment and equal protection . . .”); Carol S. Steiker, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 844 (1994) (arguing “the creation of professional police forces and the deeply rooted problem of racially discriminatory treatment of black citizens by the police constitute the kind of circumstances that call for new constructions of the Fourth Amendment”); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 961 (1999) (“[I]t is too soon to take the Fourth Amendment off the table as a source of relief for racially motivated searches and seizures.”).

to have it serve as the gatekeeper of old-fashioned ideas about gender difference in propriety.<sup>314</sup> That is wrong.

But while I have been vocal about framing an argument against traditional notions of gender, I also want to begin a conversation, not end one. The issues I raise deserve colloquy, not soliloquy. What is needed is a conversation in which we consider, honestly and without circumlocution, both the benefits of same-sex searches *and*, as I have argued above, their substantial costs. If the concern is that a government-endorsed preference for same-gender searches is at odds with our goal of gender equality and neutrality, then we should consider what alternatives exist that can address this concern. Might there be technologies, if not today,<sup>315</sup> then tomorrow,<sup>316</sup> that can accomplish the state's interest in engaging in bodily searches to maintain safety without raising the troubling issue of gender?<sup>317</sup> Just consider. The New York

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<sup>314</sup> This is not to suggest that the Fourth Amendment's emphasis on reasonableness is itself necessarily unreasonable. Rather, the argument I am making here is similar to the argument made by scholars such as Cynthia Lee in discussing the "reasonable person" in the context of criminal law defenses such as self-defense. The argument is that our conception of reasonableness, rather than being purely positive or descriptive, should have a normative component. See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 235-39 (2003).

<sup>315</sup> On the use of current technology in general, see David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 *TEMP. L. REV.* 1, 7-14 (1996). One such technology that may warrant further consideration and use is canine sniffs, which generally fall outside of the purview of the Fourth Amendment. See *Florida v. Jardines*, 133 S. Ct. 1409, 1417-18 (2013); *United States v. Place*, 462 U.S. 696, 697-98 (1983); Irus Braverman, *Passing the Sniff Test: Police Dogs as Surveillance Technology*, 61 *BUFF. L. REV.* 81, 89-90 (2013). The use of dogs, which can be trained to detect narcotics or explosives, would avoid many of the concerns raised in this Article about sexy searches.

<sup>316</sup> For example, for airport travel, might there be a next generation of millimeter-wave radar devices that can detect both metal and non-metal objects and preserve passengers' modesty? Other technologies that are currently under development through the National Institute of Justice include a hand-held battery-operated Weapons and Non-permitted Devices Detector ("WANDD"), which would obviate the need for any human contact. See *Detecting Items Hidden on a Person or Inside a Body*, NAT'L INST. OF JUSTICE (Aug. 29, 2012), <http://www.nij.gov/topics/technology/detection-surveillance/contraband-detection/person.htm>. For more on new search technologies in general, see NICHOLAS G. PAULTER, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NCJ-184432, *GUIDE TO THE TECHNOLOGIES OF CONCEALED WEAPON AND CONTRABAND IMAGING AND DETECTION* 33-50 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/184432.pdf>. As I have argued in a related context, our goal should be to use the Fourth Amendment to harness technology's full potential in a way that benefits communities and ensures privacy. See I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 *FORDHAM URB. L.J.* 959, 984-85 (2013).

<sup>317</sup> One might even imagine extending the world envisioned by Donna Haraway in her seminal feminist text *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE*,

City Police Department is currently working with the Defense Department to develop gun-scan technology capable of detecting concealed firearms from a distance.<sup>318</sup> Researchers at the University of Michigan are developing radar technology that schools can use to insure that students do not have weapons.<sup>319</sup> And private companies are developing software that uses cameras to read minute shifts in facial expressions, sensing whether a person may be lying about, for example, possessing a sharp object or some other weapon.<sup>320</sup> Each of these technologies has the potential to vastly reduce the number of bodily searches.

And where humans are necessary — the “laying of hands” that was the *bête noir* during oral argument in *Terry*<sup>321</sup> — what steps can we take to insure that the searches humans conduct — whatever their gender — are non-sexy searches? If some searches cross the line into inappropriate sexual searches, might it be more effective to focus on identifying and removing the *individuals* conducting those searches — “Pornstache” in *Orange is the New Black*; Matt Dillon in *Crash*; the trooper Kelly Helleson in Texas; those TSA employees whose hands linger a little too long; those correction officers who uses bodily searches as “ceremonies of degradation”<sup>322</sup> — rather than castigating

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a world in which post-gender, sexless cyborgs conduct bodily searches, and thus eliminate the risk of sexy searches entirely. See generally DONNA J. HARAWAY, *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* (1991).

<sup>318</sup> See Al Baker, *Police Device Aims to Take Guesswork Out of Detecting Guns*, N.Y. TIMES, Jan. 18, 2012, at A19; Rocco Parascandola, Larry McShane & Corky Siemaszko, *NO HANDS! NYPD Gizmo Detects Guns Frisk-Free*, N.Y. DAILY NEWS, Jan. 24, 2013, at NEWS 2. Indeed, such technology has the benefit of not only reducing sexy searches. It is also likely to reduce racial profiling resulting from implicit biases. It will also reduce the “targeting harm” that Sherry Colb has written so eloquently about, see Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1464 (1996), as well as Bill Stuntz’s stigmatic harm, see William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1273 (1999). In addition, since *Terry* stops permit a frisk for weapons but not for other contraband such as drugs, such technology can also curb unlawful frisks for drugs.

<sup>319</sup> Kelsey D. Atherton, *Researcher Says Radar Tech Could Detect Guns at School*, POPULAR SCI. (Mar. 25, 2013, 10:00 AM), <http://www.popsci.com/technology/article/2013-03/how-can-radar-help-school-safety>.

<sup>320</sup> PAUL K. DAVIS ET AL., RAND NAT’L DEF. RESEARCH INST., *USING BEHAVIORAL INDICATORS TO HELP DETECT POTENTIAL VIOLENT ACTS: A REVIEW OF THE SCIENCE BASE*, at xxvi-xxvii (2013), available at [http://www.rand.org/content/dam/rand/pubs/research\\_reports/RR200/RR215/RAND\\_RR215.sum.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR215/RAND_RR215.sum.pdf); Anne Eisenberg, *When Algorithms Grow Accustomed to Your Face*, N.Y. TIMES, Dec. 1, 2013, at BU3.

<sup>321</sup> Transcript of Oral Argument, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), available at [http://www.soc.umn.edu/~samaha/cases/terry\\_v\\_ohio\\_oral\\_arguments.htm](http://www.soc.umn.edu/~samaha/cases/terry_v_ohio_oral_arguments.htm).

<sup>322</sup> I borrow this phrase from Kaaryn Gustafson’s work. See Kaaryn Gustafson,

and stereotyping the entire gender to which they belong?<sup>323</sup> All of these questions are deserving of research, data, and yes, conversation. Maybe, just maybe, this conversation can be a starting point for both reducing the real risk that a search will be inappropriate, and reducing the number of bodily searches in toto.<sup>324</sup> Maybe, just maybe, we will conclude that in some circumstances, like that of middle school student accused of having ibuprofen, or marijuana, or indeed any drug, bodily searches are never appropriate.<sup>325</sup>

#### CONCLUSION

The first and more modest ambition of this Article has been to show that sexy searches, those searches that courts and other decision-makers assume run the risk of sexual impropriety, inform much of Fourth Amendment practice and jurisprudence, from *Terry* stop and frisks, to how we monitor prisoners, to which TSA employees search which passengers. The second and far grander ambition has been to make an

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*Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 UC IRVINE L. REV. 297, 300-02 (2013).

<sup>323</sup> It is likely focusing on individuals rather than groups will have other benefits as well. For example, studies of police brutality have shown that offenders do not have a normal distribution, but rather what statisticians refer to as a “power law” distribution: a few repeat offenders are in fact responsible for the bulk of offending conduct. Where that is the case, removing those officers can have trickle down effects, subtly changing the culture of officers more generally. For more on the “power law” distribution among police, see Malcolm Gladwell, *Million-Dollar Murray: Why Problems Like Homelessness May Be Easier to Solve than to Manage*, NEW YORKER, Feb. 13, 2006, at 98. On the importance of attending to police culture in order to address police misconduct, see Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 380-89 (2010); and Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 496-506 (2008).

<sup>324</sup> It is telling that Justice Scalia views such searches, even when conducted by someone of the same sex, as an indignity that warrants a higher degree of justification than what the Court currently permits. See *Minnesota v. Dickerson*, 508 U.S. 366, 379-83 (1993) (Scalia, J., concurring); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 680-87 (1989) (Scalia, J., dissenting).

<sup>325</sup> As Justice Stevens has put it, “It does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude.” *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 380 (2009) (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted). Redding herself, after hearing oral arguments in her case, had a suggestion worth repeating: Maybe we could try calling the student’s parents first. See Dahlia Lithwick, *Search Me: The Supreme Court is Neither Hot Nor Bothered by Strip Searches*, SLATE (Apr. 21, 2009, 7:49 PM), [http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2009/04/search\\_me.1.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2009/04/search_me.1.html).



argument against: to show how such preferences stereotype men and women, erase sexual difference, entrench and over-determine gender difference, and function as a type of state-imposed sexual discipline with troubling racial undertones. For too long, we have accepted without question gender-preferences in Fourth Amendment practice and jurisprudence. It is time, past time, to question them. The goal is not necessarily a world that is genderless, but certainly a world where gender matters less. I hope, too, that I have begun a broader conversation: that any discussion of sexy searches should question not just our preference for same-gender searches but also how we can instead design non-sexy searches. The discussion should also include how we can we reduce bodily searches more generally.