

# Identity

This final chapter examines a series of issues relating to identity and gender. The first involves the interrelationships of multiple identities. Do characteristics such as race, ethnicity, age, disability, or sexual orientation interact with gender in ways that simply amplify the experience of inequality, or do they sometimes transform that experience? What implications does the interaction of these characteristics have for law and policy?

A related issue is who speaks for “women’s” interests? To what extent do claims on behalf of a group marginalize some of its members? Do they presuppose as the background norm a white, middle-class, heterosexual woman? When Western feminists criticize cultural practices of other nations or religions that contribute to sexual inequality, are they being arrogant, or even “imperialist”?

Another issue of gender identity concerns masculinity. Most of this book is focused on the interests of women, but gender also constrains opportunities for men. What is masculinity and what attention does it demand? What’s in it for women to ask those questions?

The chapter also addresses fundamental issues involving the definition of male and female. Are these natural, biological (or “essential”) categories? Psychological? Social? Should a male-to-female transsexual be able to marry a male? A female? Is discrimination against transsexuals discrimination “because of sex”?

Finally, what does it mean to be “feminist”? Many women seem uncomfortable with the label, even as they accept its fundamental premise of sexual equality. Why? Is this a problem? Are we living in a “post-feminist” world? What does that mean?

Readings in the other chapters of this book tend to take for granted various identity assumptions—what a woman is, what sex is, and what it means that a law or practice is (or is not) in women’s interests. The identity issues raised in this chapter challenge some of these assumptions. In an important sense, much of the material in this chapter could be viewed as an application of insights of feminist theory to feminism itself. These analyses are, in other words, a form of self-critique. Do they go too far? Far enough?

## A. DIFFERENCES AMONG WOMEN AND THE PROBLEM OF INTERSECTIONALITY

The term “women” is used freely throughout the book. To what extent do differences among women make such categorical claims problematic? Some critics charge that feminist theory often essentializes women and assumes characteristics that are true for most, but not all women. From this perspective, the generic “woman” is too frequently a relatively privileged woman—white, middle class, heterosexual, and able-bodied. In responding to this charge, many feminists acknowledge the importance of recognizing differences among women but note that political action and reform require some generalizations and an assumption of shared interest. In their view, different aspects of identity become more or less critical depending on the circumstances. This debate raises one of the central questions of this chapter: to what extent and in what contexts can we usefully make claims about women?

This debate is focused through an article by Devon Carbado and Mitu Gulati. It highlights the ways in which black women might experience work differently from other blacks and from other women. This experience of multiple, interacting identities is often referred to as a problem of intersectionality.

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**Intersectionality** refers to the interaction between more than one source of identity.

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### Reading Questions

1. Are there claims in this book that have overlooked certain groups of women?
2. Is it possible to avoid generalizations? Won't every generalization be inaccurate as to someone?
3. What does it mean to “perform identity”?

### *Devon W. Carbado & Mitu Gulati, The Fifth Black Woman*

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Consider the following hypothetical. Mary, a black woman, works in an elite corporate firm. There are eighty attorneys at the firm, twenty of whom are partners. Only two of the partners are black, and both are men. The firm has three female partners, and all three are white. There are no Asian American, Native American, or Latina/o partners. The firm is slightly more diverse at the associate rank. There are fifteen female associates: three, including Mary, are black, two are Asian American, and one is Latina. The

remaining female associates are white. Of the forty-five male associates, two are black, two are Latino, three are Asian American, and the rest are white.

Mary is a seventh-year associate at the firm. She, along with five other associates, is up for partnership this year. Her annual reviews have been consistently strong. The partners for whom she has worked praise her intellectual creativity, her ability to perform well under pressure, her strong work ethic, her client-serving skills, and her commitment to the firm. She has not brought in many new clients, but, as one of the senior partners puts it, "that is not unusual for a person on the cusp of partnership."

For the past three years, the Chair of the Associate's Committee, the committee charged with making partnership recommendations to the entire partnership, has indicated to Mary that she is "on track." Being "on track" was important to Mary because, were she not on track, she would have seriously explored the option of moving either to another firm with better partnership prospects for her or in-house to an investment bank that provided greater job security. It was generally understood, however, and the Chair made sure to make it clear that "being on track is not a guarantee that you will ultimately make partner." . . .

The Associate Committee recommends that the firm promote all six. However, the partners vote only four into the partnership: one black man, one Asian American male, one white man, and one white woman. They deny partnership to Mary and a white male associate. The partnership's decision to depart from the Associate Committee's recommendation is not unusual. . . . [I]t accepts the committee's positive recommendation only half of the time.

Subsequently, Mary brings a disparate treatment discrimination suit under Title VII. She advances three separate theories: race discrimination, sex discrimination, and race and sex discrimination. She does not, however, have any direct evidence of animus against her on the part of the employer. In other words, Mary can point to no explicit statements such as "We don't like you because you are a woman," or "We think that you are incompetent; all blacks are." The evidence is all circumstantial: Mary was highly qualified, but was rejected for a position that was arguably open.

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A **motion for summary judgment** is a request to the court by the defendant to dismiss a particular cause of action by the plaintiff on the grounds that even if all of the facts alleged were proved, they would be insufficient to support a legal claim.

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The court, ruling in favor of the firm's summary judgment motion, rejects all three of Mary's claims. With respect to the race discrimination claim, the court reasons that it is not supported by evidence of intentional or animus-based discrimination. According to the court, there is no evidence that the firm dislikes (or has a taste for discrimination against) blacks. In fact, argues the

court, the evidence points in the other direction. The very year the firm denied partnership to Mary, it extended partnership to another African-American. Further, within the past five years, the firm had promoted two other African-Americans to the partnership. The court notes that both of these partners participated in the deliberations as to whether Mary would be granted partnership, and neither has suggested that the firm's decision to deny Mary partnership was discriminatorily motivated. The court concludes that the simple act of denying one black person a promotion is, especially when other blacks have been promoted, insufficient to establish discrimination.

The court disposes of Mary's gender discrimination claim in a similar way. That is, it concludes that the fact that the firm has in the past promoted women to the partnership, that the partners who voted to deny partnership to Mary extended partnership to another woman, and that women participated in the firm's deliberations as to whether Mary would be promoted, and none of these women have claimed that Mary was treated unfairly because she is a woman, suggests that the firm did not engage in sex-based discrimination against Mary.

The court concludes its dismissal of Mary's compound discrimination claim (the allegation of discrimination based on her race and sex) with an argument about cognizability. . . . According to the court, there is no indication in the legislative history of Title VII that the statute intended "to create a new classification of 'black women' who would have greater standing than, for example, a black male." According to the court, "the prospect of the creation of new classes of protected minorities, governed only by mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box."

The foregoing hypothetical articulates the classic intersectionality problem wherein black women fall through an anti-discrimination gap constituted by black male and white female experiences. The problem can be framed in terms of essentialism. Consider first the court's response to Mary's race discrimination claim. In determining whether Mary experienced race discrimination, the court assumes that there is an essential black experience that is unmodified by gender. The court's adjudication of Mary's race discrimination claim conveys the idea that racism is necessarily total. It is a particular kind of animus that reaches across gender, and affects men and women in the same way. It is about race—a hostility against all black people. . . .

Consider now the court's adjudication of Mary's sex discrimination. Here, too, the court's analysis reflects essentialism. The essentialism in this context conveys the idea that women's experiences are unmodified by race. The court assumes that if a firm engages in sex discrimination, such discrimination will negatively affect all women—and in the same way. . . .

Finally, consider the court's rejection of Mary's compound discrimination claim. Here, the court doctrinally erases black women's status identity as black women. Its conclusion that this identity status is not cognizable means that, for purposes of Title VII, black women exist only to the extent that their

experiences comport with the experiences of black men or white women. Under the court's view, and in the absence of explicit race/gender animus, black women's discriminatory experiences as black women are beyond the remedial reach of Title VII. . . .

To appreciate the identity performance problem, assume again that Mary is an African American female in a predominantly white elite corporate law firm. As before, Mary is up for partnership and her evaluations have been consistently strong. Stipulate now that four other black women are up for partnership, as are two white women and two white men. The Associate's Committee recommends that the firm extends partnership to all nine associates. The members of the partnership, however, decide to depart from this recommendation. They grant partnership to four of the black women. The fifth black woman, Mary, does not make partner. Of the four white associates, the firm extends partnership to one of the men and one of the women.

The partnership's decision creates a buzz around the firm. The firm had never before granted partnership to so many non-white attorneys. Moreover, in the firm's fifty year history, it had only ever promoted two black people to partnership. Both of these partners are men, and the firm promoted both of them in the mid-1980s, a period during which the firm, along with many others, had enjoyed a high level of prosperity.

Prior to 1980, the firm had never hired a black female associate. Furthermore, most of those who were hired after that date left within two to three years of their arrival. Given the history of black women at the firm — low hiring rate, high attrition rate, low promotion rate — associates at the firm dubbed this year the "year of the black woman."

Mary, however, does not agree. Subsequent to the partnership decision, she files a Title VII discrimination suit, alleging (1) race and sex compound discrimination, i.e., discrimination against her on account of her being a black woman, and (2) discrimination based on identity performance. The firm moves for summary judgment on two theories. First, it argues that Mary may not ground her discrimination claim on her race and sex. According to the firm, Mary may separately assert a race discrimination claim and/or a sex discrimination claim; however, she may not, under Title VII, advance a discrimination claim combining race and sex. Second, the firm contends that whatever identity Mary invokes to ground her claim, there is simply no evidence of intentional discrimination.

With respect to the first issue, the court agrees with Mary that a discrimination claim combining race and sex is, under Title VII, legally cognizable. The court has read, and understood, and it agrees with the literature on intersectionality. Under the court's view, black women should be permitted to ground their discrimination claims on their specific status identity as black women. According to the court, failing to do so would be to ignore the complex ways in which race and gender interact to create social disadvantage: a result that would be inconsistent with the goals of Title VII.

With respect to second issue, the court agrees with the firm. The court reasons that recognizing Mary's status identity does not prove that the firm discriminated against her because of that identity. It explains that the firm promoted four associates with Mary's precise status identity—that is, four black women. Why, the court rhetorically asks, would a racist/sexist firm extend partnership to these women? The court suggests that when there is clear evidence of non-discrimination against the identity group within which the plaintiff is situated, that produces an inference that the plaintiff was not the victim of discrimination.

The court rejects the plaintiff's arguments that Title VII itself and the Supreme Court's interpretation of Title VII focuses on protecting individuals, not groups, from discrimination. . . .

The problem with the court's approach is that it fails to consider whether Mary was the victim of an intra-racial (or intra-gender) distinction based not simply on her identity status as a black woman but on her performance of that identity. In effect, the court's approach essentializes the identity status "black female." More specifically, the court assumes that Mary and the other four black women are similarly situated with respect to their vulnerability to discrimination. However, this might not be the case. The social meaning of being a black woman is not monolithic and static but contextual and dynamic. An important way in which it is shaped is by performance. In other words, how black women present their identity can (and often does) affect whether and how they are discriminated against.

Consider, for example, the extent to which the following performance issues might help to explain why Mary was not promoted, but the other black women were.

*Dress.* While Mary wears her hair in dreadlocks, the other black women relax their hair. On Casual Fridays, Mary sometimes wears West African influenced attire. The other black women typically wear khaki trousers or blue jeans with white cotton blouses.

*Institutional Identity.* Mary was the driving force behind two controversial committees: the committee for the Recruitment and Retention of Women and Minorities and the committee on Staff/Attorney Relations. She has been critical of the firm's hiring and work allocation practices. Finally, she has repeatedly raised concerns about the number of hours the firm allocates to pro bono work. None of the other four black women have ever participated on identity-related or employee relations-related committees. Nor have any of them commented on either the racial/gender demographics of the firm or the number of hours the firm allocates for pro bono work.

*Social Identity.* Mary rarely attends the firm's happy hours. Typically, the other four black women do. Unlike Mary, the four black women each have hosted at least one firm event at their home. All four play tennis, and two of them play golf. Mary plays neither. Finally, while all four black women are members of the country club to which many of the partners belong, Mary is not.

*Educational Affiliations.* Two of the other four black women graduated from Harvard Law School, one graduated from Yale, and the other graduated from Stanford. Mary attended a large local state law school at the bottom of the second tier of schools.

*Marital Status.* All four of the other black women are married. Two are married to white men and each of them is married to a professional. Mary is a single mother.

*Residence.* Each of the other four black women lives in predominantly white neighborhoods. Mary lives in the inner city, which is predominantly black.

*Professional Affiliation.* Mary is an active member of the local black bar association, the Legal Society Against Taxation, and the Women's Legal Caucus. None of the four black women belongs to any of these organizations. One of them is on the advisory board of the Federalist Society. One of the four black women is a Catholic, two are Episcopalian, and the other does not attend church. Mary is a member of the Nation of Islam. . . .

Intersectionality does not capture this form of preferential treatment. While intersectionality recognizes that institutions make intra-group distinctions, that understanding is situated in an anti-discrimination context that is buttressed by a status conception of identity.

Assuming the foregoing performance issues obtain in Mary's case, do they reflect impermissible discrimination? The answer is not obviously yes. Perhaps the partners simply do not like Mary. Based on the description of how Mary performs her identity, could one not reasonably conclude the following: She does not attend happy hours, she creates trouble, she is not a team player, she does not dress or act professionally. Redescribing Mary's performance in this way makes the employer's decision to deny her partnership appear non-discriminatory (and even legitimate). After all, working and succeeding in an organization is not only about doing work. It is also about getting along with people and getting them to like you. An argument can be made that Mary simply did not do much work in the direction of getting the people who mattered to like her. The other four black women did; and they got promoted. On its face some—perhaps—will see this as fair. Those who do the extra work of making people like them should get promoted. Given our claim that this line of reasoning is flawed, the question is: What exactly is the relationship between identity performance and workplace discrimination? . . .

Broadly speaking, there are two ways to make the point that intra-group distinctions based on identity performance implicate workplace discrimination. The first is to focus on the preferred group members. In our hypothetical, they are the four black women. The second way is to focus on the disfavored group members. Mary, the fifth black woman, falls into this category. . . .

In a prior article, *Working Identity* [85 Cornell L. Rev. 1259 (2000)], we argued that an employee's awareness that identity-based assumptions about her are at odds with the institutional norms and criteria of a firm creates an incentive for that employee to work her identity. There are a number of ways

an employee might do this. The employee might laugh in response to, or engage in racist humor (signaling collegiality). She might socialize with her colleagues after work (signaling that she can fit in; is one of the boys). She might avoid contact with other employees with negative workplace standing (signaling that she is not really “one of them”). The list goes on. The point is that whatever particular strategy the employee deploys, her aim will likely be to comfort her supervisors/colleagues about her negative workplace standing. Specifically, the employee will attempt to signal that she can fit in, that she is not going to make her supervisors/colleagues uncomfortable about her identity—or theirs—and, at bottom, that the negative stereotypes that exist about her status identity are inapplicable to her. *Working Identity* refers to these strategies collectively as “comfort strategies.” These strategies are constituted by identity performances.

Stipulate that the four black women in the hypothetical performed comfort strategies. The claim that the performance of such strategies constitutes discrimination is based on the idea that people with negative workplace standing (e.g., people of color) have a greater incentive to perform comfort strategies than people with positive workplace standing. This means that identity performances burden some employees (e.g., blacks) more than others (e.g., whites). Without more, this racial distribution of identity performances is problematic. The problem is compounded by the fact that identity performances constitute work, a kind of “shadow work.” This work is simultaneously expected and unacknowledged. Plus, it is work that is often risky. Finally, this work can be at odds with the employee’s sense of her identity. That is, the employee may perceive that she has to disassociate from or disidentify with her identity in order to fit in. To the extent the employee’s continued existence and success in the workplace is contingent upon her behaving in ways that operate as a denial of self, there is a continual harm to that employee’s dignity.

Recall that the claim is that the firm’s discrimination against Mary derives from an intra-group distinction based on Mary’s dress, institutional identity, marital status, professional and educational affiliations, and residence. The question becomes, why is this discrimination impermissible? The short answer is that the distinction creates an intra-racial and an inter-racial problem. The problem is that the firm draws a line between black people who do (or whom the firm perceives as performing) identity work to fit in at the firm and black people who do not perform (or whom the firm perceives as not performing) such work. The interracial problem is that white people are not subject to this subcategorization.

## Notes

**1. Racial Tensions in the First Wave of Feminism.** Nineteenth-century suffragettes exploited both the civil rights principles underlying abolition and the racism that persisted after the Civil War. Elizabeth Cady Stanton, for

example, claimed both affinity with Negro slaves and superiority over them, reminding white political leaders of the obvious injustice that black men could vote while white women could not: “[Y]ou place the [N]egro, so unjustly degraded by you, in a superior position to your own wives and mothers,” she complained.<sup>1</sup> Later suffragettes used even more explicitly racist arguments asserting the desirability of diluting the Negro vote as a rationale for supporting women’s suffrage. For example, one Southern suffragist at a 1903 convention of the National American Women Suffrage Association claimed that “[t]he enfranchisement of women would insure immediate and durable white supremacy, honestly attained.”<sup>2</sup> Is any of this familiar? To what extent are the rights and welfare of minorities viewed, even today, as a kind of floor, below which the rights and welfare of whites should never fall?<sup>3</sup>

**2. The Intersectionality Critique.** A widely recognized case of intersectionality involved a challenge by a black woman to an airline grooming policy prohibiting employees from wearing a braided hairstyle.<sup>4</sup> The court held that because the policy applied to all employees—women and men, black and white—it was not discrimination on the basis of either race or gender. In rejecting claims that the style was crucial to black women, the judge pointed out that the plaintiff did not begin to wear the hairstyle until just after a white actress, Bo Derek, popularized corn rows in the movie “10,” rather than several years earlier when Cicely Tyson wore the hairstyle at the Academy Awards.

Critics attacked the case for ignoring intersectionality—or the inter-relationships between race and gender. According to Paulette Caldwell,

Wherever they exist in the world, black women braid their hair. They have done so in the United States for more than four centuries. African in origin, the practice of braiding is as American—black American—as sweet potato pie. A braided hairstyle was first worn in a nationally-televised media event in the United States—and in that sense “popularized”—by a black actress, Cicely Tyson, nearly a decade before the movie “10.” More importantly Cicely Tyson’s choice to popularize (i.e., to “go public” with) braids, like her choice of acting roles, was a political act made on her own behalf and on behalf of all black women.

The very use of the term “popularized” to describe Bo Derek’s wearing of braids—in the sense of rendering suitable to the majority—specifically subordinates and makes invisible all of the black women who for centuries have worn braids in places where they and their hair were not overt threats to the American aesthetic.<sup>5</sup>

How compelling is this critique? Consider Richard Ford’s response.

Suppose some black women employed by American Airlines wished to wear cornrows and advance the political message they ostensibly embody, while others thought cornrows damaged the interests of black women in particular and reflected badly on the race as a whole (given the cultural politics of black

America in the mid-to-late 1970s, there almost certainly were such black women employed by American Airlines and even more certainly there were such black women among its customers). Suppose further that the management of American Airlines, either formally or informally, sought out and considered the opinions of its employees as well as of its customers and made its grooming policies based at least in part on such information. Now Rogers's claim is no longer plausibly described as a claim on behalf of black women. Instead it is a claim on behalf of some black women over the possible objections of other black women.

Rogers and her supporters might object: "What business is it of other black women whether we wear braids—no one will be forced to wear them." But this individualistic account of the stakes of the case flatly contradicts the proffered rationale for conceiving of the hairstyle as a legal right: cornrows are the "cultural essence," not of one black *woman*. If this claim is to be taken seriously then cornrows cannot be the cultural essence of only those black women who choose to wear them—they must be the cultural essence of *all* black women. And in this case *all* black women have a stake in the rights claim and the message about them that it will necessarily send—not only those who support the political and cultural statement conveyed by cornrows but also those who oppose that statement.

We'd need a fairly detailed account of the cultural and political stakes of cornrows to have a real sense of the political dimensions of this legal conflict. Does the wearing of cornrows track social class (are most cornrow wearers working class "authentics" or bourgeois trendies?) or ideological splits (nationalist v. integrationist?) within the black community? Do cornrows reflect a sophisticated racial politics in which the essentialist message is subordinate, ambiguous or even ironic or is a crude essentialism a central or indispensable part of the politics of cornrows? Is the symbolism of cornrows widely shared and well understood at least within some subset of American society or is it ambiguous?<sup>6</sup>

Is Ford right? How would you have decided the *Rogers* case? What evidence would have been relevant to your decision?

Issues of multiple identities also arise in sexual harassment law. When employees are labeled as "hot Chicanas" or "black bitches," can issues of race and gender be separated? Does it follow that courts should evaluate the impact of such terms from the perspective of a woman of color?

Recall also the concern expressed by Joan Williams:

Domesticity divides women against themselves. Until feminists acknowledge this dynamic and diffuse it, alliances among women will remain fragile and difficult. Gender wars are not limited to conflicts between employed women and homemakers, for American women are not divided into two dichotomous groups. Instead, they are on a continuum. Some are as work-primary as 'high-powered' men; others do no market work. But most American women lie somewhere in the middle, or shift between various points on the continuum at different stages of their lives. These infinite gradations are divisive, as each woman judges women more work-centered than herself as insensitive to their children's needs, and those less work-centered as having "dropped out," or "given up." . . .

Gender has always seemed the most important axis of social power for privileged white women because it is the only one that blocks their way, privileged as they are by class and race. This is not to say that the injustice meted out to them is not injustice. It is. But if privileged women want others to join their struggles, they must re-imagine themselves in ways that take into account the perspective of their proposed allies.<sup>7</sup>

As the basic intersectionality critique has become accepted within feminist legal theory, it has reached increasingly beyond race to include other dimensions of oppression as well, including age, class, disability, and sexual orientation. Reflecting this shift, some scholars have substituted the term “multidimensionality” for “intersectionality.”<sup>8</sup>

**3. Intersectionality and the Problem of Categorization.** To what extent is the intersectionality critique a problem of *all* categories? Can categories be eliminated? Consider Linda Krieger’s analysis:

Every person, and perhaps even every object that we encounter in the world, is unique, but to treat each as such would be disastrous. Were we to perceive each object *sui generis*, we would rapidly be inundated by an unmanageable complexity that would quickly overwhelm our cognitive processing and storage capabilities. Similarly, if our species were “programmed” to refrain from drawing inferences or taking action until we had complete, situation-specific data about each person or object we encountered, we would have died out long ago. To function at all, we must design strategies for simplifying the perceptual environment and acting on less-than-perfect information. A major way we accomplish both goals is by creating categories. . . . Categories and categorization permit us to identify objects, make predictions about the future, infer the existence of unobservable traits or properties, and attribute the causation of events.

What happens when we group objects into categories? First, we tend to perceive members of the same category as being more similar to each other, and members of different categories as more dissimilar to each other, than when all the objects are viewed in aggregate. The same results adhere when the “objects” we categorize are other human beings.

This should come as no surprise. Categories are guardians against complexity. Their purpose is to simplify the perceptual field by distorting it, so that we experience it as less complex and more predictable than it actually is. Categorical structures can simplify the perceptual environment only if “fuzzy” differences are transformed into clear-cut distinctions. Complexity continually threatens the balance of our categorical structures. Assimilation and enhancement of contrast “guard the guardians.” Thus, with object and social categories, one can predict a tendency towards thinking that “all x’s are alike.”

Second, although some debate exists on this issue, it appears that we create a mental prototype, often visual, of the “typical” category member. To determine whether an item is a member of a particular category, we match the object perceived with the category prototype and determine the “distance”

between the two. We experience an object first as a member of its “basic” category—the category most accessible at the moment. Only with additional mental processing do we identify it as a member of its superordinate or subordinate categories. According to this view, we carry in our heads images of the “typical letter a,” the “typical chair,” the “typical law school professor,” and the “typical urban gang member.”

Cognitive psychologists refer to these categorical structures as “schemas.” . . .

Schemas, like other categorical structures, “enable the perceiver to identify stimuli quickly, . . . fill in information missing from the stimulus configuration, and select a strategy for obtaining further information, solving a problem, or reaching a goal.” But the price of this cognitive economy is that categorical structures—whether prototypes, stereotypes, or schemas—bias what we see, how we interpret it, how we encode and store it in memory, and what we remember about it later. In intergroup relations, these biases, mediated through perception, inference, and judgment, can result in discrimination, whether we intend it or not, whether we know it or not.<sup>9</sup>

So, for example, a person who expects Asian women to be non-assertive will notice, process, and remember best the evidence that affirms an Asian woman’s non-assertiveness and evaluate her based on this evidence.

What is the best strategy for overcoming these biases? Should the law recognize more protected categories? Which ones? What limiting principles should be applicable?

Another problem with categorizing individuals by groups is that it pressures individuals to resist, or emphasize, key aspects of their identity in order to get along. As legal theorists like Kenji Yoshino note, members of subordinate groups choose when to assert their identity and when to “cover” their differences to fit within the dominant culture. Unlike “passing,” which involves efforts to hide identity, covering involves downplaying identity.<sup>10</sup> Does this concept help to explain the conduct of some of the female lawyers in the Carbado and Gulati excerpt? If so, what follows?

### Putting Theory Into Practice

**6.1** An Afro-Panamanian man has sued the City University of New York for failing to renew his academic appointment. His allegation is that the Latino heads of the Spanish department discriminated against Black Hispanics and favored White Cubans and South American Hispanics. The employer shows that five of the eight instructors who were reappointed were natives of South or Central American and “[d]iversity in an employer’s staff undercuts an inference of discriminatory intent.”<sup>11</sup> Should diversity be sufficient to prevent liability?<sup>12</sup>

**6.2** Reconsider Problem 2.6, involving the pregnant teenage girl, fired from her job at the YWCA because of concern that she would be a

poor role model for the teenagers served by the YWCA programs. What, if anything, does the intersectionality critique add to your analysis of her case?

6.3 As a gift for her mother, Seandria purchased the Miracle Morning package from an Elizabeth Arden Red Door Salon and Spa in suburban Washington D.C., which included a facial, massage, manicure, and lunch. While her mother who is African American was at the salon, she asked that the salon also color and style her hair. The receptionist refused, telling her that the salon “did not do black people’s hair.”<sup>13</sup> Is this unlawful discrimination?

## B. WHAT IS A WOMAN? THE SPECIAL CASE OF TRANSGENDER

Throughout this book, male and female are assumed (for the most part) to be clear, easily ascertainable categories. This section examines the challenge that transgendered individuals make to this assumption and to the law generally.

*Kantaras v. Kantaras* illustrates the traditional commitment to an unalterable, biological definition of sex. It holds that a marriage entered into by a post-operative female-to-male is not valid, and thus cannot end in a legal divorce, with rights such as property division or spousal support. *Kantaras* still represents the majority view in the marriage context.

*Schroer v. Billington* addresses the issue of transgender in the employment context. Traditionally, just as courts have held that discrimination based on an individual’s sexual orientation is not discrimination “because of sex” under Title VII, Title VII has not generally been applied to transsexuals. *Schroer* represents a new minority view that discrimination against transgender individuals violates Title VII, based both on a literal reading of the statute and on the sex stereotyping theory of *Price Waterhouse v. Hopkins* [excerpted in Chapter 1].

The first-person account by Elvia Arriola shows how transsexuals challenge some conventional feminist assumptions.

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The San Francisco Human Rights Commission defines **transgender** as “an umbrella term that includes male and female cross dressers, transvestites, female and male impersonators, pre-operative and post-operative transsexuals, and transsexuals who choose not to have genital reconstruction, and all persons whose perceived gender and anatomic sex may conflict with the gender expression, such as masculine-appearing women and feminine-appearing men. All other terms—cross-dresser, transvestite, transsexual—are subsets of the umbrella term transgender.”

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