

Beyond Comparison: Sex and Discrimination

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Contents

<i>Acknowledgments</i>	<i>page xi</i>
1. The Issues	1
I. DISCRIMINATION AND EQUALITY	1
II. DISCRIMINATION AND DIFFERENCE	4
III. DISCRIMINATION WITHOUT COMPARISON	10
IV. COMPARISON AND NONCOMPARISON	16
V. EQUALITY, DIFFERENCE, AND THE ENDING OF ROLES	19
VI. WHAT IT MEANS TO LEAD A SUCCESSFUL LIFE	23
VII. WHAT IT MEANS TO BE A WOMAN	33
VIII. RADICAL INQUIRIES	39
2. Equality	42
I. INTRODUCTION	43
II. DIFFERENCE AND DOMINANCE	44
III. IMPLICATIONS	58
IV. CONCLUSION	71
3. Difference	78
I. INTRODUCTION	79
II. THE DECONSTRUCTION OF GENDER	82
III. THE RENEWAL OF GENDER	91
4. Reasons for Feminism	107
I. THE VALUE OF DIVERSITY	107
II. THE CHARACTER OF DISADVANTAGE	109
III. THE ROLE OF SEXUAL IDENTITY IN A SUCCESSFUL LIFE	113
5. The Value of Diversity	120
I. THE NATURE OF DIVERSITY	121
II. THE RELEVANCE OF DIVERSITY	128
III. THE VALUE OF DIVERSITY	132

6. The Character of Disadvantage	135
I. INTRODUCTION	135
II. UNDERSTANDING DISADVANTAGE	140
III. SEXUAL DISADVANTAGE	153
IV. DISADVANTAGE, LIMITATION, AND INFERIORITY	155
7. The Role of Sexual Identity in a Successful Life	157
I. THE SIGNIFICANCE OF LIMITATIONS AND INFERIORITY	157
II. THE SIGNIFICANCE OF MISCONCEPTIONS	167
III. ASCERTAINING MISCONCEPTIONS	184
8. Equality, Difference, and the Law	192
I. THE IMPORTANCE OF BEING UNDERSTOOD	192
II. WHERE DIFFERENCE MATTERS	197
III. DISCRIMINATION AND THE LAW	202
<i>Index</i>	209

The Issues

I. Discrimination and Equality

It is a hot summer's day, ice-cream weather, sunbathing-in-the-park weather. A woman walks down the street, bare-breasted. Asked to cover herself, she refuses. As she sees it, indeed as she explains it to the police officer, if a man is entitled to appear in public naked to the waist, as he certainly is, she is entitled to do the same. It would be discriminatory, she insists, for the law to deny this and so treat her behaviour as indecent. Is she right? Does a woman's nakedness mean the same thing as a man's? If not, should it? What is gained by understanding discrimination in this way? What is lost?

The complexity and significance of the problem become clearer when it is looked at from the opposite perspective. Suppose it is true that a woman, like a man, is entitled to appear in public naked to the waist, in hot weather at least (as in fact the courts decided).¹ What makes this so? The answer has large implications for our understanding of both sexual difference and the nature of value. Whatever may have been claimed by the topless pedestrian in question, it cannot be the case that there are meaningful differences between the sexes, yet that women are entitled to do whatever men are entitled to do (and vice versa), without regard to those differences. That would be to suggest that sexual difference is at once, in the same settings and for the same purposes, both meaningful and not meaningful, relevant and irrelevant. If men and women are to enjoy the same entitlements, despite the apparent differences between them, either our understanding of sexual difference or our understanding of value must give way. It is not possible for us, as individuals or as a society, to maintain a commitment both to the idea that people are not to be distinguished and to recognizing the characteristics and values that distinguish them.

If a woman is as free as a man to go topless in hot weather, it must be because, contrary to what has been conventionally assumed, there is no difference

¹ *R. v. Jacob*, 31 O.R. (3d) 350; 142 D.L.R. (4th) 411 (C.A., 1996).

between the sexes that could affect their entitlement to appear in public naked to the waist. There are a number of reasons why this might be so.² It might be because, as a general matter, the differences that genuinely distinguish the sexes, whatever they may be, should not be allowed to make a difference to men's and women's options in life, that is, to men's and women's access to the valuable pursuits that make it possible to flourish in life. Neither women nor men should suffer comparative disadvantage in the project of their lives on account of their sex. If that is true, however, then a policy of nondiscrimination is unfortunately bound to follow one of two paths, which require us to treat either our sexual identity³ or the values that make our lives worth living as entirely plastic and insubstantial. Either we must reshape men and women, to ensure that they are equal in the face of human values, by eliminating any difference between the sexes that is relevant to the assessment of value (the path of androgyny), or we must reshape human values, to ensure that men and women are never distinguished by them (the path of value relativism). If men's success in any field of endeavour is greater than women's (or vice versa), we must either change the distribution of the qualities that lead to success (fantastic as that may seem), diminishing their presence in the more successful sex, increasing it in the less successful, or alter our sense of what constitutes a successful endeavour, by eliminating from consideration those criteria of success that one sex is able to meet more (or less) readily than the other.

The first of these explanations (or courses of action) dissolves our respect for, indeed the very existence of, sexual difference; the second does the same for value to the extent that value is engaged by sexual difference. Neither seems terribly plausible. Quite apart from the fact (as I take it to be) that neither sexual identity nor human value as we know it is entirely plastic and so susceptible to our will (a fact that might, after all, be merely a moral misfortune), it is hard to believe that eliminating sex discrimination requires us to eliminate either sexual difference or all that makes that difference matter. Indeed the suggestion that it does so comes close to a contradiction. It is in principle possible to eliminate

² For further reasons, see the next two sections.

³ In what follows, I use the term "sexual identity" to refer to the concept that is sometimes called sex and sometimes called gender. I have tried to avoid speaking of sex or gender, where possible, to avoid suggesting that I am taking a position in the familiar nature/nurture debate, which I regard as misguided, for reasons set out below. Yet because the term "sexual identity" is potentially confusing, it might be helpful at the outset to make three things clear about the way I have used it. First, in using the word "sexual", as part of the term "sexual identity", I am referring to the distinction between the sexes, rather than the idea of sexuality. It is women and men that I have in mind, rather than the many ways in which men and women express themselves sexually. Second, in using the word "identity", as part of the term "sexual identity", I am referring to the set of qualities and characteristics that is definitive of the distinction between women and men, rather than to the qualities that men and women identify with, which might include the qualities of the opposite sex. Finally, in using the term "sexual identity" in relation to a particular sex, I have in mind both the qualities that men and women share and the qualities that distinguish them, unless stated otherwise.

the practice of sex discrimination by eliminating either sexual difference or the capacity to distinguish value in terms of that difference, just as it is possible to eliminate any form of wrongdoing by eliminating the occasion for it, for example, eliminating theft by eliminating property. Clearly, women could not be discriminated against if women did not exist or, more precisely and fairly, if women could not be distinguished as women in any way that mattered. The question is what would justify us in bringing about such a state of affairs, if bring it about we could.

Eliminating a distinction and its significance is only consistent with the recognition of value and the human qualities and achievements that value responds to where, and to the extent that, the distinction in question is *in fact* either not real or not relevant to the consideration of value. This is a possible claim about property, perhaps, but a highly implausible claim about sexual difference as a whole. It is not really credible to suggest that men and women, properly understood, are indistinguishable from one another in any way that is relevant to value. Yet to eliminate a distinction that is admittedly relevant to value simply because it is often, even typically, invoked improperly is to misunderstand the nature of wrongdoing, which consists not in (wrongly) including among human options, such as the option to engage in the sorts of activities that make sexual difference relevant to the evaluation and pursuit of a successful life, options that can be exercised wrongly, but in exercising wrongly options that should be exercised rightly.

Given that sexual difference is not entirely fictional (although some supposed aspects of it certainly are), and that the values that register sexual difference are not entirely bogus, it must be the case that sex discrimination arises not because sexual difference does not exist or does not matter, but because sexual difference does exist and does matter, although not in the ways that we have taken it to. Is it possible, then, to build upon this thought so as to arrive at an account of sex discrimination that respects both sexual identity and human value, while allowing for mistakes in our perception of each?

I begin by giving, in the next two sections of this chapter, an overview of the nature of the problem and what I take to be its proper solution. These two sections are not intended as a précis of the argument in the balance of the book, or even as a necessary premise to that argument. They can be read now or returned to later. Their purpose is to sketch for the reader certain issues that the book pursues in depth. The four subsequent sections similarly seek to expand upon, without fully defending, certain aspects of the solution I propose that may strike a reader as unfamiliar and even puzzling: rejection of the idea that discrimination depends upon comparison, a consequent reinterpretation of the significance of sexual equality, and reliance upon ideas of what it means to lead a successful life and what it means to be a woman. The final section seeks to say something brief about my choice of which arguments for equality and difference to respond to. As a whole, the chapter approaches the question of sex discrimination from the

positive perspective of its remedy, rather than from the negative perspective of the disadvantage women now experience. It asks what might make women's lives go well rather than what has made them go badly. It thus offers a different, briefer way of thinking about the ideas developed and explored in the chapters that follow. That said, however, I should warn that because these issues are complex, their compressed treatment in the rest of this chapter is likely to become fully intelligible only in light of the argument of the book as a whole.

II. Discrimination and Difference

I have developed the narrative so far by referring to the pursuit of equality in the face of physical difference, and it might be reasonably objected that the conclusions I have drawn from this example are not applicable to the pursuit of equality in the face of intellectual or emotional differences between the sexes, or are not applicable to the recognition of sexual difference rather than the pursuit of sexual equality.⁴ The short answer is that the only distinction between physical and other forms of sexual difference that could be thought to have a bearing on the argument is that physical differences between the sexes may be less amenable to alteration than intellectual or emotional differences. Yet the possibility of alteration is a question that I deliberately bracketed in the previous discussion in order to focus on the prior question of its desirability. It does not matter whether sexual difference can be changed or not, and so does not matter, for example, whether that difference is the product of nurture (and so allegedly amenable to change) or of nature (and so allegedly not amenable to change) if there is no reason, or at least no reason founded on a commitment to ending discrimination, to make that change.⁵

⁴ I take it that objects that are equal are the same in some respects (the respects in which they are equal), and different in others (the respects in which they are unequal). In what follows, I treat equality as meaning sameness in this sense. In fact, I do not know of any claim to equality that is not a claim to sameness in the relevant respect. Equal pay, for example, means either the same pay or pay that bears the same relation to the value of the work done as does the pay of the comparator. Equality is often said to be compatible with the recognition of difference, and this is plainly true, provided that the difference to be recognized exists in a respect other than that in which equality is sought. For illuminating considerations of the idea of equality, see Peter Westen, *Speaking of Equality* (Princeton, N.J., 1990), and Derek Parfit, "Equality and Priority", in *Ideals of Equality*, ed. Andrew Miller (Oxford, 1998). For a full consideration of the relation between equality and sex discrimination, see sections V and VI below and the next chapter.

⁵ In fact, as Joseph Raz once reminded me, the evidence seems to be that we are capable of changing nature, usually for the worse, and relatively incapable of changing society.

I suggested in the text that there might be *no* reason to change the present character of sexual difference. Strictly speaking, there is always reason to make a change to anything that is good, that reason being the good that lies in the outcome of the change, such as the distinctive good that can be achieved through the condition of being a man. The suggestion in the text remains valid, however, for two reasons. First, the reason to belong to a particular sex cuts both ways, for there is as good reason to be a woman as to be a man. In itself, therefore, it is no reason to change the qualities of one sex to those of the other. Second, if the reason to be a man is thought to be

The latter objection to the narrative so far deserves a fuller response, for it raises considerably more difficult issues. An approach to understanding and remedying sex discrimination that focuses on sexual difference rather than sexual equality by definition places no pressure on sexual identity. It takes sexual identity as a given and uses it to place pressure on human value. Presumably, that is part of its appeal, for the approach seems to permit reconciliation of sexual justice with respect for and pride in sexual identity. It insists that we should not include among the values to which our society responds those that are insensitive to what women (or men) have to offer, or that are more sensitive to what men have to offer than to what women have to offer (or vice versa). And yet, in spite of its attempt to show respect for sexual identity, concerns about this approach remain, which, like those expressed in the previous section, stem from its comparative character.

It will be clear from the sketch just offered that there are two possible readings of this difference-based approach to understanding and remedying sex discrimination. The first treats the approach as no more than a distinctively framed form of the sexual egalitarianism considered above, one that places its egalitarian pressure on human values rather than on sexual identity. An egalitarian condition is to be achieved not by eliminating the difference between the sexes but by eliminating the human values that register that difference. This reading, then, like its egalitarian sibling considered above, insists that genuine differences between the sexes should not be allowed to make a difference to men's and women's options in life, that is, to men's and women's access to the valuable pursuits that make it possible to flourish in life. It achieves its ends, however, not by changing men and women, but by denying recognition to all values that are more sensitive to the qualities and achievements of one sex than those of the other.

In doing so, unfortunately, it denies recognition in the pantheon of our values to all the aspects of sexual identity that make it meaningful and rewarding to belong to a particular sex, that is, to be a woman or a man. A world in which one cannot be disvalued on the ground of one's sex is a world in which one cannot be so valued either, in which nothing either bad or good could flow from being a woman or a man. If realizable, such a world would diminish, perhaps to a critical degree, the prospects of the women and men who require access to their sexual identity, and thus to the valuable options that it makes possible, in order to flourish in life. In that sense and to that extent, the approach would be self-defeating. More generally and more profoundly, in asking society to eliminate all values that register sexual difference, the approach assumes not merely that

strengthened by the fact that the qualities of men are culturally preeminent in most societies today and so are more easy to realize value from than the qualities of women, it must be remembered that any change, even if possible and desirable, carries the cost of change, here both short-term trauma and long-term rootlessness and alienation. This means that to make such a change, there must be not only reason but strong reason. The arguments in the text deny that there is any such strong reason.

value is amenable to social decision, but that value is answerable to some feature of society for its very condition as value, which in this context means being answerable to the feature of sexual identity. Values would be genuinely valuable only if they failed to register sexual identity. Unlike the project of eliminating sexual difference considered above, the implausibility here is that of regarding human value as being relative to sexual identity. This implausibility is perhaps brought out more directly and fully in the second reading of the difference-based approach to understanding and ending the practice of sex discrimination, which is concerned to register sexual identity rather than fail to register it.

This reading is one that asks society to tailor its understanding of human value to the character of women, to ensure not that women are equal to men, but that women's known qualities are honoured and respected; or in some versions, to ensure that women's heretofore suppressed qualities are recovered and given voice. Whether by endorsing as good women's qualities as they are presently understood, or by endorsing as women's and as good those human qualities that are said to have been neglected or suppressed in our society's present picture of human existence, the approach asks no questions about what it means to be a woman (or a man). Just as in the earlier reading, it takes sexual identity as a given and uses that identity to place pressure upon human value. Women are either just as we have always known them to be (but have failed to value) or are everything that we have refused to imagine (and so have refused to recognize in our account of value). In both cases, value is said to be relative to sexual identity, although different theories offer different ideas of what sexual identity is.

Assume first the more difficult and less common proposition that value is to be related to sexual identity *as a whole*, in order to ensure the valuing of women's qualities *as well as* those of men. As I have suggested, this proposition is a particular form of value relativism, the doctrine that value is a function of some other feature of the world.⁶ Relativists have different views of what it is that value is properly related to. Cultural relativists believe that value is a function of particular cultures, and so regard as valuable (for particular cultures) whatever is treated as valuable by those cultures. Subjectivists believe that value is a function of personal attitudes, and so regard as valuable (for particular people) whatever is treated as valuable by those people. The particular relativists that I have in mind believe that value is a function of sexual identity, and so regard as valuable (for men and for women) whatever is a reflection of that identity.⁷

⁶ Relativists typically believe that value is relative to such features because it is a product of them, so that for relativists value becomes the name of a cultural attitude, or a personal attitude, or the male or female outlook: see the discussion in Section VI. Thus, to believe that value is relative to sexual identity is (typically) to believe that value is the product of whatever attitude or outlook defines men and women as sexual beings. This, however, raises the problem of differences in sexual outlook, with the ramifications for value discussed in the text.

⁷ So some feminists claim that women are subject to a special, female form of rationality, not because rationality has dimensions we have historically neglected or dismissed that women are

By treating men and women, and the qualities that define them, as valuable just as they are, without criticism or qualification, these relativists hope never to reach the conclusion that it is better to be one than the other, better to be a man than a woman, or a woman than a man, in any setting, for any purpose.

It is not possible to make a general case against relativism and for the objectivity of value in the space of this chapter.⁸ It is possible to point out, however, that even if value relativism were a coherent doctrine (as I believe it is not), value could not plausibly be regarded as relative to sexual identity, given the particular conceptual structure of sexual identity.⁹ One of the consequences of relativism, of the claim that value is a function of some feature of the world as it is, is that all valuable things become compatible with one another, for otherwise they could not coexist in features of the world as it is. That being the case, relativism implies that we need never be forced, for reasons of incompatibility, to prefer one value to another, in our beliefs or actions. This may explain in part the appeal of relativism, at least for those who are troubled by conflicts of values. It removes the possibility of any confrontation between incompatible values, for values that coexist in the world are necessarily compatible with one another. It certainly explains the attraction of relativism to those who seek a world in which it never would be preferable to belong to one sex rather than the other. Yet the very compatibility of values that makes relativism attractive sets a limit to the kinds of things to which value can be related.

This gives rise to fundamental difficulties for those who would relate value to sexual identity *as a whole*. On the one hand, to treat value as a function of sexual identity as that identity is understood *and valued* in a particular culture would only end sex discrimination if the culture in question had no practice of sex discrimination. Otherwise the reference would simply have the effect of affirming that culture's particular form of sex discrimination. Since no culture is free from sex discrimination, it would be a recipe for maintaining rather than ending existing forms of sex discrimination to treat value as a function of sexual identity as it is understood *and valued* in any existing culture.

On the other hand, given the conceptual structure of sexual identity, to treat value as a function of sexual identity as it is understood (but not valued) in any particular culture, in an attempt to ensure that the existing qualities of both sexes are regarded as valuable, does nothing to free that culture from the burden of deciding whether it is better, in any given setting, to think or act like a woman or like a man. Sexual identity depends for its existence on a contrast between the qualities that define a woman as a woman and those that define a man as a man.

particularly fluent in, but because how women think is how they should think. This is one way, although not in my view the correct way, to understand the central claim of Carol Gilligan's *In a Different Voice* (Cambridge, Mass., 1982).

⁸ For a sketch of that case, see note 19 and the discussion there.

⁹ This is to set aside for the moment any questions about the *content* of sexual identity as it is presently understood. The argument here applies however sexual identity is understood.

If it is true that women are caring, for example, then it is true that men are not caring, or at least are less so, or less often so; otherwise the sexes could not be distinguished by their capacity for concern. This contrast makes it impossible to give effect to both aspects of sexual identity at once, so as not to prefer in any given setting the thoughts or actions of a man to those of a woman, or vice versa. It is impossible, for example, to be simultaneously concerned and unconcerned in one's thoughts or actions, or to put it another way, to implement the value of each, in the same setting and for the same purpose. One quality, be it concern or lack of concern, and the sex that exhibits or tends to exhibit that quality, must be preferred to the other. This makes it impossible to regard value as relative to sexual identity as a whole, so as never to prefer one sex to the other. The qualities that define and distinguish the sexes must each have their place, a place that is determined by an account of value that is not relative to sexual identity. That being the case, a relativist who seeks to relate value to sexual identity would have to regard value as residing, in any particular setting, in one aspect or the other of that identity (in which case value would no longer be relative to sexual identity, strictly speaking, but to maleness or femaleness, as the case might be) or in neither.¹⁰

In fact, few, if any, critics of the present social order maintain that value is relative to sexual identity in just the way I have described, though that may be a necessary implication of their arguments. Rather, they emphasize the need to relate value to the qualities of *women*, so as to ensure that those qualities are at last recognized as good, as the qualities of men presumably already are and long have been. This contention, however, to the extent that it differs from the contention that value is relative to sexual identity as a whole, only exposes a more familiar weakness in value relativism, namely, its inability to criticize the particular social order, or particular feature of that social order, to which value is related. If value were relative to the qualities of one sex, here to the qualities of women, so that the qualities of women were recognized as good by definition, then the qualities of men, if not also said to be valuable in the manner considered above, would have to be correspondingly bad. Setting to one side the inherent implausibility of a suggestion that the present practice of sex discrimination could be brought to an end by simply inverting it, so as to change the identity of its victims from women to men, the attempt to treat women's qualities as good by definition rather than by virtue of their objective

¹⁰ This is not to say that value cannot embody a contradiction, for clearly it can. Many features of the world are understood in terms of a contrast that makes it impossible to realize both aspects of them at once, yet they are no less valuable for that reason. Femaleness and maleness are both capable of being valued despite the fact that the different values they may give rise to are incompatible. However, while both ways of being are valuable, it is not possible to realize them both at once. In any setting where both forms of value are realizable, a choice must be made as to which value to realize. In some settings and for some purposes, it is better to be a woman; in others, a man. Practice does not guide value, as not only objectivists but any critic of the present social order must agree.

value is no recipe for a valuable life for women, or for true respect for and pride in one's identity as a woman.

To take sexual identity, as we now understand it,¹¹ as the premise of value is to place that identity beyond the capacity of value to criticize. And yet, as many have pointed out, such criticism is surely crucial to the ending of sex discrimination. It is possible, of course, to believe that the present social practice of sex discrimination is in no way reflected in the present social understanding of sexual identity, but it is not terribly plausible to do so. On the contrary, it seems almost certain that the present practice of sex discrimination is broadly reflected in the present understanding of sexual identity, so that the picture we as a society now have of what it means to be a woman both includes qualities that women do not possess and neglects qualities that women do possess, in each case to women's disadvantage. If that is so, then to take women's present identity as the premise for understanding value, and hence for understanding discrimination, is to honour as women's and as valuable qualities that are not women's and may not be valuable, and correspondingly, to fail to honour qualities that are women's and are valuable, or that are capable of being used valuably. In other words, and in its own terms, to treat value as relative to women's present identity as women is to make it impossible to regard that identity as anything but good. If that is implausible, then it is implausible, even if intelligible, to regard human value as relative to sexual identity.

These are points about the nature of value, but as my last comments make clear, they also place in question the status of the present understanding of sexual identity, of what it means to be a woman or a man. Value relativism aside, whether the qualities that we take to describe and define sexual difference are real or mythical is a crucial question for any account of sex discrimination. Whatever human value is or is taken to be, it can be engaged in only by those who genuinely possess the qualities, and the corresponding achievements, that human value registers and responds to. To put it another way, even value relativists can only know what values they should endorse by knowing, and knowing accurately, the context to which those values are to be related. To relate value to a difference that is wholly or partially mythical would be to succumb to the very error that value relativists themselves seek to remedy, here the (supposed) error of failing to relate value to sexual difference as it actually is, that is, to what it genuinely means to be a woman or a man. If that is so, it is doubly

¹¹ The account could be premised on sexual identity as it really is rather than as we now understand it. This would not be easy, however, for such an account would typically incorporate an account of what is valuable, so as to distinguish what is material from what is immaterial in the potentially vast description of what anything is. An account of what we are that makes no reference to value risks lapsing into incoherence, counting the number of hairs on our heads, or freckles on our forearms. Even if this problem could be overcome, an account of value that took the qualities of women as they really are as the premise of value would still suffer from the implausibility of defining men as bad and from the more general objections to relativism sketched in note 19.

implausible to treat sexual identity, as we now understand it, as the premise for value.

The question remains, then, as it stood at the end of the previous section: whether it is possible to arrive at an account of sex discrimination that respects both sexual identity and human value while allowing for mistakes in our perception of each. The approaches considered so far have all been comparative in character, in that they have attempted to frame sexual identity and human value by reference to equality and difference. Yet it must be possible to understand women other than in terms of the ways in which they are and are not different from men, just as it is possible to understand men without reference to women. At some point comparisons between the sexes must end, and we must simply ask, and then answer, what it means to be a woman or a man. Whatever answer we arrive at must then be related to value. As I have said, it is not only possible but necessary to understand value other than in terms of a comparison between women and men. This suggests that a proper understanding of the disadvantage that flows from sex discrimination, a disadvantage that involves a denial to women, as they really are, of the ingredients necessary to a genuinely valuable life, must proceed other than by a comparison to the lives of men.

III. Discrimination Without Comparison

To return to the story with which I began, an alternative explanation of a woman's entitlement to appear in public naked to the waist (in hot weather at least) is that the conventional understanding of a woman's nakedness, and in particular of the significance of bare breasts on a public street, is profoundly mistaken. Indeed, it is only one instance of the manifold errors that we as a society have made, and continue to make, about what it means to be a woman, errors that have prevented women from leading successful lives. On that explanation, nondiscrimination would be a matter of removing the prevailing misconceptions of *what it means to be a woman*¹² and of the valuable activities to which a woman's life might be directed, in any case where the effect of those misconceptions is to disadvantage women, by impairing their prospect of leading a successful life.

It is a familiar fact, one not confined to this explanation of sex discrimination, that discrimination typically proceeds from a misconception (to put it gently) of what it means to be a woman. Time and again women are said to lack abilities that they in fact possess, or to possess disabilities that they in fact do not. The options available to them are then tailored accordingly, so as to deny women, on one

¹² In referring to what it means to be a woman, as I do throughout this section, I mean simply to refer to what it *is* to be a woman, whatever that may be. For a discussion of the many issues surrounding that idea, see section VII, below. I believe that it is impossible to know which values to pursue, or the extent to which one has been denied access to those values, and so has been discriminated against, without an adequate degree of self-understanding, which, in the case of women, means an adequate understanding of what it means to be a woman.

basis or the other, access to those that they in fact possess the ability to flourish in. This denial of access is typically to women's disadvantage, for women tend to be excluded by it from options that are critical to the success of their lives, although it is not inevitably so, as the life stories of the many women who have flourished despite the obstacles placed before them make clear. Sometimes, having been excluded from one valuable option or another, women are able to discover further valuable options in life that correspond to qualities they both possess and are acknowledged to possess, whose correspondence with women's qualities is typically overlooked, or whose value is typically downplayed.

Such enterprising and fortunate women are moral survivors. More often, the denial to women of access to valuable options, as a result of prevailing misconceptions of what it means to be a woman and of the activities to which a woman's life might be directed, prevents them from leading successful lives. According to the alternative explanation of discrimination under consideration here, the precise extent to which misconceptions about women have this effect is the precise extent of sex discrimination in any given society, for sex discrimination is a matter of so misunderstanding women as to deny them access to options that are critical to the success of their lives. Less profound failures of understanding are not to be dismissed, for ignorance unchallenged often begets greater and more dangerous ignorance, but they do not amount to a wrong, and so do not amount to the wrong of sex discrimination, unless they damage some person's, in this case some woman's, prospects in life.

So women are said (inaccurately) to be unaggressive or unscientific, and are consequently excluded from options whose value is a function of aggression or of a scientific approach. Or they are said (accurately, let us assume) to be unusually caring, but are then steered towards, and often confined to, options in life where the value of care is bound up with other nonvaluable aspects of those options, so as to make the options either unworthy in themselves (where serving others, for example, degenerates into servitude) or less than the whole story of a successful life (where being a good parent to one's children, for example, becomes one's only role in life). A nondiscriminatory reappraisal of what it means to be a woman, in terms both of a woman's qualities and of the valuable activities to which a woman's life might be directed, would enable women to gain access to the many valuable options in life that have long been and still remain closed to them, and correspondingly, would enable women to escape the confines of options that either are not valuable or, if valuable, are too limited a basis on which to build a successful life.¹³

¹³ I speak here of value, and the extent to which discrimination denies access to value, so preventing women's lives from being successful. Some may find the language of justice more familiar and more apt. They may feel that the idea of justice captures not only the instances of discrimination I draw attention to, which involve misconceptions, but other instances of what we recognize as discrimination that do not appear to involve misconceptions. Suppose, to take a familiar example, a society refuses to provide adequate child care for working women. This could be

Nothing in this story of discrimination and nondiscrimination depends upon a comparison of women to men, one that would describe women as equal to men, or as different from them. Nor would anything in the story be assisted by such a comparison. On the contrary, sexual equality and sexual difference are

said to be unjust, on the basis that it denies women a fair share of social resources. It is less obvious that it involves a misconception of working women and what it takes for them (or at least some of them) to lead a successful life. Yet appearances are deceptive.

One possibility is that the refusal to provide adequate child care is indeed based on a misconception. Some people probably do believe that women should stick to raising children, or at least that if women choose to have children, they should then make their family the focus of their lives, not compromise their domestic role with work outside the home. Set that possibility aside. The other, more relevant, possibility is that the refusal to provide adequate child care is seen by those responsible (and their critics) as an issue of justice. Some may believe that existing levels of child care represent working women's fair share of social resources; others believe that it does not. Either way the disagreement between them is on its face a disagreement about justice.

There are two ways to understand such arguments about justice, both captured in the idea that the right is prior to the good. On the one hand, arguments about justice are arguments about the proper role of the state. Antiperfectionists believe that the obligations of the state are confined to the right, namely, that which can be performed and enforced without reference to particular conceptions of the good life. I do not share that belief, but in any event my project brackets the question of its soundness. I am concerned to explore the nature of the problem of sex discrimination, not decide whose job it is to solve which aspects of that problem. As I see it, the obligation to end the practice of sex discrimination falls on all of us, individually and collectively. Those who believe that the role of the state is limited to securing the right will want to temper that claim. But that is no reason for them to disagree with my account of the nature of discrimination, which is practised by people everywhere, not merely by the state, and whose remedy is everyone's responsibility, not merely the state's.

On the other hand, the belief that the right is prior to the good transcends the question of the proper role of the state, and distinguishes obligations that are justified on the basis of the value of having them from those that are justified independently of that value. Yet as I see it, value underpins reasons and duties, so that the answer to the question of our duty not to discriminate depends ultimately upon the badness of discrimination, which in turn is a function of its tendency to impair the success of someone's life, here the life of a woman. In this sense my account is teleological rather than deontological, as those terms are explained by Rawls in *A Theory of Justice* (Oxford, 1973) at 24ff.

If a successful life is what ultimately matters, so that references to justice are best understood as references to certain aspects of our duty to support one another in the pursuit and achievement of a successful life, then any refusal to provide adequate child care to working women, if not simply a matter of bad faith or weakness of will, must be based on a misconception, even if that misconception is no more than an after-the-fact rationalization and so the product of self-deception. No argument of justice could warrant the denial of a successful life to women if, as I believe, arguments of justice are ultimately directed to making each person's life successful. As a society, we owe women resources such as child care because and to the extent that those resources are necessary to a successful life, and so can withhold them only where they are in that sense unnecessary. The account I give thus reaches some, perhaps many, of the same conclusions as more familiar arguments from justice, not because it is derivable from the idea of justice, but because the idea of justice is derived from the understanding of value on which I rely.

For further discussion of the idea of a successful life, see section VI of this chapter; for consideration of the relationship between misconceptions and disadvantage, see Chapter 6, section II, part C; for further exploration of some of the practical implications of the account I give for issues such as child care, see the final chapter. On reasons and values, see Gardner and Macklem, "Reasons", in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford, 2002), 440, at 450ff.

themselves conceptions of what it means to be a woman, which, given their sweeping character, may be as heavily distorted as those they are invoked to replace. It is of course clearly the case that, contrary to what was once widely assumed, women are in very many ways no different from men, and to that extent are, strictly speaking, not distinguishable in terms of their sex. That is to say, an accurate picture of sexual difference, of the qualities that distinguish women and men, would not include the qualities that men and women have in common, in like kind and degree, in terms of which they are equal to one another. It is as clearly the case that in other respects women are different from men, although not necessarily in the same respects that they have been widely taken to be, so that an accurate picture of sexual difference would be one that captured that difference accurately, rather than some other difference, or none at all.

And yet, just as clearly, it is not possible to arrive at an accurate picture of what it means to be a woman, and of the valuable activities to which a woman's life might be directed, by pursuing the idea that women are equal to men, or are different from men, or some combination of the two. Rather, we know that women are equal to men only when we know what women and men are, and then notice that whatever may once have been pretended, there is no difference between them, and similarly, know that women are different from men when we know what each is and see that they are to be distinguished, and how they are to be distinguished. Indeed, it is not possible to identify either equality or difference other than by identifying the genuine qualities of the objects under comparison, whether the purpose is to show that people are equal, or that they are unequal as the first step in an argument that they should not be so, an argument of the kind considered and rejected in the previous sections.

There is also nothing in this story of discrimination and nondiscrimination about the qualities of men, or about any necessary reciprocity in policies of nondiscrimination. It is possible, of course, to misunderstand both women and men, and to misunderstand them both so badly as to deny them both access to options that are critical to the success of their lives. But it is not necessary to misunderstand men in order to misunderstand women, and in fact there is little evidence that we as a society misunderstand men to an extent that would damage men's lives. On the contrary, it is not only possible in principle, but seems to be the case in practice, that a society can understand men well, or at least well enough, and yet understand women little, or at least too little to enable them to lead successful lives. If it is indeed the case that sex discrimination is one-sided in this way, then the remedy must be similarly one-sided, so as to focus on the true problem, namely, the effect on women, and the success of their lives, of prevailing misconceptions of what it means to be a woman and of the valuable activities to which a woman's life might be directed.

It might be objected that this is to contradict what I have earlier contended, namely, that sexual identity is a bivalent distinction, in which the qualities of

one sex are correlative to those of the other. If that is the character of sexual identity, then it follows that to know what it means to be a woman is, *ipso facto*, to know what it means to be a man. Does it not also follow that it is not possible to know what it means to be a woman other than by knowing what it means to be a man? And does it not then follow that the misconceptions of what it means to be a woman that underlie sex discrimination are necessarily reciprocal, so that their understanding and their remedy must also be reciprocal?

There is some truth in this line of thought, but it is a truth that is easy to overstate. To grasp its real implications it is necessary to distinguish two different understandings of what it means to be a woman or a man. On the one hand, to speak of men and women is to speak of *people* who can, in some respects and for some purposes, be distinguished in terms of their sex. On the other hand, and more precisely, to speak of men and women is to speak of that distinction itself. To take the most obvious example of the difference between the two usages, on the former way of speaking, women and men are often equal to one another, indeed, are equal to one another in all respects in which they cannot be distinguished from one another. On the latter way of speaking, women and men cannot be equal, for to the extent that they are equal they cannot be distinguished as women and men. In principle the two usages, while distinct, might be coextensive in practice. However, that would be so only if the sexes were entirely different and so never equal, an idea that is as implausible as the idea, considered and rejected earlier, that the sexes are entirely equal and so indistinguishable.

Two related consequences follow from these two understandings of what it means to be a woman or a man. First, only women and men in the first sense are people and thus can succeed or fail in life. Distinctions do not have lives, except when spoken of metaphorically, and so are not subject to disadvantage in life. Given that the inquiry into sex discrimination is an inquiry into the predicament of people who are disadvantaged in life as the result of the way they have been treated on the basis of their sex, it is an inquiry into the predicament of women and men in the first sense (the sense in which they are people who are equal in some respects, different in others), as the result of their treatment as women and men in the second sense (the sense in which the sexes are different by definition). Second, and consequently, it is perfectly possible to understand people correctly as people (and thus as women and men in the first sense) while misunderstanding them as women or men (in the second, more precise sense). This happens whenever we correctly attribute certain qualities to certain people but then incorrectly attribute those qualities to the status of those people as women or men. Whenever that is the case, one sex may be discriminated against and the other not, depending on the damage that flows from the misattribution.

Suppose, for example, that men are correctly understood to possess a certain quality that women are incorrectly thought to lack. Such a misconception is reciprocally mistaken, since maleness is mistakenly thought to include, and

femaleness to lack, a quality that does not in fact distinguish the sexes. But it is not reciprocally damaging, and so is not reciprocally discriminatory, because men (in the first sense, as people) have full access to the quality in question, albeit under the wrong description, while women (again in the first sense) have no access at all to that quality, not merely no access to it under their description as women.¹⁴ As I suggested above, then, it follows that it is perfectly possible, and indeed seems to be the case, that a society can understand men well, or at least well enough, and yet understand women little, or at least too little to enable them to lead successful lives. If sex discrimination is one-sided in this way, the remedy must be similarly one-sided, not reciprocal.

This is not to suggest that it is in any sense an easy matter to establish the meaning of sexual identity or the nature of value, or to decide whether a mistake about either amounts to discrimination. On the contrary, it is extremely difficult, as can be readily appreciated by attempting to consider, from this point of view, the question of whether it would be discriminatory for the law to treat as indecent the fact that a woman has appeared in public naked to the waist. To answer that question one would have to know something about the meaning of a woman's nakedness, enough to know, perhaps, the extent to which bare breasts are sexually freighted, whether as the result of their physical nature or of cultural convention, and further, one would have to know the value (if any) of public decency, and the extent to which (if at all) decency is undermined by heavily sexually freighted conduct in public. Having determined (let us suppose) that bare breasts are not sexually freighted, or that public decency is either not valuable or not undermined by the exposure of bare breasts, one would then have to determine whether the inability to appear in public naked to the waist, as the result of a prevailing misconception of what it means to be a woman and of the valuable activities to which a woman's life might be directed, genuinely disadvantages women. This would involve determining whether appearing in public naked to the waist is not merely a valuable option, but one that is critical to the success of at least some women's lives.¹⁵ It would not be enough to establish,

¹⁴ I set to one side here the special and relatively rare cases in which it is possible to have access to a quality only by acting under that description, as it may, for example, be possible to be gay only by acting under the description of oneself as gay. It is a mistake to think that, if the damage to women's lives produced by sex discrimination is the consequence of women's having been forced to act under a false description of what it means to be a woman, then the success of women's lives must be dependent upon their acting under a true description of what it means to be a woman. If women and men are to have successful lives, they must draw upon an accurate understanding of themselves as the people they are, but in doing so they need not act under the description of themselves as women and men, or indeed, and special cases aside, under any description at all.

¹⁵ These conditions are widely thought to be met with regard to breast-feeding in public. Such exposure of a bare breast is not sexually freighted and so should not offend public decency, assuming that public decency is offended by heavily sexually freighted conduct in public. A sense of public decency that was offended by breast-feeding in public, on the ground that bare breasts are heavily sexually freighted, would be discriminatory, for such a sense of decency

as the court did in fact, the content of the community standard of tolerance, for it is entirely possible that the community standard of tolerance is discriminatory, although it happened not to be so in this case (or so we may assume).

IV. Comparison and Noncomparison

As I have said, all these are difficult questions. And yet the alternatives, if less difficult, are less persuasive, for the reasons sketched in the first two sections. One of the great attractions of an egalitarian approach to sex discrimination, for example, is that it is straightforward and easy to apply. Women are entitled to do whatever men are entitled to do. It is not necessary to know anything about women, or about what is good for women, or about the nature of a successful life and when it may be undermined, in order to pursue the equality of the sexes. Straightforward though the egalitarian approach may be, however, it has the unfortunate consequences outlined above. To commit ourselves to it would be to commit ourselves to the destruction either of sexual difference or of all that makes that difference matter.

However, to say that the questions raised by this alternative approach to sex discrimination are difficult, while true, is also somewhat misleading, for it is to neglect the fact that in many respects they are extremely familiar questions. It has long been a central function of antidiscrimination initiatives, and of the feminist movements that have inspired and sustained them, to challenge the prevailing picture of what women are and what they ought to do with their lives. Admittedly, their analysis has almost invariably been couched in terms of equality (and less commonly difference), and so has almost invariably been comparative in character. But the impetus for those initiatives, with which the analysis sits uncomfortably, has been noncomparative, for it has been to challenge, and seek to dispel, a certain conception of what it means to be a woman, in order to bring to an end the disadvantage that conception causes to women. It is this need to ensure that women are able to lead successful lives that determines whether ending discrimination is to be pursued through a strategy of equality or a strategy of difference, and so explains the apparent opportunism of sometimes pursuing one, sometimes the other strategy. What the apparent opportunism reveals is that it is not in fact equality or difference themselves, but an underlying, unarticulated sense of what it means for a woman to lead a successful life, that establishes the particular conception of a woman's life that is to be pursued, which is then compared with the prevailing conception of a man's life and so determined to be equal or different.

not only involves a misconception of what it means to be a woman, but that misconception is damaging to women, for the ability to breast-feed a child in public is critical to all those women whose success in life depends upon the ability to reconcile parenthood and employment (or any other life) outside the home.