PART I

What Is Sex Discrimination?

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

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

(Andy Gray, Sky Sports Presenter)

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

(Robin Givhan, *Washington Post* staff writer)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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