RACISM, SEXISM, AND PREFERENTIAL TREATMENT: AN APPROACH TO THE TOPICS

RICHARD A. WASSERSTROM

Reprinted from UCLA LAW REVIEW Volume 24, February 1977, Number 3
© 1977 by the Regents of the University of California
RACISM, SEXISM, AND PREFERENTIAL TREATMENT: AN APPROACH TO THE TOPICS

Richard A. Wasserstrom*

INTRODUCTION

Racism and sexism are two central issues that engage the attention of many persons living within the United States today. But while there is relatively little disagreement about their importance as topics, there is substantial, vehement, and apparently intractable disagreement about what individuals, practices, ideas, and institutions are either racist or sexist—and for what reasons. In dispute are a number of related questions concerning how individuals and institutions ought to regard and respond to matters relating to race or sex.

One particularly contemporary example concerns those programs variously called programs of “affirmative action,” “preferential treatment,” or “reverse discrimination” that are a feature of much of our institutional life. Attitudes and beliefs about these programs are diverse. Some persons are convinced that all such programs in virtually all of their forms are themselves racist and sexist and are for these among other reasons indefensible.

* Professor of Law and Professor of Philosophy, University of California, Los Angeles. Copyright © 1977 by Richard A. Wasserstrom.

Such a view appears to be held in, e.g., Brief for the Anti-Defamation League of the B’nai B’rith as Amicus Curiae on Appeal, DeFunis v. Odegaard, 416 U.S. 312 (1974): “Discrimination on the basis of race is illegal, immoral, unconstitutional, and inherently wrong.” Id. at 16-17; Mr. Justice Douglas’ dissent in DeFunis, supra: “There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he has a constitutional right to have his application considered on its individual merits in a racially neutral manner,” id. at 337; Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972): Preferential treatment “under the guise of ‘affirmative action’ is the imposition of . . . racial discrimination,” id. at 249; Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 45 U.S.L.W. 3437 (U.S. Dec. 14, 1976) (No. 76-811): “We cannot agree with the proposition that deprivation based on race is subject to a less demanding standard of review under the Fourteenth Amendment if the race discriminated against is the majority rather than a minority. We have found no case so holding, and we do not hesitate to reject the notion that racial discrimination may be more easily

581.
programs are causally explicable, perhaps, but morally reprehensible. Other persons—a majority, I suspect—are sorely troubled by these programs. They are convinced that some features of some programs, e.g., quotas, are indefensible and wrong. Other features and programs are tolerated, but not with fervor or enthusiasm. They are seen as a kind of moral compromise, as, perhaps, a lesser evil among a set of unappealing options. They are reluctantly perceived and implemented as a covert, euphemistic way to do what would clearly be wrong—even racist or sexist—to do overtly and with candor. And still a third group has a very different view. They think these programs are important and appropriate. They do not see these programs, quotas included, as racist or sexist, and they see much about the dominant societal institutions that is. They regard the racism and sexism of the society as accounting in substantial measure for the failure or refusal to adopt such programs willingly and to press vigorously for their full implementation.

justified against one race rather than another," id. at 50, 553 P.2d at 1163, 132 Cal. Rptr. at 691 (footnotes omitted); Graglia, Special Admission of the "Culturally Deprived" to Law School, 119 U. PA. L. REV. 351 (1970); Lavinsky, DeFunis v. Odegard: The Non-Decision with a Message, 75 COLUM. L. REV. 520 (1975).

I say such a view "appears to be held" because it is never wholly clear within the context of constitutional adjudication and commentary whether the claim is that it is wrong to take race into account in these ways or that it is forbidden by the Constitution so to take race into account. The two claims are intimately related. What one thinks about the rightness or wrongness of a practice or program will, appropriately, influence the way in which a constitutional provision—particularly one as general as the equal protection clause of the 14th amendment—is interpreted. And, in fact, it does appear that those who think these programs are unconstitutional also believe that it is good that the Constitution prohibits such programs, because they independently believe that it is wrong to have programs such as these that take race into account. But the two claims are also distinguishable. Legislative history, prior judicial decisions, and various doctrinal considerations, such as standing and state action, are also appropriately taken into account in interpreting and applying the Constitution to particular cases and practices.

The inquiry I conduct in this paper is not directed to the constitutional question, but to broader questions concerning a number of moral, conceptual, and methodological issues involving race and sex. Since the two kinds of questions are related, my comments have relevance, I believe, within and for the constitutional context. The focus of my inquiry is not the constitutional question, however. I therefore do not seek to elucidate doctrine or even to discuss cases and commentaries dealing with these matters in the way or to the degree one might otherwise expect.


3 Among those who have defended such programs, in one form or another, are Askin, The Case for Compensatory Treatment, 24 RUT. L. REV. 65 (1964); Bell, In Defense of Minority Admissions Programs: A Reply to Professor Graglia, 119 U. PA. L. REV. 364 (1970); Ely, The Constitutionality of Reverse Discrimination, 41 U. CHI. L. REV. 723 (1974); Hughes, Reparations for Blacks, 43
I think that much of the confusion in thinking and arguing about racism, sexism and affirmative action results from a failure to see that there are three different perspectives within which the topics of racism, sexism and affirmative action can most usefully be examined. The first of these perspectives concentrates on what in fact is true of the culture, on what can be called the social realities. Here the fundamental question concerns the way the culture is: What are its institutions, attitudes and ideologies in respect to matters of race and sex?  

The second perspective is concerned with the way things ought to be. From this perspective, analysis focuses very largely on possible, desirable states of affairs. Here the fundamental question concerns ideals: What would the good society—in terms of its institutions, its attitudes, and its values—look like in respect to matters involving race and sex?  

The third perspective looks forward to the means by which the ideal may be achieved. Its focus is on the question: What is the best or most appropriate way to move from the existing social realities, whatever they happen to be, to a closer approximation of the ideal society? This perspective is concerned with instrumentalities.  

Many of the debates over affirmative action and over what things are racist and sexist are unilluminating because they neglect to take into account these three perspectives, which are important and must be considered separately. While I do not claim that all the significant normative and conceptual questions concerning race, sex, or affirmative action can be made to disappear, I do believe that an awareness and use of these perspectives can produce valuable insights that contribute to their resolution. In particular, it can almost immediately be seen that the question of whether something is racist or sexist is not as straightforward or unambiguous as may appear at first. The question may be about social realities, about how the categories of race or sex in fact function in the culture and to what effect. Or the question may be about ideals, about what the good society would make of race or sex. Or the question may be about instrumentalities, about how, given the social realities as to race and sex, to achieve a closer approximation of the ideal. It can also be seen, therefore, that what might be an impermissible way to take race or sex into account in the ideal society, may also be a desirable and appro-
propriate way to take race or sex into account, given the social realities.

It is these three different perspectives and these underlying issues that I am interested in exploring. This framework is used to clarify a number of the central matters that are involved in thinking clearly about the topics of racism, sexism and affirmative action. Within this framework, some of the analogies and disanalogies between racism and sexism are explored—the ways they are and are not analytically interchangeable phenomena. I also provide an analytic scheme for distinguishing different respects in which a complex institution such as the legal system might plausibly be seen to be racist or sexist. And I examine some of the key arguments that most often arise whenever these topics are considered. In respect to programs of affirmative action, or preferential treatment, I argue specifically that much of the opposition to such programs is not justifiable. It rests upon confusion in thinking about the relevant issues and upon a failure to perceive and appreciate some of the ways in which our society is racist and sexist. I argue that there is much to be said for the view that such programs, even when they include quotas, are defensible and right. My central focus is not, however, on affirmative action per se, but rather on how a consideration of affirmative action is linked to a deepened understanding of these larger, related issues.

I. Social Realities

One way to think and talk about racism and sexism is to concentrate upon the perspective of the social realities. Here one must begin by insisting that to talk about either is to talk about a particular social and cultural context. In this section I concentrate upon two questions that can be asked about the social realities of our culture. First, I consider the position of blacks and females in the culture vis-à-vis the position of those who are white, and those who are male. And second, I provide an analysis of the different ways in which a complex institution, such as our legal system, can be seen to be racist or sexist. The analysis is offered as a schematic account of the possible types of racism or sexism.

A. The Position of Blacks and Women

In our own culture the first thing to observe is that race and sex are socially important categories. They are so in virtue of the fact that we live in a culture which has, throughout its existence, made race and sex extremely important characteristics of and for all the people living in the culture.7

7 In asserting the importance of one's race and sex in our culture I do
It is surely possible to imagine a culture in which race would be an unimportant, insignificant characteristic of individuals. In such a culture race would be largely if not exclusively a matter of superficial physiology; a matter, we might say, simply of the way one looked. And if it were, then any analysis of race and racism would necessarily assume very different dimensions from what they do in our society. In such a culture, the meaning of the term "race" would itself have to change substantially. This can be seen by the fact that in such a culture it would literally make no sense to say of a person that he or she was "passing." This is something that can be said and understood in our own culture and it shows at least that to talk of race is to talk of more than the way one looks.

Sometimes when people talk about what is wrong with affirmative action programs, or programs of preferential hiring, they say that what is wrong with such programs is that they take a thing as superficial as an individual's race and turn it into something important. They say that a person's race doesn't matter; other

not mean to deny the importance of other characteristics—in particular, socio-economic class. I do think that in our culture race and sex are two very important facts about a person, and I am skeptical of theories which "reduce" the importance of these features to a single, more basic one, e.g., class. But apart from this one bit of skepticism I think that all of what I have to say is compatible with several different theories concerning why race and sex are so important—including, for instance, most versions of Marxism. See, e.g., the account provided in J. MITCHELL, WOMAN'S ESTATE (1971). The correct causal explanation for the social realities I describe is certainly an important question, both in its own right and for some of the issues I address. It is particularly significant for the issue of how to alter the social realities to bring them closer to the ideal. See Part III infra. Nonetheless, I have limited the scope of my inquiry to exclude a consideration of this large, difficult topic.

8 Passing is the phenomenon in which a person who in some sense knows himself or herself to be black "passes" as white because he or she looks white. A version of this is described in Sinclair Lewis' novel KINGSBLOOD ROYAL (1947), where the protagonist discovers when he is an adult that he, his father, and his father's mother are black (or, in the idiom of the late 1940's, Negro) in virtue of the fact that his great grandfather was black. His grandmother knew this and was consciously passing. When he learns about his ancestry, one decision he has to make is whether to continue to pass, or to acknowledge to the world that he is in fact "Negro."

9 That looking black is not in our culture a necessary condition for being black can be seen from the phenomenon of passing. That is not a sufficient condition can be seen from the book BLACK LIKE ME (1960), by John Howard Griffin, where "looking black" is easily understood by the reader to be different from being black. I suspect that the concept of being black is, in our culture, one which combines both physiological and ancestral criteria in some moderately complex fashion.

10 Mr. Justice Douglas suggests something like this in his dissent in DeFunis: "The consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination." DeFunis v. Odegaard, 416 U.S. 312, 333 (1974).
things do, such as qualifications. Whatever else may be said of statements such as these, as descriptions of the social realities they seem to be simply false. One complex but true empirical fact about our society is that the race of an individual is much more than a fact of superficial physiology. It is, instead, one of the dominant characteristics that affects both the way the individual looks at the world and the way the world looks at the individual. As I have said, that need not be the case. It may in fact be very important that we work toward a society in which that would not be the case, but it is the case now and it must be understood in any adequate and complete discussion of racism. That is why, too, it does not make much sense when people sometimes say, in talking about the fact that they are not racists, that they would not care if an individual were green and came from Mars, they would treat that individual the same way they treat people exactly like themselves. For part of our social and cultural history is to treat people of certain races in a certain way, and we do not have a social or cultural history of treating green people from Mars in any particular way. To put it simply, it is to misunderstand the social realities of race and racism to think of them simply as questions of how some people respond to other people whose skins are of different hues, irrespective of the social context.

I can put the point another way: Race does not function in our culture as does eye color. Eye color is an irrelevant category; nobody cares what color people's eyes are; it is not an important cultural fact; nothing turns on what eye color you have. It is important to see that race is not like that at all. And this truth affects what will and will not count as cases of racism. In our culture to be nonwhite—and especially to be black—is to be treated and seen to be a member of a group that is different from and inferior to the group of standard, fully developed persons, the adult white males. To be black is to be a member of what was a despised minority and what is still a disliked and oppressed one. That

11 There are significant respects in which the important racial distinction is between being white and being nonwhite, and there are other significant respects in which the fact of being black has its own special meaning and importance. My analysis is conducted largely in terms of what is involved in being black. To a considerable extent, however, what I say directly applies to the more inclusive category of being nonwhite. To the extent to which what I say does not apply to the other nonwhite racial distinctions, the analysis of those distinctions should, of course, be undertaken separately.

12 See, e.g., J. Baldwin, The Fire Next Time (1963); W.E.B. DuBois, The Souls of Black Folk (1903); R. Ellison, Invisible Man (1952); J. Franklin, From Slavery to Freedom (3d ed. 1968); C. Hamilton & S. Carmichael, Black Power (1967); Report of the U.S. Commission on Civil Disorders (1968); Kilson, Whither Integration?, 45 Am. Scholar 360 (1976); and hundreds, if not thousands of other books and articles, both literary and empirical. These
is simply part of the awful truth of our cultural and social history, and a significant feature of the social reality of our culture today.

We can see fairly easily that the two sexual categories, like the racial ones, are themselves in important respects products of the society. Like one's race, one's sex is not merely or even primarily a matter of physiology. To see this we need only realize that we can understand the idea of a transsexual. A transsexual is someone who would describe himself or herself either as a person who is essentially a female but through some accident of nature is trapped in a male body, or a person who is essentially a male but through some accident of nature is trapped in the body of a female. His (or her) description is some kind of a shorthand way of saying that he (or she) is more comfortable with the role allocated by the culture to people who are physiologically of the opposite sex. The fact that we regard this assertion of the transsexual as intelligible seems to me to show how deep the notion of sexual identity is in our culture and how little it has to do with physiological differences between males and females. Because people do pass in the context of race and because we can understand what passing means; because people are transsexuals and because we can understand what transsexuality means, we can see that the existing social categories of both race and sex are in this sense creations of the culture.

It is even clearer in the case of sex than in the case of race that one’s sexual identity is a centrally important, crucially relevant category within our culture. I think, in fact, that it is more important and more fundamental than one's race. It is evident that there are substantially different role expectations and role assignments to persons in accordance with their sexual physiology, and that the positions of the two sexes in the culture are distinct. We do have a patriarchal society in which it matters enormously whether one is a male or a female. By almost all important measures it is more advantageous to be a male rather than a female.

Sources describe a great variety of features of the black experience in America: such things as the historical as well as the present day material realities, and the historical as well as present day ideological realities, the way black people have been and are thought about within the culture. In Kingblood Royal, supra note 8, Lewis provides a powerful account of what he calls the “American Credo” about the Negro, circa 1946. Id. at 194-97.

The best general account I have read of the structure of patriarchy and of its major dimensions and attributes is that found in Sexual Politics in the chapter, “Theory of Sexual Politics.” K. Millett, Sexual Politics 23-58 (1970). The essay seems to me to be truly a major contribution to an understanding of the subject. Something of the essence of the thesis is contained in the following:

[A] disinterested examination of our system of sexual relationship must point out that the situation between the sexes now, and throughout his-
Women and men are socialized differently. We learn very early and forcefully that we are either males or females and that much turns upon which sex we are. The evidence seems to be to be overwhelming and well-documented that sex roles play a fundamental role in the way persons think of themselves and the world—to say nothing of the way the world thinks of them.14 Men and women are taught to see men as independent, capable, and powerful; men and women are taught to see women as dependent, limited in abilities, and passive. A woman's success or failure in life is defined largely in terms of her activities within the family. It is important for her that she marry, and when she does she is expected to take responsibility for the wifely tasks: the housework, the child care, and the general emotional welfare.

tory, is a case of that phenomenon Max Weber defined as *herrschaft*, a relationship of dominance and subordination. What gets largely unexamined, often even unacknowledged (yet is institutionalized nonetheless) in our social order, is the birthright priority whereby males rule females. Through this system a most ingenious form of "interior colonization" has been achieved. It is one which tends moreover to be studier than any form of segregation and more rigorous than class stratification, more uniform, certainly more enduring. However muted its present appearance may be, sexual domination obtains nevertheless as perhaps the most pervasive ideology of our culture and provides its most fundamental concept of power.

This is so because our society, like all other historical civilizations, is a patriarchy. The fact is evident at once if one recalls that the military, industry, technology, universities, science, political office, and finance—in short, every avenue of power within the society, including the coercive force of the police, is entirely in male hands. . . . Sexual politics obtains consent through the "socialization" of both sexes to basic patriarchal politics with regard to temperament, role, and status. As to status, a pervasive assent to the prejudice of male superiority guarantees superior status in the male, inferior in the female. The first item, temperament, involves the formation of human personality along stereotyped lines of sex category ("masculine" and "feminine"), based on the needs and values of the dominant group and dictated by what its members cherish in themselves and find convenient in subordinates: aggression, intelligence, force and efficacy in the male; passivity, ignorance, docility, "virtue," and ineffectuality in the female. This is complemented by a second factor, sex role, which decrees a consonant and highly elaborate code of conduct, gesture and attitude for each sex. In terms of activity, sex role assigns domestic service and attendance upon infants to the female, the rest of human achievement, interest and ambition to the male. . . . Were one to analyze the three categories one might designate status as the political component, role as the sociological, and temperament as the psychological—yet their interdependence is unquestionable and they form a chain.

Id. at 24-26 (footnotes omitted).

14 See, e.g., Hochschild, *A Review of Sex Role Research*, 78 Am. J. Soc. 1011 (1973), which reviews and very usefully categorizes the enormous volume of literature on this topic. See also Stewart, *Social Influences on Sex Differences in Behavior*, in *Sex Differences* 138 (M. Teitelbaum ed. 1976); Weitzman, *Sex-Role Socialization*, in *Women: A Feminist Perspective* 105 (J. Freeman ed. 1975). A number of the other pieces in *Women: A Feminist Perspective* also describe and analyze the role of women in the culture, including the way they are thought of by the culture. I return to consider further the question of what accounts for the existing psychological and sociological sex differences in pp. 609-15 infra.
of the husband and children. Her status in society is determined in substantial measure by the vocation and success of her husband. Economically, women are substantially worse off than men. They do not receive any pay for the work that is done in the home. As members of the labor force their wages are significantly lower than those paid to men, even when they are engaged in similar work and have similar educational backgrounds. The higher the prestige or the salary of the job, the less present women are in the labor force. And, of course, women are conspicuously absent from most positions of authority and power in the major economic and political institutions of our society.

As is true for race, it is also a significant social fact that to be a female is to be an entity or creature viewed as different from the standard, fully developed person who is male as well as white. But to be female, as opposed to being black, is not to be conceived of as simply a creature of less worth. That is one important thing that differentiates sexism from racism: The ideology of sex, as opposed to the ideology of race, is a good deal more complex and confusing. Women are both put on a pedestal and deemed not fully developed persons. They are idealized; their approval and

---

15 For the married woman, her husband and children must always come first; her own needs and desires, last. When the children reach school age, they no longer require constant attention. The emotional-expressive function assigned to the woman is still required of her. Called the "stroking function" by sociologist Jessie Bernard, it consists of showing solidarity, raising the status of others, giving help, rewarding, agreeing, concurring, complying, understanding, and passively accepting. The woman is expected to give emotional support and comfort to other family members, to make them feel like good and worthwhile human beings.


Patriarchy's chief institution is the family. It is both a mirror of and a connection with the larger society; a patriarchal unit within a patriarchal whole. Mediating between the individual and the social structure, the family effects control and conformity where political and other authorities are insufficient.

K. MILLETT, supra note 13, at 33.

16 Even if the couple consciously try to attain an egalitarian marriage, so long as the traditional division of labor is maintained, the husband will be "more equal." He is the provider not only of money but of status. Especially if he is successful, society values what he does; she is just a housewife. Their friends are likely to be his friends and co-workers; in their company, she is just his wife. Because his provider function is essential for the family's survival, major family decisions are made in terms of how they affect his career. He need not and usually does not act like the authoritarian paterfamilias [sic] of the Victorian age. His power and status are derived from his function in the family and are secure so long as the traditional division of labor is maintained.

B. DECKARD, supra note 15, at 62.

17 In 1970, women workers were, on the average, paid only 59 percent of men's wages. And when wages of persons with similar educational levels are compared, women still were paid over 40 percent less than men. Id. at 79-81.
admiration is sought; and they are at the same time regarded as less competent than men and less able to live fully developed, fully human lives—for that is what men do. At best, they are viewed and treated as having properties and attributes that are valuable and admirable for humans of this type. For example, they may be viewed as especially empathetic, intuitive, loving, and nurturing. At best, these qualities are viewed as good properties for women to have, and, provided they are properly muted, are sometimes valued within the more well-rounded male. Because the sexual ideology is complex, confusing, and variable, it does not unambiguously proclaim the lesser value attached to being female rather than being male, nor does it unambiguously correspond to the existing social realities. For these, among other reasons, sexism could plausibly be regarded as a deeper phenomenon than racism. It is more deeply embedded in the culture, and thus less visible. Being harder to detect, it is harder to eradicate. Moreover, it is less unequivocally regarded as unjust and unjustifiable. That is to say, there is less agreement within the dominant ideology that sexism even implies an unjustifiable practice or attitude. Hence, many persons announce, without regret or embarrassment, that they are sexists or male chauvinists; very few announce openly that they are racists. For all of these reasons sexism may

18 It is generally accepted that Western patriarchy has been much softened by the concepts of courtly and romantic love. While this is certainly true, such influence has also been vastly overestimated. In comparison with the candor of "machismo" or oriental behavior, one realizes how much of a concession traditional chivalrous behavior represents—a sporting kind of reparation to allow the subordinate female certain means of saving face. While a palliative to the injustice of woman's social position, chivalry is also a technique for disguising it. One must acknowledge that the chivalrous stance is a game the master group plays in elevating its subject to pedestal level. Historians of courtly love stress the fact that the raptures of the poets had no effect upon the legal or economic standing of women, and very little upon their social status. As the sociologist Hugo Beigel has observed, both the courtly and the romantic versions of love are "grants" which the male concedes out of his total powers. Both have the effect of obscuring the patriarchal character of Western culture and in their general tendency to attribute impossible virtues to women, have ended by confining them in a narrow and often remarkably constricting sphere of behavior. It was a Victorian habit, for example, to insist the female assume the function of serving as the male's conscience and living the life of goodness he found tedious but felt someone ought to do anyway.

K. MILLETT, supra note 13, at 36-37.

19 Thus, even after his "joke" about black persons became known to the public, the former Secretary of Agriculture, Earl Butz, took great pains to insist that this in no way showed that he was a racist. This is understandable, given the strongly condemnatory feature of being described as a racist. Equally illuminating was the behavior of Butz's associates and superiors. Then-President Ford, for example, criticized Butz for the joke, but did not demand Butz's removal until there was a strong public outcry. It was as though Butz's problem was that he had been indiscreet; he had done something rude like belching in public. What Ford, Butz, and others apparently failed to grasp is that it is just as wrong to tell these jokes in private because to tell a joke of this sort is to have a view about what black people are like: that they can appropriately
be a more insidious evil than racism, but there is little merit in trying to decide between two seriously objectionable practices which one is worse.

While I do not think that I have made very controversial claims about either our cultural history or our present-day culture, I am aware of the fact that they have been stated very imprecisely and that I have offered little evidence to substantiate them. In a crude way we ought to be able both to understand the claims and to see that they are correct if we reflect seriously and critically upon our own cultural institutions, attitudes, and practices. But in a more refined, theoretical way, I am imagining that a more precise and correct description of the social reality in respect to race and sex would be derivable from a composite, descriptive account of our society which utilized the relevant social sciences to examine such things as the society's institutions, practices, attitudes and ideology—if the social sciences could be value-free and unaffected in outlook or approach by the fact that they, themselves, are largely composed of persons who are white and male.

Viewed from the perspective of social reality it should be clear, too, that racism and sexism should not be thought of as phenomena that consist simply in taking a person's race or sex into account, or even simply in taking a person's race or sex into account in an arbitrary way. Instead, racism and sexism consist in taking race and sex into account in a certain way, in the context of a specific set of institutional arrangements and a specific ideology which together create and maintain a system of unjust insti-

---

20 At a minimum, this account would include: (1) a description of the economic, political, and social positions of blacks and whites, males and females in the culture; (2) a description of the sexual and racial roles, i.e., the rules; conventions and expectations concerning how males and females, blacks and whites, should behave, and the attitudes and responses produced by these roles; and (3) a description of the de facto ideology of racial and sexual differences. This would include popular beliefs about how males and females, blacks and whites, differ, as well as the beliefs as to what accounts for these differences, roles, and economic, political and social realities.

21 The problem of empirical objectivity is compounded by the fact that part of the dominant, white male ideology is that white males are the one group in society whose members are able to be genuinely detached and objective when it comes to things like an understanding of the place of race and sex in the culture. Thus, for example, when a sex-discrimination suit was brought against a law firm and the case was assigned to Judge Constance Motley, the defendant filed a motion that she be disqualified partly because, as a woman judge, she would be biased in favor of the plaintiff. Judge Motley denied the motion. Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975), writ of mandamus denied sub nom. Sullivan & Cromwell v. Motley, No. 75-3045 (2d Cir. Aug. 26, 1975). Explaining her decision, Judge Motley stated: "If back-
tutions and unwarranted beliefs and attitudes. That system is and has been one in which political, economic, and social power and advantage are concentrated in the hands of those who are white and male.

One way to bring this out, as well as to show another respect in which racism and sexism are different, concerns segregated bathrooms—a topic that may seem silly and trivial but which is certainly illuminating and probably important. We know, for instance, that it is wrong, clearly racist, to have racially segregated bathrooms. There is, however, no common conception that it is wrong, clearly sexist, to have sexually segregated ones. How is this to be accounted for? The answer to the question of why it was and is racist to have racially segregated bathrooms can be discovered through a consideration of the role that this practice played in that system of racial segregation we had in the United States—from, in other words, an examination of the social realities. For racially segregated bathrooms were an important part of that system. And that system had an ideology; it was complex and perhaps not even wholly internally consistent. A significant feature of the ideology was that blacks were not only less than fully developed humans, but that they were also dirty and impure. They were the sorts of creatures who could and would contaminate white persons if they came into certain kinds of contact with them—in the bathroom, at the dinner table, or in bed, although it was appropriate for blacks to prepare and handle food, and even to nurse white infants. This ideology was intimately related to a set of institutional arrangements and power relationships in which whites were politically, economically, and socially dominant. The ideology supported the institutional arrangements, and the institutional arrangements reinforced the ideology. The net effect was that racially segregated bathrooms were both a part of the institutional mechanism of oppression and an instantiation of this ideology of racial taint. The point of maintaining racially segregated bathrooms was not in any simple or direct sense to keep both whites and blacks from using each other's bathrooms; it was to make sure that blacks would not contaminate bathrooms used by whites. The practice also taught both whites and blacks that certain kinds of contacts were forbidden because whites would be degraded by the contact with the blacks.

The failure to understand the character of these institutions of racial oppression is what makes some of the judicial reasoning ground or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.” 418 F. Supp. at 4 (emphasis added).
about racial discrimination against blacks so confusing and unsatisfactory. At times when the courts have tried to explain what is constitutionally wrong with racial segregation, they have said that the problem is that race is an inherently suspect category. What they have meant by this, or have been thought to mean, is that any differentiation among human beings on the basis of racial identity is inherently unjust, because arbitrary, and therefore any particular case of racial differentiation must be shown to be fully rational and justifiable. But the primary evil of the various schemes of racial segregation against blacks that the courts were being called upon to assess was not that such schemes were a capricious and irrational way of allocating public benefits and burdens. That might well be the primary wrong with racial segregation if we lived in a society very different from the one we have. The primary evil of these schemes was instead that they design-edly and effectively marked off all black persons as degraded, dirty, less than fully developed persons who were unfit for full membership in the political, social, and moral community.

It is worth observing that the social reality of sexually segregated bathrooms appears to be different. The idea behind such sexual segregation seems to have more to do with the mutual undesirability of the use by both sexes of the same bathroom at the same time. There is no notion of the possibility of contamination; or even directly of inferiority and superiority. What seems to be involved—at least in part—is the importance of inculcating and preserving a sense of secrecy concerning the genitalia of the

---

22 Thus, in Bolling v. Sharpe, 347 U.S. 497 (1953), the Supreme Court said that what was wrong with preventing black children from attending the all white schools of the District of Columbia was that

[s]egregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

Id. at 500. I ignore those cases in which the courts decline to formulate a view about racial differentiation because the behavior involved is not the sort that the law thinks it appropriate to deal with, e.g., “private” racial discrimination.

23 Others have made this general point about the nature of the evil of racial segregation in the United States. See, e.g., Ely, note 3 supra; Fiss, Groups and Equal Protection, 5 PHIL. & PUB. AFF. 107 (1976); Thalberg, Reverse Discrimination and the Future, 5 PHIL. F. 268 (1973).

The failure fully to understand this general point seems to me to be one of the things wrong with Weschler’s famous article, Toward Neutral Principles of Constitutional Interpretation, 73 HARV. L. REV. 1 (1959). Near the very end of the piece Weschler reports, “In the days when I joined with Charles H. Houston [a well-known black lawyer] in a litigation in the Supreme Court, before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess.” Id. at 34. If the stress in that sentence is wholly on the fact of knowing, no one can say for certain that Weschler is wrong. But what is certain is that Charles H. Houston suffered more than Weschler from living in a system in which he could only lunch at Union Station.
opposite sex. What seems to be at stake is the maintenance of that same sense of mystery or forbiddenness about the other sex's sexuality which is fostered by the general prohibition upon public nudity and the unashamed viewing of genitalia.

Sexually segregated bathrooms simply play a different role in our culture than did racially segregated ones. But that is not to say that the role they play is either benign or unobjectionable—only that it is different. Sexually segregated bathrooms may well be objectionable, but here too, the objection is not on the ground that they are prima facie capricious or arbitrary. Rather, the case against them now would rest on the ground that they are, perhaps, one small part of that scheme of sex-role differentiation which uses the mystery of sexual anatomy, among other things, to maintain the primacy of heterosexual sexual attraction central to that version of the patriarchal system of power relationships we have today. Whether sexually segregated bathrooms would be objectionable, because irrational, in the good society depends once again upon what the good society would look like in respect to sexual differentiation.

B. Types of Racism or Sexism

Another recurring question that can profitably be examined within the perspective of social realities is whether the legal system is racist or sexist. Indeed, it seems to me essential that the social realities of the relationships and ideologies concerning race and sex be kept in mind whenever one is trying to assess claims that are made about the racism or sexism of important institutions such as the legal system. It is also of considerable importance in assessing such claims to understand that even within the perspective of social reality, racism or sexism can manifest itself, or be understood, in different ways. That these are both important points can be seen through a brief examination of the different, distinctive ways in which our own legal system might plausibly be understood to be racist. The mode of analysis I propose serves as well, I believe, for an analogous analysis of the sexism of the legal system, although I do not undertake the latter analysis in this paper.

The first type of racism is the simplest and the least controversial. It is the case of overt racism, in which a law or a legal institution expressly takes into account the race of individuals in order to assign benefits and burdens in such a way as to bestow

---

24 This conjecture about the role of sexually segregated bathrooms may well be inaccurate or incomplete. The sexual segregation of bathrooms may have more to do with privacy than with patriarchy. However, if so, it is at least odd that what the institution makes relevant is sex rather than merely the ability to perform the eliminatory acts in private.
an unjustified benefit upon a member or members of the racially dominant group or an unjustified burden upon members of the racial groups that are oppressed. We no longer have many, if any, cases of overt racism in our legal system today, although we certainly had a number in the past. Indeed, the historical system of formal, racial segregation was both buttressed by, and constituted of, a number of overtly racist laws and practices. At different times in our history, racism included laws and practices which dealt with such things as the exclusion of nonwhites from the franchise, from decent primary and secondary schools and most professional schools, and the prohibition against interracial marriages.

The second type of racism is very similar to overt racism. It is covert, but intentional, racism, in which a law or a legal institution has as its purpose the allocation of benefits and burdens in order to support the power of the dominant race, but does not use race specifically as a basis for allocating these benefits and burdens. One particularly good historical example involves the use of grandfather clauses which were inserted in statutes governing voter registration in a number of states after passage of the fifteenth amendment.25

Covert racism within the law is not entirely a thing of the past. Many instances of de facto school segregation in the North and West are cases of covert racism. At times certain school boards—virtually all of which are overwhelmingly white in composition—quite consciously try to maintain exclusively or predominantly white schools within a school district. The classifications such school boards use are not ostensibly racial, but are based upon the places of residence of the affected students. These categories provide the opportunity for covert racism in engineering the racial composition of individual schools within the board's jurisdiction.26

What has been said so far is surely neither novel nor controversial. What is interesting, however, is that a number of persons

25 See, e.g., Guinn v. United States, 238 U.S. 347 (1915). Such statutes provided that the grandchild of someone who had been registered to vote in the state was permitted to vote in that state; but the grandchild of somebody who had never been registered to vote in the state had to take a special test in order to become qualified to vote. It does not take much knowledge of history to know that in most of the southern states few if any black people had grandparents who before the Civil War were registered to vote. And the persons who enacted these laws knew it too. So even though race was not made a category by the described laws, they effectively divided people on grounds of race into those who were qualified to vote without more, and those who had to submit to substantially more rigorous tests before they could exercise the franchise. All of this was done, as is well known, so as to perpetuate the control of the franchise by whites.

appear to believe that as long as the legal system is not overtly or covertly racist, there is nothing to the charge that it is racist. So, for example, Mr. Justice Powell said in a speech a few years ago:

It is of course true that we have witnessed racial injustice in the past, as has every other country with significant racial diversity. But no one can fairly question the present national commitment to full equality and justice. Racial discrimination, by state action, is now proscribed by laws and court decisions which protect civil liberties more broadly than in any other country. But laws alone are not enough. Racial prejudice in the hearts of men cannot be legislated out of existence; it will pass only in time, and as human beings of all races learn in humility to respect each other—a process not furthered by recrimination or undue self-accusation.27

I believe it is a mistake to think about the problem of racism in terms of overt or covert racial discrimination by state action, which is now banished, and racial prejudice, which still lingers, but only in the hearts of persons. For there is another, more subtle kind of racism—unintentional, perhaps, but effective—which is as much a part of the legal system as are overt and covert racist laws and practices. It is what some critics of the legal system probably mean when they talk about the “institutional racism” of the legal system.28

There are at least two kinds of institutional racism. The first is the racism of sub-institutions within the legal system such as the jury, or the racism of practices built upon or countenanced by the law. These institutions and practices very often, if not always, reflect in important and serious ways a variety of dominant values in the operation of what is apparently a neutral legal mechanism. The result is the maintenance and reenforcement of a system in which whites dominate over nonwhites. One relatively uninteresting (because familiar) example is the case of de facto school segregation. As observed above,29 some cases of de facto

27 N.Y. Times, Aug. 31, 1972, § 1, at 33, col. 3.
28 All of the laws, institutional arrangements, etc., that I analyze are, I think, cases of racism and not, for example, cases of prejudice. The latter concept I take to refer more specifically to the defective, incomplete or objectionable beliefs and attitudes of individuals. Prejudiced individuals often engage in racist acts, enact racist laws and participate in racist institutions. But they need not. Nor is it true that the only persons connected with racist acts, laws, or institutions need be prejudiced individuals.

A perceptive account of the differences between prejudice and racism, and of the different kinds of racism, including institutional racism of the sorts I discuss below, can be found in M. Jones, Prejudice and Racism (1972). See especially id. at 60-115 (ch. 4, “Perspectives on Prejudice”); id. at 116-67 (ch. 5, “Realities of Racism”). A somewhat analogous set of distinctions concerning sexism is made in Jaggar, On Sexual Equality, 84 ETHICS 275, 276-77 (1974).

29 See p. 595 supra.
1977] RACISM, SEXISM 597

segregation are examples of covert racism. But even in school districts where there is no intention to divide pupils on grounds of race so as to maintain existing power relationships along racial lines, school attendance zones are utilized which are based on the geographical location of the pupil. Because it is a fact in our culture that there is racial discrimination against black people in respect to housing, it is also a fact that any geographical allocation of pupils—unless one pays a lot of attention to housing patterns—will have the effect of continuing to segregate minority pupils very largely on grounds of race. It is perfectly appropriate to regard this effect as a case of racism in public education.30

A less familiar, and hence perhaps more instructive, example concerns the question of the importance of having blacks on juries, especially in cases in which blacks are criminal defendants. The orthodox view within the law is that it is unfair to try a black defendant before an all-white jury if blacks were overtly or covertly excluded from the jury rolls used to provide the jury panel, but not otherwise.31 One reason that is often given is that the systematic exclusion of blacks increases too greatly the chance of racial prejudice operating against the black defendant.32 The problem with this way of thinking about things is that it does not make much sense. If whites are apt to be prejudiced against blacks, then an all-white jury is just as apt to be prejudiced against a black defendant, irrespective of whether blacks were systematically excluded from the jury rolls. I suspect that the rule has developed in the way it has because the courts think that many, if not most, are doing so.

30 One example of what may have been an instance of genuine de facto racism in a noneducational setting is found in Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), modified, 472 F.2d 631 (9th Cir. 1972). Litton Systems had a policy of refusing to employ persons who had been frequently arrested. The court found this to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970):

Negroes are arrested substantially more frequently than whites in proportion to their numbers. The evidence on this question was overwhelming and utterly convincing. For example, negroes nationally comprise some 11% of the population and account for 27% of reported arrests and 45% of arrests reported as "suspicious arrests". Thus, any policy that disqualifies prospective employees because of having been arrested once, or more than once, discriminates in fact against negro applicants. This discrimination exists even though such a policy is objectively and fairly applied as between applicants of various races. A substantial and disproportionately large number of negroes are excluded from employment opportunities by Defendant's policy.

316 F. Supp. at 403.

31 Whitus v. Georgia, 385 U.S. 545 (1967), Avery v. Georgia, 345 U.S. 559 (1953), and Strauder v. West Virginia, 100 U.S. 303 (1880), are three of the many cases declaring it unconstitutional to exclude blacks systematically from the jury rolls when the defendant is black. Swain v. Alabama, 380 U.S. 202 (1965), is one of the many cases declaring that it is not unconstitutional that no blacks were in fact on the jury that tried the defendant.

whites are not prejudiced against blacks, unless, perhaps, they happen to live in an area where there is systematic exclusion of blacks from the jury rolls. Hence prejudice is the chief worry, and a sectional, if not historical, one at that.

White prejudice against blacks is, I think, a problem, and not just a sectional one. However, the existence or nonexistence of prejudice against blacks does not go to the heart of the matter. It is a worry, but it is not the chief worry. A black person may not be able to get a fair trial from an all-white jury even though the jurors are disposed to be fair and impartial, because the whites may unknowingly bring into the jury box a view about a variety of matters which affects in very fundamental respects the way they will look at and assess the facts. Thus, for example, it is not, I suspect, part of the experience of most white persons who serve on juries that police often lie in their dealings with people and the courts. Indeed, it is probably not part of their experience that persons lie about serious matters except on rare occasions. And they themselves tend to take truth telling very seriously. As a result, white persons for whom these facts about police and lying are a part of their social reality will have very great difficulty taking seriously the possibility that the inculpatory testimony of a police witness is a deliberate untruth. However, it may also be a part of the social reality that many black persons, just because they are black, have had encounters with the police in which the police were at best indifferent to whether they, the police, were speaking the truth. And even more black persons may have known a friend or a relative who has had such an experience. As a result, a black juror would be more likely than his or her white counterpart to approach skeptically the testimony of ostensibly neutral, reliable witnesses such as police officers. The point is not that all police officers lie; nor is the point that all whites always believe everything police say, and blacks never do. The point is that because the world we live in is the way it is, it is likely that whites and blacks will on the whole be disposed to view the credibility of police officers very differently. If so, the legal system’s election to ignore this reality, and to regard as fair and above reproach the common occurrence of all-white juries (and white judges) passing on the guilt or innocence of black defendants is a decision in fact to permit and to perpetuate a kind of institutional racism within the law.33

33 I discuss this particular situation in somewhat more detail in Wasserman, The University and the Case for Preferential Treatment, 13 Am. Phil. Q. 165, 169-70 (1976). Mr. Justice Marshall expresses a view that I take to be reasonably close to mine in Peters v. Kiff, 407 U.S. 493 (1972). The case involved the question whether a white defendant could challenge the systematic
The second type of institutional racism is what I will call "conceptual" institutional racism. We have a variety of ways of thinking about the legal system, and we have a variety of ways of thinking within the legal system about certain problems. We use concepts. Quite often without realizing it, the concepts used take for granted certain objectionable aspects of racist ideology without our being aware of it. The second Brown case (Brown II) provides an example. There was a second Brown case because, having decided that the existing system of racially segregated public education was unconstitutional (Brown I), the Supreme Court gave legitimacy to a second issue—the nature of the relief to be granted—by treating it as a distinct question to be considered and decided separately. That in itself was striking because in most cases, once the Supreme Court has found unconstitutionality, there has been no problem about relief (apart from questions of retroactivity): The unconstitutional practices and acts are to cease. As is well known, the Court in Brown II concluded that the desegregation of public education had to proceed "with all deliberate speed." The Court said that there were "complexities arising from the transition to a system of public education freed from racial discrimination." More specifically, time might be necessary to carry out the ruling because of problems related to administration, arising from the physical condition of the school plant, the school transportation system personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public school on a non-racial basis, and exclusion of blacks from the jury rolls. Mr. Justice Marshall held that he could: [W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. Id. at 503-04 (footnote omitted).

Given my analysis, I think any defendant is disadvantaged by the absence of blacks from the jury, where, for instance, the testimony of a police officer is a significant part of the prosecution case. Because police are more apt to lie about black defendants, and because black jurors are more apt to be sensitive to this possibility, black defendants are, I think, especially likely to be tried unfairly by many all-white juries. What matters in terms of fairness is that blacks be represented on particular juries; nonexclusion from the jury rolls is certainly not obviously sufficient.

36 349 U.S. at 301.
37 Id. at 299.
revision of local laws and regulations which may be necessary
in solving the foregoing problems.\textsuperscript{38}

Now, I do not know whether the Court believed what it said
in this passage, but it is a fantastic bit of nonsense that is, for my
purposes, most instructive. Why? Because there was nothing
complicated about most of the dual school systems of the southern
states. Many counties, especially the rural ones, had one high
school, typically called either “Booker T. Washington High
School” or “George Washington Carver High School,” where all
the black children in the county went; another school, often called
“Sidney Lanier High School” or “Robert E. Lee High School,” was
attended by all the white children in the county. There was noth­
ing difficult about deciding that—as of the day after the de cis ­
ion—half of the children in the county, say all those who lived
in the southern part of the county, would go to Robert E. Lee
High School, and all those who lived in the northern half would
go to Booker T. Washington High School. \textit{Brown I} could have
been implemented the day after the Court reached its decision.
But it was also true that the black schools throughout the South
were utterly wretched when compared to the white schools.
There never had been any system of separate but equal education.
In almost every measurable respect, the black schools were infer­
ior. \textbf{One possibility} is that, without being explicitly aware of it,
the members of the Supreme Court made use of some assumptions
that were a significant feature of the dominant racist ideology. If
the assumptions had been made explicit, the reasoning would have
gone something like this: Those black schools are wretched. We
cannot order white children to go to those schools, especially
when they have gone to better schools in the past. So while it
is unfair to deprive blacks, to make them go to these awful, seg r e­
gated schools, they will have to wait until the black schools either
are eliminated or are sufficiently improved so that there are good
schools for everybody to attend.

What seems to me to be most objectionable, and racist, about
\textit{Brown II} is the uncritical acceptance of the idea that during this
process of change, black schoolchildren would have to suffer by
continuing to attend inadequate schools. The Supreme Court’s
solution assumed that the correct way to deal with this problem
was to continue to have the black children go to their schools until
the black schools were brought up to par or eliminated. That is
a kind of conceptual racism in which the legal system accepts the
dominant racist ideology, which holds that the claims of black
children are worth less than the claims of white children in those

\textsuperscript{38} \textit{ld.} at 300-01.
cases in which conflict is inevitable.\footnote{The unusual character of \textit{Brown II} was recognized by Mr. Justice Goldberg in \textit{Watson v. City of Memphis}, 373 U.S. 526 (1963):}

It seems to me that any minimally fair solution would have required that during the interim process, if anybody had to go to an inadequate school, it would have been the white children, since they were the ones who had previously had the benefit of the good schools. But this is simply not the way racial matters are thought about within the dominant ideology.

A study of \textit{Brown II} is instructive because it is a good illustration of conceptual racism within the legal system. It also reflects

\footnote{Most importantly, of course, it must be recognized that even the delay countenanced by \textit{Brown} was a necessary, albeit significant, adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, present rights; they are not merely hopes to some future enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. The second \textit{Brown} decision is but a narrowly drawn, and carefully limited, qualification upon usual precepts of constitutional adjudication . . . .}

\textit{Id.} at 532-33 (emphasis in original; footnote omitted). As I have indicated, the problem with \textit{Brown II} is that there was no "overwhelmingly compelling reason" to delay. It might be argued though, that the Court deliberately opted for "all deliberate speed" and all that meant about the dreary pace of desegregation because it believed the country would not accept full, immediate implementation of \textit{Brown I}. If this was the reasoning, it is equally pernicious. It is sound, only if the country is identified with white people; blacks were surely willing to accept the immediate elimination of the system of racial segregation.

But someone might still say that the Court was just dealing sensibly with the political realities. The white power structure would not have accepted anything more drastic. Arguments such as these are developed at considerable length by A. Bickel, \textit{The Least Dangerous Branch} 247-54 (1962). The problem with this is twofold. First, what is deemed a drastic solution has a lot to do with whether whites or blacks are being affected, and how. It was and is thought to be drastic for force and the criminal law to be used against whites to secure compliance with laws relating to segregation. It was and is thought to be much less drastic to use force and the criminal law against blacks who object vigorously and sometimes violently to the system of racial oppression. The simple truth is that when the executive branch, as well as the judiciary, thought about these issues it typically weighed the claims of whites very differently from the claims of blacks. The history of the enforcement of civil rights by the federal government in the 1950's and early 1960's is largely a history of the consistent overvaluation of the claims and concerns of whites vis-à-vis blacks. I have suggested some of the ways this was true of the Civil Rights Division of the Department of Justice. See Wasserstrom, Book Review, 33 U. Chi. L. Rev. 406, 409-13 (1966); Wasserstrom, \textit{Postscript: Lawyers and Revolution}, 30 U. Pitt. L. Rev. 125, 131 (1968).

Second, whether the decision would have been "accepted" is in large measure a function of what the United States government would have been prepared to do to get the decision implemented. During this same era things that were viewed as absolutely unacceptable or as not feasible suddenly became acceptable and feasible without any substantial change in material circumstances, e.g., the passage of the 1965 Voting Rights Act, 42 U.S.C. §§ 1973 et seq. (1970). It mysteriously became acceptable to the Congress, enforceable by the government and accepted by the South when Reverend Reeb and Mrs. Liuzza were murdered during the
another kind of conceptual racism—conceptual racism about the system. *Brown I* and *II* typically are thought of by our culture, and especially by our educational institutions, as representing one of the high points in the legal system’s fight against racism. The dominant way of thinking about the desegregation cases is that the legal system was functioning at its very best. Yet, as I have indicated, there are important respects in which the legal system’s response to the then existing system of racially segregated education was defective and hence should hardly be taken as a model of the just, institutional way of dealing with this problem of racial oppression. But the fact that we have, as well as inculcate, these attitudes of effusive praise toward *Brown I* and *II* and its progeny reveals a kind of persistent conceptual racism in talk about the character of the legal system, and what constitutes the right way to have dealt with the social reality of American racial oppression of black people.40

In theory, the foregoing analytic scheme can be applied as readily to the social realities of sexual oppression as to racism. Given an understanding of the social realities in respect to sex—the ways in which the system of patriarchy inequitably distributes important benefits and burdens for the benefit of males, and the ideology which is a part of that patriarchal system and supportive of it—one can examine the different types of sexism that exist within the legal system. In practice the task is more difficult because we are inclined to take as appropriate even overt instances of sexist laws, *e.g.*, that it is appropriately a part of the definition of rape that a man cannot rape his wife.41 The task is also more difficult because sexism is, as I have suggested, a “deeper” phenomenon than racism.42 As a result, there is less awareness of the significance of much of the social reality, *e.g.*, that the language we use to talk about the world and ourselves has embedded within it ideological assumptions and preferences.
that support the existing patriarchal system. Cases of institutional sexism will therefore be systematically harder to detect. But these difficulties to one side, the mode of analysis seems to me to be in principle equally applicable to sexism, although, as I indicate in the next section on ideals, a complete account of the sexism of the legal system necessarily awaits a determination of what is the correct picture of the good society in respect to sexual differences.

II. Ideals

A second perspective is also important for an understanding and analysis of racism and sexism. It is the perspective of the ideal. Just as we can and must ask what is involved today in our culture in being of one race or of one sex rather than the other, and how individuals are in fact viewed and treated, we can also ask different questions: What would the good or just society make of race and sex, and to what degree, if at all, would racial and sexual distinctions ever be taken into account? Indeed, it could plausibly be argued that we could not have an adequate idea of whether a society was racist or sexist unless we had some conception of what a thoroughly nonracist or nonsexist society would look like. This perspective is an extremely instructive as well as an often neglected one. Comparatively little theoretical literature dealing with either racism or sexism has concerned itself in a systematic way with this perspective. Moreover, as I shall try to demonstrate, it is on occasion introduced in an inappropriate context, e.g., in discussions of the relevance of the biological differences between males and females.

To understand more precisely what some of the possible ideals are in respect to racial or sexual differentiation, it is necessary to distinguish in a crude way among three levels or areas of social and political arrangements and activities. First, there is the area of basic political rights and obligations, including the right to vote and to travel and the obligation to pay taxes. Second, there is the area of important, nongovernmental institutional benefits and burdens. Examples are access to and employment in the significant economic markets, the opportunity to acquire and enjoy housing in the setting of one’s choice, the right of

43 See, e.g., R. LAKOFF, LANGUAGE AND WOMAN'S PLACE (1975); Baker, "Pricks" and "Chicks": A Plea for "Persons", in PHILOSOPHY AND SEX 45 (R. Baker & F. Elliston eds. 1975); Moulton, Sex and Reference in id. at 34.

44 One thorough and very valuable exploration of this and a number of the other topics discussed in this section is Alison Jaggar's On Sexual Equality, note 28 supra. The article also contains a very useful analysis of the views of a number of other feminists who have dealt with this issue.

45 An analysis of the social realities of an existing society can also divide things up into these three areas.
persons who want to marry each other to do so, and the duties (nonlegal as well as legal) that persons acquire in getting married. Third, there is the area of individual, social interaction, including such matters as whom one will have as friends, and what aesthetic preferences one will cultivate and enjoy.

As to each of these three areas we can ask whether in a nonracist society it would be thought appropriate ever to take the race of the individuals into account. Thus, one picture of a nonracist society is that which is captured by what I call the assimilationist ideal: A nonracist society would be one in which the race of an individual would be the functional equivalent of the eye color of individuals in our society today. In our society no basic political rights and obligations are determined on the basis of eye color. No important institutional benefits and burdens are connected with eye color. Indeed, except for the mildest sort of aesthetic preferences, a person would be thought odd who even made private, social decisions by taking eye color into account. And for reasons that we could fairly readily state, we could explain why it would be wrong to permit anything but the mildest, most trivial aesthetic preference to turn on eye color. The reasons would concern the irrelevance of eye color for any political or social institution, practice or arrangement. It would, of course, be equally odd for a person to say that while he or she looked blue-eyed, he or she regarded himself or herself as really a brown-eyed person. That is, because eye color functions differently in our culture than does race or sex, there is no analogue in respect to eye color to passing or transsexuality. According to the assimilationist ideal, a nonracist society would be one in which an individual's race was of no more significance in any of these three areas than is eye color today.

The assimilationist ideal is not, however, the only possible, plausible ideal. There are two others that are closely related, but distinguishable. One is the ideal of diversity; the other, the ideal of tolerance. Both can be understood by considering how religion, rather than eye color, tends to be thought about in our culture. According to the ideal of diversity, heterodoxy in respect to religious belief and practice is regarded as a positive good. In this view there would be a loss—it would be a worse society—were everyone to be a member of the same religion. According to the other view, the ideal of tolerance, heterodoxy in respect to religious be-

46 There is a danger in calling this ideal the "assimilationist" ideal. That term suggests the idea of incorporating oneself, one's values, and the like into the dominant group and its practices and values. I want to make it clear that no part of that idea is meant to be captured by my use of this term. Mine is a stipulative definition.
lief and practice would be seen more as a necessary, lesser evil. In this view there is nothing intrinsically better about diversity in respect to religion, but the evils of achieving anything like homogeneity far outweigh the possible benefits.

Now, whatever differences there might be between the ideals of diversity and tolerance, the similarities are more striking. Under neither ideal would it be thought that the allocation of basic political rights and duties should take an individual's religion into account. We would want equalitarianism or nondiscrimination even in respect to most important institutional benefits and burdens—for example, access to employment in the desirable vocations. Nonetheless, on both views it would be deemed appropriate to have some institutions (typically those which are connected in an intimate way with these religions) which do in a variety of ways take the religion of members of the society into account. For example, it might be thought permissible and appropriate for members of a religious group to join together in collective associations which have religious, educational and social dimensions. And on the individual, interpersonal level, it might be thought unobjectionable, or on the diversity view, even admirable, were persons to select their associates, friends, and mates on the basis of their religious orientation. So there are two possible and plausible ideals of what the good society would look like in respect to religion in which religious differences would be to some degree maintained because the variety of religions was seen either as a valuable feature of the society, or as one to be tolerated. The picture is a more complex, less easily describable one than that of the assimilationist ideal.

The point of all this is its relevance to the case of sexism. One central and difficult question is what the ideal society would look like in respect to sex. The assimilationist ideal does not seem to be as readily plausible and obviously attractive here as it is in the case of race. Many persons invoke the possible realization of the assimilationist ideal as a reason for rejecting the equal rights amendment and indeed the idea of women's liberation itself. My view is that the assimilationist ideal may be just as good and just as important an ideal in respect to sex as it is in respect to race. 47 But many persons think there are good reasons why

---

47 Jaggar describes something fairly close to the assimilationist view in this way:

The traditional feminist answer to this question [of what the features of a nonsexist society would be] has been that a sexually egalitarian society is one in which virtually no public recognition is given to the fact that there is a physiological sex difference between persons. This is not to say that the different reproductive function of each sex should be unacknowledged in such a society nor that there should be no phy-
an assimilationist society in respect to sex would not be desirable. One reason for their view might be that to make the assimilationist ideal a reality in respect to sex would involve more profound and fundamental revisions of our institutions and our attitudes than would be the case in respect to race. It is certainly true that on the institutional level we would have to alter radically our practices concerning the family and marriage. If a nonsexist society is a society in which one's sex is no more significant than eye color in our society today, then laws which require the persons who are being married to be of different sexes would clearly be sexist laws. Insofar as they are based upon the desirability of unifying the distinctive features of one male and one female, laws and institutions which conceive of the nuclear family as ideally composed of two and only two adults should also be thought of as anachronistic as well as sexist laws and institutions.

On the attitudinal and conceptual level, the assimilationist ideal would require the eradication of all sex-role differentiation. It would never teach about the inevitable or essential attributes of masculinity or femininity; it would never encourage or discourage the ideas of sisterhood or brotherhood; and it would be unintelligible to talk about the virtues as well as disabilities of being a woman or a man. Were sex like eye color, these things would make no sense. A nonsexist world might conceivably tolerate both homosexuality and heterosexuality (as peculiar kinds of personal erotic preference), but any kind of sexually exclusive preference would be either as anomalous or as statistically fortuitous as is a sexual preference connected with eye color in our society today. Just as the normal, typical adult is virtually oblivious to the eye color of other persons for all major interpersonal relationships, so the normal, typical adult in this kind of nonsexist society would be indifferent to the sexual, physiological differences of other persons for all interpersonal relationships. Bisexuality, not heterosexuality or homosexuality, would be the norm for intimate, sexual relationships in the ideal society that was assimilationist in respect to sex.

All of this seems to me to be worth talking about because unless and until we are clear about issues such as these we cannot be wholly certain about whether, from the perspective of the ideal, sicians specializing in female and male complaints, etc. But it is to say that, except in this sort of context, the question whether someone is female or male should have no significance.

... In the mainstream tradition, the non-sexist society is one which is totally integrated sexually, one in which sexual differences have ceased to be a matter of public concern. Jaggar, supra note 28, at 276-77.
some of the institutions in our own culture are or are not sexist. We know that racially segregated bathrooms are racist. We know that laws that prohibit persons of different races from marrying are racist. But throughout our society we have sexually segregated bathrooms, and we have laws which prohibit individuals of the same sex from marrying. As I have argued above, from the perspective of the existing social reality there are important ways to distinguish the racial from the sexual cases and to criticize both practices. But that still leaves open the question of whether in the good society these sexual distinctions, or others, would be thought worth preserving either because they were meritorious, or at least to be tolerated because they were necessary.

As I have indicated, it may be that the problem is with the assimilationist ideal. It may be that in respect to sex (and conceivably, even in respect to race) something more like either of the ideals in respect to religion—pluralistic ideals founded on diversity or tolerance—is the right one. But the problem then—and it is a very substantial one—is to specify with a good deal of precision and care what that ideal really comes to. Which legal, institutional and personal differentiations are permissible and which are not? Which attitudes and beliefs concerning sexual identification and difference are properly introduced and maintained and which are not? Part, but by no means all, of the attractiveness of the assimilationist ideal is its clarity and simplicity. In the good society of the assimilationist sort we would be able to tell easily and unequivocally whether any law, practice or attitude was in any respect either racist or sexist. Part, but by no means all, of the unattractiveness of any pluralistic ideal is that it makes the question of what is racist or sexist a much more difficult and complicated one to answer. But although simplicity and lack of ambiguity may be virtues, they are not the only virtues to be taken into account in deciding among competing ideals. We quite appropriately take other considerations to be relevant to an assessment of the value and worth of alternative nonracist and nonsexist societies.

Nor do I even mean to suggest that all persons who reject the assimilationist ideal in respect to sex would necessarily embrace either something like the ideal of tolerance or the ideal of diversity. Some persons might think the right ideal was one in which substantially greater sexual differentiation and sex-role identification was retained than would be the case under either of these conceptions. Thus, someone might believe that the good society was, perhaps, essentially like the one they think we now have in respect to sex: equality of political rights, such as the right

48 See pp. 584-94 supra.
to vote, but all of the sexual differentiation in both legal and non-legal institutions that is characteristic of the way in which our society has been and still is ordered. And someone might also believe that the usual ideological justifications for these arrangements are the correct and appropriate ones. This could, of course, be regarded as a version of the ideal of diversity, with the emphasis upon the extensive character of the institutional and personal difference connected with sexual identity. Whether it is a kind of ideal of diversity or a different ideal altogether turns, I think, upon two things: first, how pervasive the sexual differentiation is; second, whether the ideal contains a conception of the appropriateness of significant institutional and interpersonal inequality, e.g., that the woman's job is in large measure to serve and be dominated by the male. The more this latter feature is present, the clearer the case for regarding this as a distinctively different ideal.

The question of whether something is a plausible and attractive ideal turns in part on the nature of the empirical world. If it is true, for example, that race is not only a socially significant category in our culture but also largely a socially created one, then many ostensibly objections to the assimilationist ideal appear to

---

49 Thus, for example, a column appeared a few years ago in the Washington Star concerning the decision of the Cosmos Club to continue to refuse to permit women to be members. The author of the column (and a member of the club) defended the decision on the ground that women appropriately had a different status in the society. Their true distinction was to be achieved by being faithful spouses and devoted mothers. The column closed with this paragraph:

> In these days of broken homes, derision of marriage, reluctance to hear children, contempt for the institution of the family—a phase in our national life when it seems more honorable to be a policewoman, or a model, or an accountant than to be a wife or mother—there is a need to reassert a traditional scale of values in which the vocation of homemaker is as honorable and distinguished as any in political or professional life. Such women, as wives and widows of members, now enjoy in the club the privileges of their status, which includes [sic] their own drawing rooms, and it is of interest that they have been among the most outspoken opponents of the proposed changes in club structure.


The same view may be held by Senator Daniel Moynihan. It is his view, apparently, that the United States government ought to work primarily to strengthen the institution of the family. Moynihan is quoted as saying:

> If the family is strong, the economy will be productive. If the family is strong, law will be respected and crime will decrease. If the family is strong, the welfare rolls will shrink. . . . All this is true, and its truth has been confirmed and reconfirmed by the evidence of history, of social science, of direct observation, and of simple common sense.


For the reasons that I give below, see pp. 609-15 infra. I think any version of this ideal is seriously flawed. But it is one that is certainly much more widely held in respect to sex than is a comparable one held today in respect to race.
disappear immediately. What I mean is this: It is obvious that we could formulate and use some sort of a crude, incredibly imprecise physiological concept of race. In this sense we could even say that race is a naturally occurring rather than a socially created feature of the world. There are diverse skin colors and related physiological characteristics distributed among human beings. But the fact is that except for skin hue and the related physiological characteristics, race is a socially created category. And skin hue, as I have shown, is neither a necessary nor a sufficient condition for being classified as black in our culture.\(^50\) Race as a naturally occurring characteristic is also a socially irrelevant category. There do not in fact appear to be any characteristics that are part of this natural concept of race and that are in any plausible way even relevant to the appropriate distribution of any political, institutional, or interpersonal concerns in the good society. Because in this sense race is like eye color, there is no plausible case to be made on this ground against the assimilationist ideal.\(^51\)

There is, of course, the social reality of race. In creating and tolerating a society in which race matters, we must recognize that we have created a vastly more complex concept of race which includes what might be called the idea of ethnicity as well—a set of attitudes, traditions, beliefs, etc., which the society has made part of what it means to be of a race. It may be, therefore, that one could argue that a form of the pluralist ideal ought to be preserved in respect to race, in the socially created sense, for reasons similar to those that might be offered in support of the desirability of some version of the pluralist ideal in respect to religion. As I have indicated, I am skeptical, but for the purposes of this essay it can well be left an open question.

Despite appearances, the case of sex is more like that of race than is often thought. What opponents of assimilationism seize upon is that sexual difference appears to be a naturally occurring category of obvious and inevitable social relevance in a way, or to a degree, which race is not. The problems with this way of thinking are twofold. To begin with, an analysis of the social realities reveals that it is the socially created sexual differences which tend in fact to matter the most. It is sex-role differentiation, not

\(^{50}\) See note 9 supra.

\(^{51}\) This is not to deny that certain people believe that race is linked with characteristics that prima facie are relevant. Such beliefs persist. They are, however, unjustified by the evidence. See, e.g., Block & Dworkin, *IQ, Heritability and Inequality* (pts. 1-2), 3 PHIL. & PUB. AFF. 331, 4 id. 40 (1974). More to the point, even if it were true that such a linkage existed, none of the characteristics suggested would require that political or social institutions, or interpersonal relationships, would have to be structured in a certain way.
gender per se,\textsuperscript{52} that makes men and women as different as they are from each other, and it is sex-role differences which are invoked to justify most sexual differentiation at any of the levels of society.\textsuperscript{53}

More importantly, even if naturally occurring sexual differences were of such a nature that they were of obvious prima facie social relevance, this would by no means settle the question of whether in the good society sex should or should not be as minimally significant as eye color. Even though there are biological differences between men and women in nature, this fact does not determine the question of what the good society can and should make of these differences. I have difficulty understanding why so many persons seem to think that it does settle the question adversely to anything like the assimilatist ideal. They might think it does settle the question for two different reasons. In the first place, they might think the differences are of such a character that they substantially affect what would be possible within a good

\textsuperscript{52} The term "gender" may be used in a number of different senses. I use it to refer to those anatomical, physiological, and other differences (if any) that are naturally occurring in the sense described above. Some persons refer to these differences as "sex differences," but that seems to me confusing. In any event, I am giving a stipulative definition to "gender."

\textsuperscript{53} See, e.g., authorities cited in note 14 supra; M. MEAD, SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES (1935):

These three situations [the cultures of the Anapesh, the Mundugumor, and the Tchambuli] suggest, then, a very definite conclusion. If those temperamental attitudes which we have traditionally regarded as feminine—such as passivity, responsiveness, and a willingness to cherish children—can so easily be set up as the masculine pattern in one tribe, and in another to be outlawed for the majority of women as well as for the majority of men, we no longer have any basis for regarding such aspects of behavior as sex-linked. . . .

. . . We are forced to conclude that human nature is almost unbelievably malleable, responding accurately and contrastingly to contrasting cultural conditions. . . . Standardized personality differences between the sexes are of this order, cultural creations to which each generation, male and female is trained to conform.

\textit{id.} at 190-91.

A somewhat different view is expressed in J. SHERMAN, ON THE PSYCHOLOGY OF WOMEN (1971). There, the author suggests that there are "natural" differences of a psychological sort between men and women, the chief ones being aggressiveness and strength of sex drive. \textit{See id.} at 238. However, even if she is correct as to these biologically based differences, this does little to establish what the good society should look like. \textit{See pp. 611-15 infra.}

Almost certainly the most complete discussion of this topic is E. MACOBY & C. JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES (1974). The authors conclude that the sex differences which are, in their words, "fairly well established," are: (1) that girls have greater verbal ability than boys; (2) that boys excel in visual-spatial ability; (3) that boys excel in mathematical ability; and (4) that males are aggressive. \textit{id.} at 351-52. They conclude, in respect to the etiology of these psychological sex differences, that there appears to be a biological component to the greater visual-spatial ability of males and to their greater aggressiveness. \textit{id.} at 360.
society of human persons. Just as the fact that humans are mortal necessarily limits the features of any possible good society, so, they might argue, the fact that males and females are physiologically different limits the features of any possible good society.

In the second place, they might think the differences are of such a character that they are relevant to the question of what would be desirable in the good society. That is to say, they might not think that the differences determine to a substantial degree what is possible, but that the differences ought to be taken into account in any rational construction of an ideal social existence.

The second reason seems to me to be a good deal more plausible than the first. For there appear to be very few, if any, respects in which the ineradicable, naturally occurring differences between males and females must be taken into account. The industrial revolution has certainly made any of the general differences in strength between the sexes capable of being ignored by the good society in virtually all activities.54 And it is sex-role acculturation, not biology, that mistakenly leads many persons to the view that women are both naturally and necessarily better suited than men to be assigned the primary responsibilities of child rearing. Indeed, the only fact that seems required to be taken into account is the fact that reproduction of the human species requires that the fetus develop in utero for a period of months. Sexual

---

54 As Sherman observes,

Each sex has its own special physical assets and liabilities. The principal female liability of less muscular strength is not ordinarily a handicap in a civilized, mechanized, society. . . . There is nothing in the biological evidence to prevent women from taking a role of equality in a civilized society.

J. Sherman, supra note 53, at 11.

There are, of course, some activities that would be sexually differentiated in the assimilationist society; namely, those that were specifically directed toward, say, measuring unaided physical strength. Thus, I think it likely that even in this ideal society, weight lifting contests and boxing matches would in fact be dominated, perhaps exclusively so, by men. But it is hard to find any significant activities or institutions that are analogous. And it is not clear that such insignificant activities would be thought worth continuing, especially since sports function in existing patriarchal societies to help maintain the dominance of males.

See K. Millett, supra note 13, at 48-49.

It is possible that there are some nontrivial activities or occupations that depend sufficiently directly upon unaided physical strength that most if not all women would be excluded. Perhaps being a lifeguard at the ocean is an example. Even here, though, it would be important to see whether the way life-guarding had traditionally been done could be changed to render such physical strength unimportant. If it could be changed, then the question would simply be one of whether the increased cost (or loss of efficiency) was worth the gain in terms of equality and the avoidance of sex-role differentiation. In a non-patriarchal society very different from ours, where sex was not a dominant social category, the argument from efficiency might well prevail. What is important, once again, is to see how infrequent and peripheral such occupational cases are.
intercourse is not necessary, for artificial insemination is available. Neither marriage nor the family is required for conception or child rearing. Given the present state of medical knowledge and the natural realities of female pregnancy, it is difficult to see why any important institutional or interpersonal arrangements must take the existing gender difference of in utero pregnancy into account.

But, as I have said, this is still to leave it a wholly open question to what degree the good society ought to build upon any ineradicable gender differences to construct institutions which would maintain a substantial degree of sexual differentiation. The arguments are typically far less persuasive for doing so than appears upon the initial statement of this possibility. Someone might argue that the fact of menstruation, for instance, could be used as a premise upon which to predicate different social roles for females than for males. But this could only plausibly be proposed if two things were true: first, that menstruation would be debilitating to women and hence relevant to social role even in a culture which did not teach women to view menstruation as a sign of uncleanness or as a curse, and second, that the way in which menstruation necessarily affected some or all women was in fact related in an important way to the role in question. But even if both of these were true, it would still be an open question whether any sexual differentiation ought to be built upon these facts. The society could still elect to develop institutions that

---

55 See, e.g., Paige, Women Learn to Sing the Menstrual Blues, in THE FEMALE EXPERIENCE 17 (C. Tavis ed. 1973).

I have come to believe that the "raging hormones" theory of menstrual distress simply isn't adequate. All women have the raging hormones, but not all women have menstrual symptoms, nor do they have the same symptoms for the same reasons. Nor do I agree with the "raging neurosis" theory, which argues that women who have menstrual symptoms are merely whining neurotics, who need only a kind pat on the head to cure their problems.

We must instead consider the problem from the perspective of women's subordinate social position, and of the cultural ideology that so narrowly defines the behaviors and emotions that are appropriately "feminine." Women have perfectly good reasons to react emotionally to reproductive events. Menstruation, pregnancy and childbirth—so sacred, yet so unclean—are the woman's primary avenues of achievement and self-expression. Her reproductive abilities define her femininity; other routes to success are only second-best in this society.

. . . . My current research on a sample of 114 societies around the world indicates that ritual observances and taboos about menstruation are a method of controlling women and their fertility. Men apparently use such rituals, along with those surrounding pregnancy and childbirth, to assert their claims to women and their children.

. . . . The hormone theory isn't giving us much mileage, and it's time to turn it in for a better model, one that looks to our beliefs about menstruation and women. It is no mere coincidence that women get the blue meanies along with an event they consider embarrassing, unclean—and a curse.

Id. at 21.
would nullify the effect of the natural differences. And suppose, for example, what seems implausible—that some or all women will not be able to perform a particular task while menstruating, e.g., guard a border. It would be easy enough, if the society wanted to, to arrange for substitute guards for the women who were incapacitated. We know that persons are not good guards when they are sleepy, and we make arrangements so that persons alternate guard duty to avoid fatigue. The same could be done for menstruating women, even given these implausibly strong assumptions about menstruation. At the risk of belaboring the obvious, what I think it important to see is that the case against the assimilationist ideal—if it is to be a good one—must rest on arguments concerned to show why some other ideal would be preferable; it cannot plausibly rest on the claim that it is either necessary or inevitable.

There is, however, at least one more argument based upon nature, or at least the "natural," that is worth mentioning. Someone might argue that significant sex-role differentiation is natural not in the sense that it is biologically determined but only in the sense that it is a virtually universal phenomenon in human culture. By itself, this claim of virtual universality, even if accurate, does not directly establish anything about the desirability or undesirability of any particular ideal. But it can be made into an argument by the addition of the proposition that where there is a virtually universal social practice, there is probably some good or important purpose served by the practice. Hence, given the fact of sex-role differentiation in all, or almost all, cultures, we have some reason to think that substantial sex-role differentiation serves some important purpose for and in human society.

This is an argument, but I see no reason to be impressed by it. The premise which turns the fact of sex-role differentiation into any kind of a strong reason for sex-role differentiation is the premise of conservatism. And it is no more convincing here than elsewhere. There are any number of practices that are typical and yet upon reflection seem without significant social purpose. Slavery was once such a practice; war perhaps still is.

More to the point, perhaps, the concept of "purpose" is ambiguous. It can mean in a descriptive sense "plays some role" or "is causally relevant." Or it can mean in a prescriptive sense "does something desirable" or "has some useful function." If "purpose" is used prescriptively in the conservative premise, then there is no reason to think that premise is true.

To put it another way, the question is whether it is desirable to have a society in which sex-role differences are to be retained
The straightforward way to think about that question is to ask what would be good and what would be bad about a society in which sex functioned like eye color does in our society. We can imagine what such a society would look like and how it would work. It is hard to see how our thinking is substantially advanced by reference to what has typically or always been the case. If it is true, as I think it is, that the sex-role differentiated societies we have had so far have tended to concentrate power in the hands of males, have developed institutions and ideologies that have perpetuated that concentration and have restricted and prevented women from living the kinds of lives that persons ought to be able to live for themselves, then this says far more about what may be wrong with any nonassimilationist ideal than does the conservative premise say what may be right about any nonassimilationist ideal.

Nor is this all that can be said in favor of the assimilationist ideal. For it seems to me that the strongest affirmative moral argument on its behalf is that it provides for a kind of individual autonomy that a nonassimilationist society cannot attain. Any nonassimilationist society will have sex roles. Any nonassimilationist society will have some institutions that distinguish between individuals by virtue of their gender, and any such society will necessarily teach the desirability of doing so. Any substantially nonassimilationist society will make one's sexual identity an important characteristic, so that there are substantial psychological, role, and status differences between persons who are males and those who are females. Even if these could be attained without systemic dominance of one sex over the other, they would, I think, be objectionable on the ground that they necessarily impaired an individual's ability to develop his or her own characteristics, talents and capacities to the fullest extent to which he or she might desire. Sex roles, and all that accompany them, necessarily impose limits—restrictions on what one can do, be or become. As such, they are, I think, at least prima facie wrong.

To some degree, all role-differentiated living is restrictive in this sense. Perhaps, therefore, all role-differentiation in society is to some degree troublesome, and perhaps all strongly role-differentiated societies are objectionable. But the case against sexual differentiation need not rest upon this more controversial point. For one thing that distinguishes sex roles from many other roles is that they are wholly involuntarily assumed. One has no choice whatsoever about whether one shall be born a male or female. And if it is a consequence of one's being born a male or a female that one's subsequent emotional, intellectual, and material development will be substantially controlled by this fact, then substantial, permanent, and involuntarily assumed restraints have
been imposed on the most central factors concerning the way one will shape and live one's life. The point to be emphasized is that this would necessarily be the case, even in the unlikely event that substantial sexual differentiation could be maintained without one sex or the other becoming dominant and developing institutions and an ideology to support that dominance.

I do not believe that all I have said in this section shows in any conclusive fashion the desirability of the assimilationist ideal in respect to sex. I have tried to show why some typical arguments against the assimilationist ideal are not persuasive, and why some of the central ones in support of that ideal are persuasive. But I have not provided a complete account, or a complete analysis. At a minimum, what I have shown is how thinking about this topic ought to proceed, and what kinds of arguments need to be marshalled and considered before a serious and informed discussion of alternative conceptions of a nonsexist society can even take place. Once assembled, these arguments need to be individually and carefully assessed before any final, reflective choice among the competing ideals can be made. There does, however, seem to me to be a strong presumptive case for something very close to, if not identical with, the assimilationist ideal.

III. INSTRUMENTALITIES

The instrumental perspective does not require much theoretical attention beyond what has already been said. It is concerned with the question of what would be the best way to move from the social realities to the ideal. The most salient considerations are, therefore, empirical ones—although of a complex sort.

Affirmative action programs, even those which require explicit racial and sexual minimum quotas, are most plausibly assessed from within this perspective. If the social reality is one

---

56 One article that explores this point in some detail is Hill, Self-Determination and Autonomy, in TODAY'S MORAL PROBLEMS 171 (Wasserstrom ed. 1975). See also Jaggar, supra note 28, at 289-91.

57 Still other arguments against something like the assimilationist ideal and in favor of something like the idea of diversity are considered by Jaggar and shown by her to be unpersuasive. See Jaggar, supra note 28, at 281-91.

58 Although ostensibly empirical, the question of whether and to what extent affirmative action programs "work" has a substantial nonempirical component. There are many variables that can plausibly be taken into account, and many differing weights to be assigned to these variables. Consequently, how one marshalls and assesses the "evidence" concerning which programs "work" and which do not, has at least as much to do with whether one believes that the programs are or are not justifiable on other grounds as it does with a disinterested marshalling of the "facts." See, e.g., T. Sowell, AFFIRMATIVE ACTION RECONSIDERED 34-40 (1975); N. Glazer, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975). This also is a feature of Mr. Justice Mosk's analysis where he asserts, for example, that "[t]he overemphasis upon
of racial and sexual oppression—as I think it is—and if, for example, the most defensible picture of a nonracist, nonsexist society is the one captured by the assimilationist ideal, then the chief and perhaps only question to be asked of such programs is whether they are well suited to bring about movement from the existing state of affairs to a closer approximation of the assimilationist ideal. If it turns out, for example, that explicit racial quotas will in fact exacerbate racial prejudice and hostility, thereby making it harder rather than easier to achieve an assimilationist society, that is a reason which counts against the instrumental desirability of racial quotas. This would not settle the matter, of course, for there might also be respects in which racial quotas would advance the coming of the assimilationist society, e.g., by redistributing wealth and positions of power and authority to blacks, thereby creating previously unavailable role models, and by putting persons with different perspectives and interests in a position more directly to influence the course of social change.

But persons might be unhappy with this way of thinking about affirmative action—and especially about quotas. They might have three different but related objections. The first objection would be that there are more questions to be asked about means or instruments than whether they will work to bring about a certain end. In particular, there is also the question of the way they will work as means to bring about the end. Some means may be morally objectionable as means, no matter how noble or desirable the end. That is the good sense in the slogan: The ends do not justify the means.

I certainly agree with this general point. It is the application to particular cases, for example this one, that vitiated the force of the objection. Indeed, given the way I have formulated the instrumental perspective, I have left a good deal of room for the moral assessment of means to be built in. That is to say, I have


The general point is related to my discussion of Brown II, note 39 supra. A tremendous amount does turn in this area on who defines the nature of the problem and how the problem gets defined. My own analysis, to the degree to which it has endeavored to be empirical is, of course, subject to this same potential distortion.

It is here that an understanding of the causes of the position of blacks and women is most important. Such an understanding is crucial to an ability to make the kinds of changes and interventions that will successfully make real and lasting differences in the status quo. See note 7 & accompanying text supra.

described the question as one of the instrumental “desirability,” not just the “efficaciousness” in any narrow sense, of the means that are selected.

The second objection is rather more sophisticated. Someone might say something like this: it is just wrong in principle ever to take an individual’s race or sex into account. Persons just have a right never to have race or sex considered. No reasons need be given; we just know they have that right. This is a common way of talking today in moral philosophy, but I find nothing persuasive or attractive about it. I do not know that persons have such a right. I do not “see” it. Instead, I think I can give and have given reasons in my discussion of the social realities as well as my discussion of ideals for why they might be said to have rights not to be treated in certain ways. That is to say, I have tried to show something of what was wrong about the way blacks and women were and are treated in our culture. I have not simply proclaimed the existence of a right.

Another form of this objection is more convincing. The opponent of quotas and affirmative action programs might argue that any proponent of them is guilty of intellectual inconsistency, if not racism or sexism. At times past, employers, universities, and many social institutions did have racial or sexual quotas, when they did not practice overt racial or sexual exclusion, and it was clear that these quotas were pernicious. What is more, many of those who were most concerned to bring about the eradication of those racial quotas are now untroubled by the new programs which re-institute them. And this is just a terrible sort of intellectual inconsistency which at worst panders to the fashion of the present moment and at best replaces intellectual honesty and integrity with understandable but misguided sympathy. The assimilationist ideal requires ignoring race and sex as distinguishing features of people.

Such an argument is a useful means by which to bring out the way in which the analysis I am proposing can respond. The racial quotas and practices of racial exclusion that were an integral part of the fabric of our culture, and which are still to some degree a part of it, were pernicious. They were a grievous wrong and it was and is important that all morally concerned individuals work for their eradication from our social universe. The racial

---

61 See, e.g., the sources cited in note 1 supra.
62 For example, such an approach seems, at least at times, to underlie the writings of R. Nozick, Anarchy, State and Utopia (1974).
63 I have also tried to discuss some of these matters, although not with anything like complete success, in Wasserstrom, Rights, Human Rights, and Racial Discrimination, 61 J. Phil. 628 (1964).
quotas that are a part of contemporary affirmative action programs are, I think, commendable and right. But even if I am mistaken about the latter, the point is that there is no inconsistency involved in holding both views. For even if contemporary schemes of racial quotas are wrong, they are wrong for reasons very different from those that made quotas against blacks wrong.

As I have argued, the fundamental evil of programs that discriminated against blacks or women was that these programs were a part of a larger social universe which systematically maintained an unwarranted and unjust scheme which concentrated power, authority, and goods in the hands of white males. Programs which excluded or limited the access of blacks and women into these institutions were wrong both because of the direct consequences of these programs on the individuals most affected and because the system of racial and sexual superiority of which they were constituents was an immoral one in that it severely and without any adequate justification restricted the capacities, autonomy, and happiness of those who were members of the less favored categories.

Whatever may be wrong with today’s affirmative action programs and quota systems, it should be clear that the evil, if any, is not the same. Racial and sexual minorities do not constitute the dominant social group. Nor is the conception of who is a fully developed member of the moral and social community one of an individual who is either female or black. Quotas which prefer women or blacks do not add to the already relatively overabundant supply of resources and opportunities at the disposal of white males. If racial quotas are to be condemned or if affirmative action programs are to be abandoned, it should be because they will not work well to achieve the desired result. It is not because they seek either to perpetuate an unjust society or to realize a corrupt ideal.

Still a third version of this objection might be that when used in affirmative action programs, race and sex are categories that are too broad in scope. They include some persons who do not have the appropriate characteristics and exclude some persons who do. If affirmative action programs made race and sex the sole criteria of selection, this would certainly be a plausible objection, although even here it is very important to see that the objection is no different in kind from that which applies to all legislation and rules. For example, in restricting the franchise to those who are eighteen and older, we exclude some who have all the relevant qualifications for voting and we include some who lack

64 See Part I supra.
them. The fit can never be precise. Affirmative action programs almost always make race or sex a relevant condition, not a conclusive one. As such, they function the way all other classificatory schemes do. The defect, if there is one, is generic, and not peculiar to programs such as these.

There is finally the third objection: that affirmative action programs are wrong because they take race and sex into account rather than the only thing that matters—an individual's qualifications. Someone might argue that what is wrong with these programs is that they deprive persons who are more qualified by bestowing benefits on those who are less qualified in virtue of their being either black or female.

There are many things wrong with the objection based on qualifications. Not the least of them is that we do not live in a society in which there is even the serious pretense of a qualification requirement for many jobs of substantial power and authority. Would anyone claim that the persons who comprise the judiciary are there because they are the most qualified lawyers or the most qualified persons to be judges? Would anyone claim that Henry Ford II is the head of the Ford Motor Company because he is the most qualified person for the job? Or that the one hundred men who are Senators are the most qualified persons to be Senators? Part of what is wrong with even talking about qualifications and merit is that the argument derives some of its force from the erroneous notion that we would have a meritocracy were it not for affirmative action. 65

But there is a theoretical difficulty as well, which cuts much more deeply into the argument about qualifications. The argument cannot be that the most qualified ought to be selected because the most qualified will perform most efficiently, for this instrumental approach was what the opponent of affirmative action thought was wrong with taking the instrumental perspective in the first place. To be at all persuasive, the argument must be that those who are the most qualified deserve to receive the benefits (the job, the place in law school, etc.) because they are the most qualified. And there is just no reason to think that this is a correct premise. There is a logical gap in the inference that the person who is most qualified to perform a task, e.g., be

65 The point is a more general one than the few random examples suggest. The more prestige, power, wealth or influence is attached to the job, the less likely it is that there are specifiable qualifications that make it easy to determine who in fact is the most qualified. There are, to be sure, minimum qualifications. But these are satisfied by a large number of individuals. Moreover, for most of these positions the notion simply does not exist that the most qualified individuals from among this large class are the ones who deserve to be selected, e.g., the dean of a college or the head of a federal agency.
a good student, deserves to be admitted as a student. Of course, those who deserve to be admitted should be admitted. But why do the most qualified deserve anything? There is just no necessary connection between academic merit (in the sense of qualification) and deserving to be a member of a student body. Suppose, for instance, that there is only one tennis court in the community. Is it clear that the two best tennis players ought to be the ones permitted to use it? Why not those who were there first? Or those who will enjoy playing the most? Or those who are the worst and therefore need the greatest opportunity to practice? Or those who have the chance to play least frequently?

We might, of course, have a rule that says that the best tennis players get to use the court before the others. Under such a rule, the best players would deserve the court more than the poorer ones. But that is just to push the inquiry back one stage. Is there any reason to think that good tennis players are entitled to such a rule? Indeed, the arguments that might be given for or against such a rule are many and varied. And few if any of the arguments that might support the rule would depend upon a connection between ability and desert.

Someone might reply that the most able students deserve to be admitted to the university because all of their earlier schooling was a kind of competition, with university admission being the prize awarded to the winners. They deserve to be admitted because that is what the rule of the competition provides. In addition, it would be unfair now to exclude them in favor of others, given the reasonable expectations they developed about the way in which their industry and performance would be rewarded. Minority admission programs, which inevitably prefer some who are less qualified over some who are more qualified, all possess this flaw.

There are several problems with this argument. The most substantial of them is that it is an empirically implausible picture of our social world. Most of what are regarded as the decisive characteristics for higher education have a great deal to do with things over which the individual has neither control nor responsibility: such things as home environment, socioeconomic class of parents, and, of course, the quality of the primary and secondary schools attended. Since individuals do not deserve having had any of these things vis-à-vis other individuals, they do not, for the most part, deserve their qualifications. And since they do not deserve their abilities they do not in any strong sense deserve to be admitted because of their abilities.

To be sure, if there is a rule which connects, say, performance at high school with admission to college, then there is a
weak sense in which those who do well at high school deserve, for that reason alone, to be admitted to college. But then, as I have said, the merits of this rule need to be explored and defended. In addition, if persons have built up or relied upon their reasonable expectations concerning performance and admission, they have a claim to be admitted on this ground as well. But it is certainly not obvious that these claims of desert are any stronger or more compelling than competing claims based upon the needs of or advantages to women or blacks.66

Qualifications are also potentially relevant in at least three other respects. In the first place, there is some minimal set of qualifications without which the benefits of participation in higher education cannot be obtained by the individuals involved. In the second place, the qualifications of the students within the university will affect to some degree or other the benefits obtainable to anyone within it. And finally, the qualifications of students within the university may also affect the way the university functions vis-à-vis the rest of the world. The university will do some things better and some things worse, depending upon the qualifications of those who make it up. If the students are “less qualified,” teachers may have to spend more time with them and less time on research. Some teachers may find teaching now more interesting. Others may find it less so. But all these considerations only establish that qualifications, in this sense, are relevant, not that they are decisive. This is wholly consistent with the claim that minority group membership is also a relevant but not a decisive consideration when it comes to matters of admission.67 And that is all that virtually any preferential treatment program—even one with quotas—has ever tried to claim.

I do not think I have shown programs of preferential treatment to be right and desirable, because I have not sought to answer all of the empirical questions that may be relevant. But I have, I hope, shown that it is wrong to think that contemporary affirmative action programs are racist or sexist in the centrally important sense in which many past and present features of our society have been and are racist and sexist. The social realities do

66 I prefer to focus on these aspects of desert and considerations of fairness rather than principles of compensation and reparation because I can thereby bypass the claim that compensation or reparation is being exacted from the wrong individuals, because they are innocent of any wrongdoing, and causally unconnected with the injuries suffered. I do think the causal link is often present and the claim of innocence often suspect. But my analysis puts these issues to one side. For a discussion of some of the literature that discusses the issues of compensation and reparation, see, e.g., Boxill, The Morality of Reparation, 2 Soc. THEORY & PRAC. 113 (1972).

67 The preceding six paragraphs appear in substantially the same form in Wasserstrom, supra note 33, at 166-67.
make a fundamental difference. It is also wrong to think that these programs are in any strong sense either unjust or unprincipled. The case for programs of preferential treatment can plausibly rest on the view that the programs are not unfair (except in the weak sense described above) to white males, and on the view that it is unfair to continue the present set of unjust—often racist and sexist—institutions that comprise the social reality. The case for these programs also rests on the thesis that it is fair, given the distribution of power and influence in the United States, to redistribute in this way, and that such programs may reasonably be viewed as useful means by which to achieve very significant social ideals.

CONCLUSION

I do not think that the topics of racism, sexism, and preferential treatment are easily penetrable. Indeed, I have tried to show that they contain complicated issues which must be carefully distinguished and discussed. But I also believe, and have tried to show, that the topics are susceptible to rational analysis. There is a difference between problems that are difficult because confusion is present, and problems that are difficult because a number of distinct ideas and arguments must be considered. It is my ambition to have moved thinking about the topics and issues in question some distance from the first to the second of these categories.