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Gender Discrimination and the Transformation of Workplace Norms

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Gender Discrimination and the Transformation of Workplace Norms

Kathryn Abrams*

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"Well, what about lavatory seats?" [Rachel] suddenly shouted at Gregory. . . .

.
"When I sit there . . . I think, this was made for men by other men.

.
"Steps, . . . [s]tepladders as well. Getting off trains. Pedals on a car. The Stock Exchange."

Gregory laughed. "You can't expect. . . ."

"Why not? Why not? Why shouldn't *you* learn? Why is it always us? What about changing a wheel? Why are the nuts screwed on so bloody hard that a woman can't bloody shift them?"

.

* Associate Professor of Law, Boston University School of Law. This Article has benefited from the generosity of many colleagues and friends, who have shared their ideas and experiences with me. I want to thank Jack Beermann, Bob Bone, Joe Brodley, Jane Cohen, Nancy Dowd, Clay Gillette, Mike Harper, Bill Kell, Fred Lawrence, Chip Lupu, Martha Minow, Ken Simons, Joe Singer, Avi Soifer, Ron Wright, and the participants in the Boston University Law School Faculty Workshop, and the Emory University Faculty Colloquium. Finally, my thanks to Jill Lesser for meticulous and indefatigable research assistance.

Jean found herself chuckling.

"What are you laughing at? It's worse for you."

"Why is it worse for me?"

"Because you grew up not knowing it."

—Julian Barnes¹

I. INTRODUCTION

Lately when I talk about gender, I am often confronted with the message that women's equality has already been achieved. A colleague may provide this insight, or a complete stranger waiting in a grocery line. But the thought was most succinctly expressed by a student who grew impatient with my activism. "I don't understand," she declared. "Women have gotten just about everything they wanted. Don't they see that the time for militancy is over?"

Perhaps this response should come as no surprise. The battle for the Equal Rights Amendment has been lost, but in salient ways our society seems to have grown more hospitable toward women. Buttressed by the Supreme Court's endorsement of affirmative action,² many women have become full-time participants in the workforce. Community property laws flourish in several states.³ Both candidates in the recent Presidential election actively sought the support of women voters.

Advocates of gender equality, however, do not mistake these changes for the full achievement of our goals. Many crucial problems remain: formal equality prevents many women from attaining fair divorce and custody settlements,⁴ the feminization of poverty continues unabated,⁵ and outdated sexual stereotypes impede our society's ability to prosecute rape.⁶ Moreover, most feminists see the challenges ahead as qualitatively different tasks, which will require the adoption of new analytical tools.

This growing awareness is one product of the interaction between feminist theory and the practical experience of women. Women who fought for access to jobs, property, and the political arena have discovered that increased access alone does not create conditions in which

1. J. BARNES, *STARING AT THE SUN* 114-15 (1987).

2. See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

3. See R. CUNNINGHAM, W. STOEBOCK & D. WHITMAN, *THE LAW OF PROPERTY* § 5.14, at 240 (1984) (describing eight community property states). The authors note that, although a few of the community property statutes date back many decades, the premise of the community property system is that husband and wife are equals. *Id.*

4. See, e.g., Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 214-24.

5. See, e.g., Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983).

6. See, e.g., Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

equality is possible. Women often are channeled into jobs that accord them little respect and few opportunities for advancement. "Women's issues" have emerged on the political agenda, but often are treated as the manipulable claims of a narrow interest group.

Feminist theory has grown from and has helped to explain these discoveries by untangling the mass of related attitudes that we call "discrimination against women." Women may be the victims of an irrational prejudice that has obscured the ways in which women are similar to men—and thus entitled to legal equality. But, in addition, an elaborate set of societal norms has systematically devalued the choices, values, and behaviors of women that tend to be different from those of men. Even the successful attacks on the exclusion of women have failed to reach many attitudes about the differences between men and women, attitudes that continue to shape the institutions in which women now find themselves. Challenging the pervasive influence of these norms is the next feminist task.

In this Article I examine the present transition in the movement for gender equality by focusing on one specific context: the workplace. I first discuss what has and has not been accomplished by the efforts to end the exclusion of women from many occupations. I then focus on the next feminist task—the effort to reveal and challenge the male-centered attitudes⁷ that structure the workplace—and discuss the inadequacy of the "equality principle," the primary analytic tool of the assault on exclusion, to this task. Finally, by discussing two persistent problems of gender equality in the workplace—sexual harassment, and the relationship between career advancement and parenting responsibilities—I sketch the elements of an approach better suited to challenging the pervasiveness of male-centered norms.

7. By "male-centered attitudes," I mean those norms generated by men, that are based on experiences in an environment either exclusively male or dominated by men. French feminists, and some American feminists, prefer the term "phallogentric." See L. IRIGARAY, *THIS SEX WHICH IS NOT ONE* (C. Porter trans. 1985); Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987). Littleton rejects the use of terms such as "male-dominated" and "male-biased"—and presumably "male-centered"—on the grounds that they suggest "that 'gender-neutral' institutions will result if we merely . . . 'squeeze the male tilt out' of the institution." *Id.* at 1280 n.2 (quoting Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 331 (1985)). Littleton notes that "actually squeezing out the male tilt of any social institution would not leave much of the institution." *Id.* While I heartily agree with this conclusion, I do not understand (or use) the term "male-centered" to imply anything to the contrary.

II. THE "STATE OF THE UNION"

A. *Discrimination in the Workplace: One Women's Story*

As my student's comment makes clear, any story of women's progress varies with the storyteller—and leaves important things unsaid. But one can describe the struggle for gender equality in the workplace as having two overlapping phases: the first concerned with ending the exclusion of women from many types of employment, and the second concerned with transforming the male-centered norms that created both the exclusion and the workplace as women now find it. As I hope my narrative reveals, the present day finds us not at the end of the path, but navigating a crucial bend in the road.

The first barrier to gender equality in the workplace was the exclusion of women from all but a handful of historically female jobs. In the struggle to gain access to broader job opportunities, the primary litigation tool was Title VII of the Civil Rights Act, and the primary analytic assumption was the "equality principle." Applying arguments that had prevailed in the context of race, advocates claimed that, for purposes of securing employment, women were "similarly situated" to men.⁸ As a group, women possessed the varied physical and intellectual qualities necessary to litigate cases, draw up budgets, and dig ditches. Thus the exclusion of this essentially equal group of applicants could be attributed only to irrational prejudice or inaccurate stereotypes.

Using Title VII, advocates pressed the equality claim in at least two different ways. First, they challenged hiring practices that treated women differently from men.⁹ Second, they attacked facially neutral policies that impeded women's efforts to be hired or promoted.¹⁰ Both strategies enjoyed a measured success. Courts continued to wrestle with the breadth of employers' defenses¹¹ and the availability of affirmative relief to compensate women victimized by past discrimination.¹² And some employers responded with more subtle devices to stem the tide of women into their workplaces.¹³ But a range of new opportunities for women became available as courts struck down categorical exclusions, such as height and weight requirements, and physical entrance

8. Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); see, e.g., Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977).

9. See, e.g., *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

10. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

11. See, e.g., *id.*; *Wilson v. Southwest Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981).

12. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

13. See *infra* Part III. As I explain in Part III, some of the barriers facing working parents can be understood as either exclusionary or devaluative devices, thus illustrating that these two types of discrimination reflect not so much a dichotomy as a continuum.

examinations.¹⁴

Over time, however, it became apparent that these victories had not secured all the gains for which women had hoped. Many once-closed occupations had opened, yet new problems confronted women upon their entry. Many encountered coworkers who were ill at ease relating to women on the job. Not only were social relations strained, but women also had difficulty forming the mentoring relationships that can be crucial to professional advancement. Many employees and supervisors persisted in treating women in a demeaning or sexual way. Some women were required to wear sexually provocative uniforms on the job. Others heard themselves addressed by diminutives that undercut their credibility in responsible positions. They became the object of lewd comments and jokes, and sometimes were propositioned by colleagues or supervisors.

New workers also found employers unwilling to accommodate their pregnancies—a development that highlighted the drawbacks of characterizing women as similar to men.¹⁵ Some women were denied maternity leaves; others returned from leave to find that their jobs had been filled. The comparatively small number of women that began to trickle into management and the professions faced an additional problem. When they returned to their jobs, particularly if on a part-time basis, they found that they had been tacitly moved to a “slower track”—a move that often cost them interesting work and important promotions. Although many women had assumed that their hard-won access to the workplace heralded a momentous change in male attitudes, they soon began to suspect that their presence had prompted only minimal adjustments in existing norms.

These and other discoveries fueled an outpouring of feminist theory, which in turn gave women new ways of understanding and talking about their experiences.¹⁶ Much of this scholarship implicitly or explicitly challenged the “equality” premise that had been central to the

14. See, e.g., *Dothard*, 433 U.S. 321 (height and weight requirements); *Officers for Justice v. Civil Serv. Comm'n*, 395 F. Supp. 378 (N.D. Cal. 1975) (height requirements and agility tests); see also *Officers for Justice v. Civil Serv. Comm'n*, 473 F. Supp. 801 (N.D. Cal. 1979) (order approving consent decree settling *Officers for Justice*, 395 F. Supp. 378).

15. See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that a comprehensive employer health plan excluding pregnancy from coverage did not violate Title VII). The Court's reasoning in *Gilbert* was rejected explicitly by Congress through the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1982). See also HOUSE COMM. ON EDUC. & LABOR, PROHIBITION OF SEX DISCRIMINATION BASED ON PREGNANCY, H.R. REP. NO. 948, 95th Cong., 2d Sess. 2-3 (1978); SENATE COMM. ON HUMAN RESOURCES, AMENDING TITLE VII, CIVIL RIGHTS ACT OF 1964, S. REP. NO. 331, 95th Cong., 1st Sess. 2-3 (1977). See generally Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

16. For a thoughtful discussion of the way in which experience both informs and is shaped by legal conceptualization, see Schneider, *The Dialectic of Rights and Politics: Perspectives from the*

struggle for access. Many scholars focused on pregnancy: a biological fact that called into question both the empirical basis and the strategic value of arguing that women are in all relevant respects comparable to men.¹⁷ Some theorists used this biological difference to modify the "equality" premise, seeking a limited exception for physical differences or an analogue in the temporary disabilities affecting men.¹⁸ Other scholars saw physical disparities as part of the larger realm of socially constructed differences. Perhaps it was not so much the physical fact of pregnancy, or of differences in upper body strength, that distinguished men and women, as it was the social constructions placed upon those differences. Difference and the social meaning assigned to it had been probed, in a nonphysical context, by the pathbreaking work of Carol Gilligan.¹⁹ Gilligan found not only that young boys and girls took different approaches to the resolution of moral conflicts, but that the incomplete moral development psychologists had attributed to female subjects was largely a consequence of their having been measured against a model created by and for males.²⁰

These insights previewed several new directions in feminist theory. One group of scholars investigated the modes of thought, expression, and commitment distinctive to women, calling for an affirmation of these differences and a "celebration" of the human diversity they represented.²¹ Another group believed that "celebrating" women's differences was unwise, until we also understood how such differences were created and used.²² Some scholars, including Martha Minow²³ and Christine

Women's Movement, 61 N.Y.U. L. REV. 589 (1986).

My focus is on works of feminist legal theory, both because these are the works with which I am most familiar and because they are, in some cases, the feminist works that have had the most direct effect on strategies of legal reform. They represent, however, only a fraction of the recent outpouring of feminist scholarship. In some cases, legal feminist theorists take up arguments that were first introduced in other disciplines. I cite feminist works from other disciplines where applicable, though I make no pretense to either a comprehensive survey or a representative sample.

17. Compare generally Finley, *supra* note 15, with Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 190-200 (1983).

18. See, e.g., Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

19. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982).

20. *Id.* at 5-23.

21. See, e.g., G. STEINEM, *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* 161-66, 176-90 (1983); *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR*, at xxiii-xxvi (C. Moraga & G. Anzaldúa eds. 1981); A. WALKER, *IN SEARCH OF OUR MOTHERS' GARDENS: WOMANIST PROSE* 3-14 (1983).

22. See, e.g., C. MACKINNON, *FEMINISM UNMODIFIED—DISCOURSES ON LIFE AND LAW* 38-39 (1987).

23. See Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) [hereinafter Minow, *The Supreme Court*]; Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS., Spring 1985, at 157 [hereinafter Minow, *Learning to Live*].

Littleton,²⁴ observed that "difference" is not inherent in the female or any other condition, but appears only in relation.²⁵ Difference is generated, as Gilligan observed in the developmental context, when those who have the power to select the instruments of measurement judge others by their own norms. Radical scholars including Catharine MacKinnon²⁶ and Ann Scales²⁷ encompassed these insights in a broader theory of domination. Men, who enjoy a hegemonic power over social meanings by virtue of their dominant status in society, label as "different" all qualities, values, and practices characteristic of or associated with women. In a society constituted by male norms, anything female is not only distinguished, but also devalued, a form of subordination that women have only begun to recognize.

These theories help to explain the apparent impasse confronting women in the workplace. The amelioration of women's exclusion through the legal assertion of equality scarcely touched the norms that have structured the workplace. With respect to these attitudes, claims of equality gain women little. Men and women are neither similar—for many of these norms differ vitally across gender lines—nor similarly situated—for male control of the workplace has permitted male norms to prevail. These norms shape intangibles such as the "appropriate" professional demeanor: the tone of voice, air of command, and quickness to accommodate or anger that mark a "successful" employee. They also dictate the acceptable forms of professional camaraderie, and prescribe the boundaries between the workplace and the rest of the world—boundaries that have defined the care of children as the province of those who are not workers.

Women have been expected to make their way by conforming to these norms. This expectation has emerged in part because demanding conformity to pre-existing norms is one way of protesting the access of women to the workplace. But it occurs mainly because the men who constitute the workplace, like most proponents of societally dominant standards, do not recognize the partiality of their norms. The prefer-

24. See generally Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987) [hereinafter Littleton, *Feminist Legal Theory*]; see also Littleton, *supra* note 7.

25. This theory also had an earlier sociological incarnation. See Coser, *Georg Simmel's Neglected Contributions to the Sociology of Women*, 2 SIGNS 869, 872-73 (1977) (citing G. SIMMEL, *PHILOSOPHISCHE KULTUR* (1911)). Some scholars writing on difference have also attributed this insight concerning the relational character of difference to Hegel. See Minow, *Learning to Live*, *supra* note 23, at 205 (citing the master-slave discussion in G. HEGEL, *PHENOMENOLOGY OF SPIRIT* 141-50 (1952)).

26. See C. MACKINNON, *supra* note 22, at 32-45; C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN—A CASE OF SEX DISCRIMINATION* 101-41 (1979) [hereinafter C. MACKINNON, *SEXUAL HARASSMENT*].

27. See Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

ences and perspectives of this group for so long have been considered "the way things are done," that most male workers never have considered the possibility that these choices could be made differently. Nor, until recently, did many women encourage such reconsideration.²⁸ But as women have come to see that the norms of the "workplace" might be nothing more than the norms of the dominant group within it, and as these norms have raised a changing array of barriers to women's ease and achievement as workers, the wisdom of conformity has been called into question.²⁹

B. *Discrimination as Devaluation*

The next phase of the struggle for gender equality in the workplace must be to expose the partiality of these debilitating norms and structures, and insist that they be modified to reflect the perspectives of women. Several legal theorists have offered conceptual frameworks to assist in this task. Christine Littleton, for example, proposes a transformation of the equality principle.³⁰ Stating that women are entitled to equality should no longer mean that they should be viewed as substantially similar to men, but rather that what is socially understood to be "female" should be accorded "equal acceptance" with what is socially understood to be "male." Although Professor Littleton's current formulation of this argument is largely theoretical, she offers several examples that help us glimpse its practical implications. Equality understood as equal acceptance means not that women should have access to men's sports teams because they are essentially similar, which many men and women may not be, but rather that men's and women's sports programs at state-supported schools or universities should receive equal funding.³¹ In the employment context, those whose careers include frequent leaves or part-time work to facilitate the care of children (the "socially

28. The fact that many women have acquiesced should not, however, lead us to neglect the many historical instances of spirited dissent from a male-centered approach to the workplace. In the 1890s, for example, feminist Charlotte Perkins Gilman argued that working women needed child care and food service to combine employment and home life satisfactorily, and proposed that businesswomen should construct apartment hotels providing such facilities. See C. GILMAN, *WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION* (1898). For a thoughtful and witty discussion of many early feminist efforts to strike a more accommodating balance between work and family life, see D. HAYDEN, *REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING, WORK, AND FAMILY LIFE* (1984).

29. Although many working women, and the popular press, have taken up this challenge only recently, some contemporary feminist scholars have been advocating the revision of workplace norms for many years. See, e.g., Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); see also Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55 (1979).

30. See generally Littleton, *Feminist Legal Theory*, *supra* note 24; Littleton, *supra* note 7.

31. Littleton, *Feminist Legal Theory*, *supra* note 24, at 1058.

female" model) should receive the same support and esteem within the workplace as those workers whose careers are uninterrupted because they subordinate family to work responsibilities (the "socially male" model).³²

Ruth Colker seeks a similar goal by replacing the equality principle with a comprehensive theory, applicable both to women and minorities, described as the "anti-subordination" principle.³³ This approach challenges, and affirmatively remedies, any policy, practice, or attitude that contributes in intent or effect to the subordination of a historically dominated group. Professor Colker examines, for example, a policy that gives professional staff more unpaid leave than support staff, and that states that any employee who is absent more than the allotted time may be terminated.³⁴ Although such a policy might be adopted without invidious motivation, Colker argues that it would violate the antisubordination principle in a workplace in which the professional staff was mainly white and male and the support staff was mainly black and female. Because parental obligations might create higher absenteeism among a group of workers that was primarily female and black, a policy granting them less leave time would impose disproportionate penalties on this group.³⁵ Because such penalties would perpetuate the subordination of two historically disadvantaged groups, the policy should be struck down as discriminatory.

I propose an approach to discrimination in the workplace that borrows from these theories and the insights that preceded them, yet is in other respects distinct. My approach incorporates the insight that many of the problems remaining for women in the workplace are problems of devaluation and subordination. Women have been disadvantaged as workers by the fact that central features of the workplace have been constructed by men, according to norms that exclude and devalue experiences and perceptions characteristic of women. Unlike Professor Colker, however, I do not believe that this insight requires complete displacement of the equality principle by the goal of antisubordination.

32. *Id.* at 1051-56.

33. See Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003 (1986).

34. What follows in the text is a simplification of the hypothetical presented by Professor Colker, *id.* at 1029, that attempts to illustrate her point.

35. *Id.* at 1033. Colker states that in evaluating the plaintiff's prima facie case, it is necessary to consider not only the disparate impact on a historically disadvantaged group, but also the effect of that impact on the group's subordination. *Id.* Thus, the increased likelihood of termination for black and female employees probably would contribute to, rather than redress, their subordination. Colker also argues that the impact of a particular rule or law on subordination of disadvantaged groups should be considered at the defendant's justification stage of the inquiry. *Id.* at 1035-45.

Nor do I believe, as does Professor Littleton, that analysis of the devaluation of women should be wholly subsumed under the equality principle, even in her thoughtfully modified form. My position rests in part on the fact that I see no need for a comprehensive principle of antidiscrimination law. The legal framework used to combat race and gender discrimination has been based for decades on several distinct theories of discrimination. This development was not, moreover, fortuitous: different analyses may be better suited to explain or to combat different instances of discrimination. The outright exclusion of women from the workplace may be best explained, and opposed, as an instance of dissimilar treatment of similarly situated persons. Yet the dissimilar treatment of similarly situated persons does not explain the devaluative treatment of women workers who are primary parents. Still other instances of discrimination, such as sexual harassment, may be best explained through a theory of subordination, yet best ameliorated by encouraging offenders to treat women in the respectful, nonsexual way that they are accustomed to treating other men. A unitary theory of gender discrimination also fails to do justice to the complicated way in which women are treated by the social and political institutions of our society. A view that combines elements from both equality and antisubordination theories better reflects a society in which women are both juridically, aspirationally equal and shaped by distinctive experiences and norms that many social institutions devalue or dismiss.

My approach, like Professor Littleton's, assumes that our central task in workplace discrimination is to challenge the pervasive influence of male-generated norms through the introduction of women's perspectives. But we may not agree on the question of means. Littleton makes creating and winning acceptance for "structures reflecting socially female patterns" a crucial element of her plan. Her published works have not yet made clear how separate she intends these female structures to be;³⁶ but the history of subordination that she cites makes me doubtful that distinct "female" structures, even if funded equally, would be valued equally by men in the workplace. I would favor, instead, an approach that transforms the dominant male norms by integrating norms that reflect women's needs and experiences.

My approach is in this respect similar to the view espoused by Joan Williams.³⁷ Professor Williams proposes that we "deinstitutionalize gender" in the workplace by replacing those practices and norms that are

36. See Littleton, *Feminist Legal Theory*, *supra* note 24, at 1056-59. Littleton notes, however, that a full practical elaboration of her theory will appear in her future work. See Littleton, *supra* note 7, at 1286 n.37 (citing works in progress addressing questions of implementation).

37. See Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797 (1989).

based on the assumption of a male worker with no child care responsibilities, with requirements better suited to the lives of women workers with family obligations.³⁸ She reaches this conclusion, however, by a route different than the one I take. Professor Williams is deeply skeptical of efforts by feminist scholars to laud or highlight the kind of socially female values Professor Littleton commends. Citing the plaintiffs' devastating defeat in *EEOC v. Sears, Roebuck & Co.*,³⁹ Professor Williams claims it is impossible to applaud these values without conjuring the negative attributes traditionally associated with women, such as passivity, deference, and single-minded commitment to home and hearth.⁴⁰ Efforts by "difference" feminists to highlight women's divergence from male abstraction and competition have encouraged employers to marginalize working women and have encouraged women to view their acquiescence in more traditional female roles as a freely chosen virtue.⁴¹ Her answer is to recognize and accommodate those norms that we value, but refrain from associating them—in our minds or in our institutions—with one gender or another.⁴²

While I agree that *Sears* sounds a sobering warning about the dangers of difference theory,⁴³ I am unconvinced that abstracting from gender differences is the best answer. Describing the world as if socially created gender differences did not exist seems to me a strained and misleading undertaking.⁴⁴ While many socially female characteristics are influenced by a social order women did not choose,⁴⁵ they are nonetheless apparent in the world around us. Moreover, there is political value in crediting women with advantageous qualities they have demonstrated, or fostered, or brought to light.⁴⁶ Of course, not all of these

38. *Id.* at 836-43.

39. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). The EEOC claimed that Sears's discrimination had produced an underrepresentation of women in the high-paying job category of commission sales. Sears successfully defended by arguing that women were underrepresented because they lacked interest in commission sales. *Id.* at 1288-94, 1305.

40. Williams, *supra* note 37, at 813-21.

41. *Id.* at 826-32.

42. *Id.* at 836-43.

43. See generally Minow, *Learning to Live*, *supra* note 23.

44. Professor Williams's efforts to highlight male neediness and intimacy, see Williams, *supra* note 37, at 841-42, seem to me as strained as the efforts of equality theorists to insist that women are, in all salient ways, comparable to men. It is crucial to remember that there is variation within gender groups, and that many individuals within each group may diverge from the qualities socially associated with a particular gender. But to deny that differences exist, or to search for male analogues to every socially female characteristic seems unrealistic and perhaps counterproductive.

45. See C. MacKINNON, *supra* note 22, at 39. Catharine MacKinnon makes this point persuasively and argues that it militates against premature celebration of "virtues" that have in fact been imposed upon women. *Id.*

46. Williams cites a revealing conversation between Carol Gilligan and Catharine MacKinnon

socially created characteristics are positive, or positive for women, and this dual character gives rise to the danger Williams cites. However, because I view the connection between desirable and undesirable socially female qualities as far from inevitable,⁴⁷ I believe that this danger can be met with two caveats.

First, feminists must communicate clearly that highlighting difference is a strategy for change, not a reason for acquiescence in the status quo.⁴⁸ A primary reason that difference theory has created problems is

on this question. According to MacKinnon, Gilligan's Amy (the study subject who demonstrates women's distinctive approach to moral choice) "is articulating the feminine. And you are calling it hers. That's what I find infuriating." 'No,' replied Gilligan, 'I am saying she is articulating a set of values which are very positive.'" Williams, *supra* note 37, at 809 (citing DuBois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, *The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 75 (1985)). Like Williams, I see merit in both perspectives, but I ultimately find myself more allied with Gilligan's. While it is true that gender roles have been imposed on women, some of the qualities we laud are a product not merely of the role imposed, but of what women have been able to create from within it. Although it is crucial that we avoid seeing as natural or necessary the best women have been able to make of a bad situation, it seems appropriate to credit those valuable things they have been able to create. Moreover, such acknowledgement seems useful in a social environment that persistently devalues those qualities or endeavors associated with women.

47. I readily acknowledge that some of these socially constructed characteristics, such as deference or passivity, are qualities that are unproductive for women, and that women might never have chosen for themselves had they been able to construct the social order. However, I reject Professor Williams's conclusion that we have to take the bitter with the sweet if we wish to highlight qualities that are more prevalent among women. This connection is abetted by her use of the image and rhetoric of domesticity to describe women's roles and qualities. Williams, *supra* note 37, at 806-21. While Williams's probing of the historical roots of this image is highly instructive, I suspect her focus on *Sears* leads her to overestimate the pervasiveness of its present influence. As I argue in Parts II and IV, I believe there are numerous ways of perceiving women's differences—most of which are subordinating, but many of which are distinct. To focus on domesticity misses the hydra-like variety of these perceptions and also exaggerates the inevitability of the connections between its component parts.

Seeing so inevitable a connection between desirable and undesirable qualities also threatens to recreate the link between sex and gender that Williams strives to undermine. There is surely nothing inherent in the nature of women that requires us to embrace deference as soon as we critique possessive individualism. Women must see that the prevalence of certain qualities among us is neither natural or chosen; while many are undesirable, some may be valuable to us and to the larger society. Learning to identify and advance these values, without embracing those that are less desirable is no doubt a perilous task. But I have hopes for the progress of this task among women, using the proper combination of comprehension and political will. Encouraging men to make the same distinction may be more difficult, because those who have an interest in maintaining the present state of gender relations will also have an interest in stressing the connections between these qualities. This is why it may be necessary to employ gender-neutral, as well as explicitly gendered, solutions over the short run. It may be that the greatest difference between Professor Williams and myself is that her experience with *Sears* leads her to believe that both men and women will be intransigently resistant to such a distinction. But this difference leads us to write in very different terms and, consequently, is worth exploring.

48. Williams acknowledges that the best of the relational or difference feminists have embraced this strategy. See Williams, *supra* note 37, at 810-13. She praises in particular the work of historian Suzanne Leacock. *Id.* at 811. However, Williams believes that when such scholars proceed beyond their critique of modern work relations to describe the source of the critique as per-

that many women have used it mainly to justify rejection of the male-centered workplace.⁴⁹ Some women, objecting to single-minded individualism and competition, have left or reduced their commitment to the workplace, using their time for more traditional family roles. Exploiting this interpretation of difference, employers have used such actions to justify their marginalization of all working women.⁵⁰ Feminists must recognize that the gender differences underscored by the male-centered workplace provide an occasion not for retreat, but for transformation. Women must use norms that may be more prevalent among them as tools for changing the workplace, rather than as reasons for backing away from it. The second caveat, however, is that the means are not always identical with the ends. Professor Williams correctly notes that in some circumstances highlighting socially female values runs too high a risk of devaluation or misinterpretation.⁵¹ I argue below that this may sometimes be true when the goal is the controversial and manipulable one of combining work with childrearing. We want to create workplaces that acknowledge conflicting obligations, provide flexibility, and value the differing contributions of many types of workers—norms, as I argue, that have been more central to the experience of women. But we may sometimes want to introduce these norms by adopting gender-neutral programs that seek accommodation both for childrearing and for more socially male analogues. Much as proponents of a racially neutral society have pursued their goal by race-conscious means, women may have to move toward a society in which socially female qualities are valued by resorting to some gender-neutral programs.

In the remainder of this Article, I elaborate this approach by discussing it in the context of two contemporary problems of discrimination in the workplace: "hostile environment" sexual harassment and the barriers facing women workers who are primary parents. While these two problems reflect only a portion of the difficulties that women encounter in the workplace, they are illustrative for several reasons. First, I consider both to be problems of devaluation or subordination rather than problems of exclusion. This is true even if one defines exclusion broadly, not only as barring the entry of women into the workplace but also as ejecting them if they fail to conform to the dominant norms. So understood, both *quid pro quo* sexual harassment and refusals to grant

ceptions or qualities associated with women, they encounter the danger she describes. *Id.* at 810-22. My view begins with observations concerning difference and proceeds from there to its critique of the norms of the workplace. I have little doubt, however, that Williams would take the same view of my argument.

49. *See id.* at 827-28 (eloquently documenting this phenomenon).

50. *Id.* at 826-32.

51. *Id.* at 813-21.

parental leaves are problems of exclusion. Women who face hostile environment sexual harassment and devaluation because of their roles as primary parents may not be excluded from the workplace. But they face equally devastating effects, such as the daily reminder that they form a second-class citizenry of the workplace.

Second, these problems illustrate the strengths and weaknesses of litigation as a means of transforming workplace norms. On the one hand, they suggest that Title VII can accommodate a complex view of gender discrimination, and can assist in altering attitudes. Some scholars might argue that the statute is a poor choice to enforce a theory that differs so much from the equality principle that was central at its inception. I reject this argument for several reasons. Title VII has always been a distinctively flexible statute in that it permits recovery on the basis of two theories, disparate treatment and disparate impact, that describe a violation in different terms. It also has been adapted to accommodate wholly new theories of gender discrimination. The judicial recognition of two new claims against sexual harassment reflects in part the growing influence of Catharine MacKinnon,⁵² whose dominance-based theory departed radically from the equality principle.⁵³ These adaptations are not, moreover, aberrational: the mandate to address the "built-in headwinds" facing minority workers,⁵⁴ that first extended the scope of Title VII, encouraged advocates to pursue and to eradicate a variety of more subtle, and often more intransigent, forms of discrimination.

These problems of discrimination, however, also highlight the limitations on litigation as a transformative tool. A lawsuit may succeed in calling attention to a social wrong so entrenched that it has escaped notice. It can be a valuable trump card in cases in which persuasion fails or the pace of voluntary change is unacceptably slow. But litigation imposes enormous costs, in hostility and in ostracization, on the women involved. Lingering resentments fostered by litigation can penalize women external to the suit itself. Litigation also can be too crude a tool for achieving the often subtle changes in understanding that produce equal treatment or regard for women. Such consequences do not require retreat from litigation, but they demonstrate the importance of exploring other avenues to normative change. In discussing these two problems, I not only propose litigation strategies, but also consider leg-

52. See generally C. MacKinnon, *SEXUAL HARASSMENT*, *supra* note 26.

53. See *id.* at 4, 9-23. MacKinnon proposes both equality- and dominance-based litigation strategies, but her own understanding of the phenomenon of sexual harassment derives from her view of male dominance, or female "inequality." *Id.* at 4 (two litigation strategies); *id.* at 9-23 (view of inequality of "women's work").

54. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

isolation, conciliation by the Equal Employment Opportunity Commission (EEOC), and voluntary compliance programs for employers.

Finally, the two examples show that the transformation of male-centered norms must be accomplished through a combination of short-term doctrinal developments and long-range strategies. Opponents of hostile environment sexual harassment, for example, can rely on well-developed legal tools. The United States Supreme Court has recognized a cause of action under Title VII, and a wealth of cases have begun to define the harm in question. The emerging doctrine signals a glaring need for redirection, but it also provides a starting point for future efforts. In contrast, the long-range task of redrawing the boundaries between work and family responsibilities is in its inception. The devaluation of women workers who are also primary parents is a comparatively recent discovery, as only lately have large numbers of women aspired to careers that can conflict with family responsibilities.⁵⁵ Moreover, this devaluation is a subtle practice whose effects are often difficult to target: a woman may not be certain that she is being given less challenging assignments, or that she will not be promoted if she remains at a particular job. More importantly, courts do not yet recognize a cause of action for this type of discrimination. For these reasons, the goal for advocates should not be doctrinal reform, but rather the development of analogues to established claims that might be used to oppose such practices. Advocates also must offer alternatives to the normative judgments underlying the current location of the boundary between professional and family life. Through these disparate examples, I mean to stress the varied strategies and resourcefulness that will be required in the next phase of our efforts.

III. "HOSTILE ENVIRONMENT" SEXUAL HARASSMENT

A. *Defining Sexual Harassment*

Sexual harassment is a potent reminder that the entry of women into the workplace is the beginning, not the end, of a social transformation.⁵⁶ Fifty-three percent of working women report having experienced

55. Notwithstanding the magnitude of the recent increase, there have been smaller groups of women throughout this century who have engaged actively in the professions. See N. COTT, *THE GROUNDING OF MODERN FEMINISM* 215-39 (1987) (discussing the burgeoning of women's professional employment in the 1920s).

56. This transformation, in fact, began long ago, when the separation of work and household, and the introduction of the wage labor system, both forced and led women out of the home and into mills and factories. See A. KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 20-72 (1982) (discussing movement from "household manufactures to wage work" and the impact of industrial work by women on "the domestic ideology"). But one also may speak of a contemporary transformation, which has occurred between the 1950s and the

behavior that they describe as sexual harassment.⁵⁷ Although the behaviors most frequently listed are sexual comments or sexual touching,⁵⁸ women are also subjected to sexual epithets, sexual demands, and the circulation of pornography.

Title VII provides women with resources crucial to ending sexual harassment on the job. Numerous plaintiffs have recovered, under the theory of quid pro quo sexual harassment, against supervisors who demand sexual contact as a condition of employment or advancement.⁵⁹ Since 1981, courts also have permitted claims against employers for harassment that creates an "intimidating, hostile, or offensive environment."⁶⁰ Because hostile environment sexual harassment need not result in the denial of employment opportunities, it seems least like exclusion and most like devaluation under unmodified, male-centered norms. It encompasses practices that are directed at women, as women, and that communicate a view of women that may be understood as threatening or dismissive.

The Supreme Court in *Vinson v. Meritor*⁶¹ recognized a distinct cause of action for hostile environment sexual harassment.⁶² In response, women have brought suits alleging an increasingly broad range of hostile environment harms. Nonetheless, adjudication of these claims provides cause for concern. Recent cases reflect judicial confusion about the meaning of hostile environment sexual harassment, uncertainty

present. This transformation has seen not only a substantial increase in the numbers of women working, *see id.* at 301, but also the entry of record numbers of women, assisted by Title VII, into jobs previously held almost exclusively by men.

57. *See* B. GUTK, *SEX AND THE WORKPLACE* 47-48 (1985). An individual woman's description of behavior as sexually harassing does not mean that it meets the legal standard for harassment, but it does suggest that women are routinely exposed to sexually oriented behavior on the job that they find offensive.

58. *Id.* at 46 table 2.

59. *See, e.g.,* *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979).

60. *Henson*, 682 F.2d at 903 (quoting 29 C.F.R. § 1604.11(a) (1981)); *see also Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

61. 477 U.S. 57 (1986).

62. Since *Vinson*, the elements of a hostile environment claim are well established. The plaintiff must demonstrate that: (1) she is a member of the protected class; (2) she was subjected to unwelcome sexual harassment in the form of requests for sexual favors or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based on sex; (4) the harassment unreasonably interfered with the plaintiff's work performance and created an intimidating, hostile, or offensive work environment that seriously affected the psychological well being of the plaintiff; and (5) there is respondeat superior liability on the part of the employer. *Id.* at 63-68. The final showing is required because Title VII actions for sexual harassment are brought against the employer, although other employees may have perpetrated the acts in question. Because it is very difficult for an employer opposing this showing to demonstrate a "legitimate business purpose" for such harassment, the plaintiff's case generally rises or falls on her ability to demonstrate these elements. *Bohen v. City of E. Chicago*, 799 F.2d 1180, 1187 (7th Cir. 1986).

about how to evaluate it, and discomfort with the transformative potential of the new claim.⁶³

The most recent round of hostile environment cases demonstrates that the basis for recovery remains remarkably narrow. Early cases of sexual harassment focused on the demand for sexual contact as the condition for promotion or advancement. These demands were among the first offenses that women targeted in hostile environment actions.⁶⁴ But as overt expressions of sexual aggression have become less frequent, and as women have become alert to the more subtle forms that harassment can take, women have begun to name a wider range of actions in their complaints. They have claimed, with increasing frequency, that the making of lewd comments, inquiries, or jokes; the use of sexual epithets; and the prominent display of pornographic materials in the workplace creates a hostile environment. Courts have proved reluctant, however, to extend the scope of liability. Although they have allowed a range of claims to survive motions for summary judgment,⁶⁵ courts most often have limited recovery to cases involving repeated sexual demands.⁶⁶ Claims involving intermittent demands have been dismissed as insufficiently pervasive.⁶⁷ Moreover, with the exception of a few cases involv-

63. This Article does not survey comprehensively the adjudicative difficulties raised by the claim. The evidence that is relevant to the difficult question whether advances are "unwelcome" and the imposition of vicarious liability on the employer have been debated at length in *Vinson* and subsequent commentary, and I do not address them here. Nor do I pursue the difficult issue of the limited recovery available for hostile environment claims under Title VII, in the absence of related claims under federal or state civil rights statutes. For a discussion of these and related questions in hostile environment sexual harassment, see: Note, *Employer Liability Under Title VII for Sexual Harassment After Vinson*, 87 COLUM. L. REV. 1258 (1987) [hereinafter Note, *Employer Liability*]; Note, *Hostile Environment Sexual Harassment: A Wrong Without a Remedy?*—*Meritor Savings Bank v. Vinson*, 21 SUFFOLK U.L. REV. 811 (1987) [hereinafter Note, *Hostile Environment*]; and Note, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328 (1988). In addition, I do not address the state tort remedies that may be available in these cases for intentional infliction of emotional harm. I make this choice not only because of the difficulties involved in analyzing tort law for many states, but also because in general state tort law in this area has tended to track developments in Title VII law. See, e.g., *Hogan v. Forsyth Country Club Co.*, 340 S.E.2d 116, 79 N.C. App. 483 (1986) (embracing basis for liability similar to hostile environment sexual harassment).

64. See, e.g., *Henson*, 682 F.2d 897 (in which plaintiff's claims were based in part on propositions from her supervisor); *Bundy*, 641 F.2d 934 (noting the same).

65. See, e.g., *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985) (reversing grant of summary judgment in case involving the use of force by a supervisor against a female employee); see also *Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988) (suggesting that claim arising from lewd depiction of female employee in men's restroom might have been sufficient to survive summary judgment if plaintiff had demonstrated that she was entitled to further relief), *cert. denied*, 109 S. Ct. 1140 (1989).

66. See, e.g., *Henson*, 682 F.2d 897; *Bundy*, 641 F.2d 934; *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988).

67. See, e.g., *Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986) (in which the court held that two requests for sexual contact plus one incident involving bare-breasted mermaids as table

ing touching⁶⁸ or particularly savage verbal antagonism,⁶⁹ courts have been reluctant to find that sexual derision unaccompanied by sexual demands is sufficient to create a hostile environment.⁷⁰ Courts similarly have rejected hostile environment claims against pornography in the workplace, even when it has been combined with verbal affronts.⁷¹

Some courts have expressed this reluctance in warnings about the limited corrective scope of the Title VII claim. Rejecting the plaintiff's claim of harassment, the Sixth Circuit court in *Rabidue v. Osceola Refining Co.*⁷² warned that,

it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.⁷³

In some cases, such warnings appear to be a foothold attempted on an apparently slippery slope. In others, they suggest a confusion about the harms that the Title VII claim is intended to prevent. The Fourth Circuit observed in *Katz v. Dole*⁷⁴ that "Title VII is not a clean language act, and does not require employers to extirpate all signs of centuries-old prejudice."⁷⁵ Similarly, the Eighth Circuit in *Hall v. Gus Construction Co.*,⁷⁶ having found that defendants' conduct had gone "far beyond that which even the least sensitive of persons is expected to tolerate," felt compelled to add that "Title VII does not mandate an employment environment worthy of a Victorian salon. Nor do we expect that our holding today will displace all ribaldry on the roadway."⁷⁷ These opin-

decorations for a company party were insufficiently pervasive to create hostile environment), *cert. denied*, 479 U.S. 1065 (1987).

68. *See, e.g.*, *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988); *see also Bohen*, 799 F.2d 1180.

69. *See, e.g.*, *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987).

70. *See, e.g.*, *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *see also Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644 (6th Cir. 1986) (holding that one instance of fondling and one verbal proposition were not sufficient to establish "hostile environment"). This pattern has been apparent as well in recent cases alleging intentional infliction of emotional distress. *See, e.g., Hogan*, 340 S.E.2d 116, 79 N.C. App. 483 (reversing summary judgment for defendants as to plaintiff who suffered sexual touching, sexual propositions, and verbal abuse; denying relief to plaintiffs who suffered only verbal abuse).

71. *See, e.g., Rabidue*, 805 F.2d 611; *Jones*, 793 F.2d 714.

72. 805 F.2d 611 (6th Cir. 1986).

73. *Id.* at 620-21 (quoting *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

74. 709 F.2d 251 (4th Cir. 1983).

75. *Id.* at 256.

76. 842 F.2d 1010 (8th Cir. 1988).

77. *Id.* at 1017.

ions depict a continuum of affronts to gender, ranging from the continuous verbal and physical abuse barred in *Hall*, through the pardonable prevalence of "girlie magazines" and sexual humor, to the use of rough language and other non-"Victorian" manners that Title VII was never intended to reach. These depictions are noteworthy for their suggestion that sexual innuendo or pornography is simply a stronger form of "rough manners." They are also striking in their posture of indulgence toward the "lesser" offenses of the defendants. The jocular alliteration of "ribaldry on the roadway" and the gently dismissive term "girlie magazines" suggest an almost amused tolerance that reflects no awareness of how female plaintiffs might perceive these affronts.

The reluctance of many courts to contemplate another perspective on sexual harassment also affects their search for legal standards in hostile environment cases. In deciding whether a defendant's behavior created an environment that was "intimidating, hostile, or offensive,"⁷⁸ courts often dismiss the plaintiff's perceptions. Some courts discount the anguish reported by the plaintiff, because of factors such as timorousness or delay in reporting the harassing conduct.

In *Highlander v. K.F.C. National Management Co.*,⁷⁹ for example, the Sixth Circuit held that the plaintiff had failed to demonstrate that she was offended, largely because when she reported the primary incident of harassment, she stated that it was "[not] that big of a deal" and that she did not want to raise "a big stink about it."⁸⁰ The court used the plaintiff's words to discredit her claims without considering the context in which they were uttered. In fact, the plaintiff was sufficiently disturbed to report the incident (sexual touching by a supervisor from another restaurant) to her manager the very next day, to repeat the account to her new manager after she was transferred, and to ask her husband to pursue her complaint with management when she failed to obtain what she viewed as satisfactory redress.⁸¹ Her statements that she did not want to raise "a big stink" may have expressed the discomfort that she felt as a new employee about complaining to management, or the anxiety produced by the entire incident. The court, however, was unwilling or unable to put itself in the position of a female employee, and understood her reluctance to make waves only as a denial of the

78. See *supra* note 60, 62 and accompanying text.

79. 805 F.2d 644 (6th Cir. 1986).

80. *Id.* at 650. The court also noted in support of its conclusion that the plaintiff was not "offended in any significant way," that she did not report a second alleged incident of harassment for three months, and that her husband (not the plaintiff herself) considered this second incident a comment that had "been made in jest." *Id.* Still, the plaintiff's self-abnegating comments received the most attention from the court.

81. *Id.* at 646.

offensiveness of the experience.

More often, courts strive for a more "objective" viewpoint by subordinating the "subjective" view of the plaintiff to some other standard. Some courts compare the reaction of the plaintiff with the perspective of the "hypothetical reasonable person."⁸² Other courts replace the "reasonable person" with the "reasonable woman,"⁸³ yet fail to denominate the difference between the two. Still others consult the perspective of the reasonable woman as well as the actual intention of the employer.⁸⁴ Each of these approaches illustrates the difficulties courts have had in understanding how sexual harassment affects working women. Adopting the perspective of the hypothetical reasonable person assumes that there is some view of sexual harassment that we are all likely to share, once we set aside the overreaction of the victim.⁸⁵ It is a stark denial of a range of social facts that make sexual harassment a distinctly different experience for women than it would be for men. Even a reasonable woman standard, when it is not carefully elaborated by a discussion of the differences between men and women, may reflect less an effort to see beyond the male perspective, than an attempt to evoke a woman who is, in Henry Higgins's words, "more like a man." Reliance on the intent of the employer misses the crucial point that even an employer who regards such exchanges as harmless "business as usual" can create an environment that is nightmarishly oppressive to his female employees.

B. *Rethinking Sexual Harassment*

One principal reason for the pervasiveness of sexual harassment in the workplace is that men regard conduct, ranging from sexual demands to sexual innuendo, differently than women do. This should not suggest that all men view such conduct the same way. Some seek to threaten women or emphasize their subordinate status, while others seek to protest women's presence in the workplace. Still other men seek to entertain themselves in a manner considered acceptable in many men's private lives or in all-male environments. But certain features unite these apparently disparate views. Because men are most often the

82. See, e.g., *id.*; *Rabidue*, 805 F.2d 611.

83. See, e.g., *Rabidue*, 584 F. Supp. at 433.

84. See, e.g., *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987).

85. In tort cases involving the intentional infliction of emotional harm, the "objective" perspective is sought not only by the employment of a "reasonable person" or "reasonable woman" standard, but also by the requirement that the plaintiff demonstrate that the defendant's conduct was "extreme and outrageous." See RESTATEMENT (SECOND) OF TORTS § 46 (1965). What is "extreme" or "outrageous" is to be evaluated from the perspective of the "reasonable person" as well. *Id.* § 46 comment d.

perpetrators of such conduct, they have not been compelled to consider how it feels to be a recipient. Moreover, because men still exercise control over most workplaces, their views of sexual behavior in the workplace remain the norm, the measure of "business as usual."

Title VII presents the opportunity to redress this imbalance of control, but its potential in the area of hostile environment sexual harassment has been frustrated by judicial enforcement.⁸⁶ In evaluating these claims, courts often must choose between the conflicting views of the alleged harassment. Because most judges are men, who have experienced the traditional forms of male socialization, their instinctive reaction is to accept the perspective of the employer.⁸⁷ In most cases this tendency has not led courts to embrace the most coercive views, which regard harassment as a convenient means of threatening women. But a characteristically "male" view, which depicts sexual taunts, inquiries or magazines as a comparatively harmless amusement, or as the treatment women should expect when they push their way into the workplace, pervades many recent opinions. It is present in the indulgent attitudes courts display toward these forms of conduct, in their confusion of harassment with profanity or rough manners, and in their reluctance to credit the accounts of female plaintiffs. If Title VII is to be a useful tool in combatting sexual harassment, courts must recognize that there is another perspective from which it is possible, in fact necessary, to view these activities. Hostile environment doctrine must begin from an understanding of the way in which those practices challenged as sexual harassment are likely to be experienced differently by women than by men.⁸⁸

86. Title VII is a statute whose breadth and demonstrated flexibility give it great potential to generate reform. *See supra* notes 52-54 and accompanying text. The achievement of this potential, however, requires private imagination and initiative in conceptualizing and enforcing new claims, and judicial recognition of the need for a change in legal rules or norms. In the area of hostile environment sexual harassment, lawyers, feminist theorists, and women plaintiffs have formulated and pressed the new claims, yet courts have proved reluctant to acknowledge the scope of the change required.

87. The better established quid pro quo claim apparently has helped courts see ill-intentioned harassment as coercive. It also seems likely that experience with invidious intent in constitutional cases has made courts more sensitive to harassment claims. *See, e.g.,* *Bohen v. City of E. Chicago*, 799 F.2d 1180 (7th Cir. 1986). *But see* *Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988) (questioning district court's determination that intentional obscene depiction of the plaintiff on the walls of the men's room was not harassment based on sex, but affirming on other grounds), *cert. denied*, 109 S. Ct. 1140 (1989); *Katz*, 709 F.2d 251 (reversing district court's determination that pervasive, intentional verbal abuse and propositions did not constitute sexual harassment). It is possible that the reluctance of the district courts in *Katz* and *Bennett* to find harassment, even in instances of intentional abuse, reflects some resistance to the increasing presence of women in the workplace.

88. I note here that my claims concerning the divergent responses of men and women are culturally limited. I am aware that there is both sexism and gender-specific socialization in other

Several factors shape the distinctive responses of women to sexual behavior on the job. The first factor is the distinctive feelings women have about their role in the workplace. While these feelings are not the same from woman to woman, several characteristics that appear far less frequently among men are likely to be found among women as a group. Women are comparative newcomers to many kinds of work.⁸⁹ This may mean, for older women, that they are filling a role they were not socialized to claim for themselves. Even younger women may have had few role models that enable them to see how women function in this new environment.⁹⁰ Because of their comparatively recent entry into many occupations, and because of the low esteem assigned the few traditionally female occupations, women tend to occupy the lower rungs of most professional hierarchies.⁹¹ Some women may feel distant from coworkers who have different personal and professional backgrounds; others may have difficulty finding mentors among senior workers,⁹² many of

countries and among extremely insular American groups such as the Amish. I am not sufficiently familiar with these patterns to describe them in detail. Moreover, because I rely in part on empirical evidence, I limit my claims to the group that is the subject of the studies cited: noninsular, late-twentieth century American men and women. This group, however, is far more heterogeneous than this initial description suggests. Patterns of socialization that influence responses to sexual conduct in the workplace may vary principally along gender lines, but also vary along racial, ethnic, and socioeconomic lines. I attempt to take account of these latter differences as I formulate an approach to hostile environment sexual harassment.

89. Small numbers of women have always worked in the professions, and during wartime many women were assigned tasks involving heavy manual labor. See A. KESSLER-HARRIS, *supra* note 56, at 275-86 (discussing women in industry during World War II); N. COTT, *supra* note 55, at 215-39 (discussing women in the professions during the 1920s). In recent years, however, an unprecedented number of women have entered the professions, and many have assumed jobs requiring physical strength or manual labor. Perhaps it is not simply their comparatively recent entry, but their lack of control over important decisions and norms in the workplace that makes many women feel like newcomers.

90. See Speizer, *Role Models, Mentors and Sponsors: The Elusive Concepts*, 6 SIGNS 692, 703-06 (1981) (reviewing social science literature on role models and mentors for women). Although Speizer argues that empirical evidence is contradictory and incomplete concerning the effects of role models on women, she cites several studies pertaining to college and graduate women which indicate that female role models are at least perceived to be important influences on future professional performance.

91. For example, in one survey the researchers found that while women occupy 46.6% of the "Lecturer" positions, 52.2% of the "Instructor" positions, and 35.5% of the "Assistant Professor" positions, they occupy only 21.2% of the "Associate Professor" positions and only 10.4% of the "Professor" positions. *Full-Time Instructional Faculty in Institutions of Higher Education by Academic Rank and by Sex, 1981-82*, in NATIONAL CENTER FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 1983/84. Similarly, in a survey of 10 different occupations (including accountant, attorney, chemist, buyer, and computer operator) the number of women decreased routinely from a range of 25-50% at the entry level to less than 10% at most of the highest "work levels." See Mellor, *Investigating the Differences in Weekly Earnings of Women and Men*, 107 MONTHLY LAB. REV., June 1984, at 17, 17-18, reprinted in F. BLAU & M. FERBER, *THE ECONOMICS OF WOMEN, MEN, AND WORK* 162 (1986).

92. See Speizer, *supra* note 90, at 707. Speizer describes two studies in which faculty women reported that they had no mentors and expressed a belief that this lack had hampered their pro-

whom may be uncomfortable forming professional relationships with women. Because of these factors, many women view their position in the workplace as marginal or precarious.⁹³ They are likely to construe disturbing personal interactions, stereotypical views of women, or other affronts to their competence as workers as serious judgments about their ability to succeed in the work environment.

The second factor conditioning women's views of sexual conduct in the workplace is the attitudes they hold about sex. Here, too, there may be substantial variance within the group, but there is greater variance between the attitudes held by women and those held by men. While many women hold positive attitudes about uncoerced sex,⁹⁴ their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification, and violence.⁹⁵ Finally, women as a group tend to hold more restrictive views of both the situation and the type of relationship in which sexual conduct is appropriate.⁹⁶ Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience.

The differences between women's views of sexual harassment and those of men exist not only between women-as-targets and men-as-perpetrators—a predictable difference—but also between women-as-targets and men-as-targets.⁹⁷ Barbara Gutek's empirical investigation of

fessional progress.

93. See C. MacKINNON, *SEXUAL HARASSMENT*, *supra* note 26, at 15. MacKinnon observes that even in jobs that women traditionally have numerically dominated, women often feel insecure about their positions because of low pay, lack of unionization, and vulnerability to employer caprice.

94. *But see* A. DWORKIN, *INTERCOURSE* (1987) (sexual intercourse is inherently coercive and contributes inevitably to the subordination of women).

95. See generally S. GRIFFIN, *PORNOGRAPHY AND SILENCE: CULTURE'S REVENGE AGAINST NATURE* (1981); MacKinnon, *Toward Feminist Jurisprudence* (Book Review), 34 *STAN. L. REV.* 703 (1982) (reviewing A. JONES, *WOMEN WHO KILL* (1980)).

96. See B. GUTEK, *supra* note 57, at 88-92 (noting that while women see most sexual conduct in the workplace as inappropriate and undesirable and attribute it to some men's desire for power or to dominate women, men are more likely to view sexual conduct in the workplace as appropriate and mutually desired); see also D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* 66-75 (1977) (stating that although women see sex as inextricably connected with love, and are reluctant to engage in it outside monogamous, loving relationships, men are willing to engage in sex in many different types of relationships, often simultaneously).

97. Classifications such as "men-as-targets" and, indeed, empirical work concerning "harassment" of men and women might seem to elide the controversial question whether men can, in fact,

sex in the workplace⁹⁸ reveals that women are more likely to regard a sexual encounter, verbal or physical, as coercive.⁹⁹ They are less likely to view such encounters as flattering or even directed to them as individuals, and more likely to see them as signs of the voracity or prejudice of the perpetrator.¹⁰⁰ In contrast, men are less likely to regard such conduct as harassing, and more likely to view it as a flattering reflection on their physical or personal attributes.¹⁰¹ Men also are more likely to perceive such encounters as mutually desired, whereas women are more likely to feel that encounters were desired only by the more powerful, initiating party.¹⁰² This evidence throws into sharper relief the difficulties employers and judges face in understanding the phenomenon of sexual harassment. If even their perceptions of what it means to be the target of sexual conduct differ so palpably from those of female plaintiffs, then it is not surprising that they feel justified—however misguidedly—in discounting the perspectives of women plaintiffs.

If judges continue to strive for the ostensibly objective perspective in assessing sexual harassment claims, then they will succeed primarily in entrenching the male-centered views of harassment that prevail in many workplaces. This approach may curtail coercive demands for sex, but verbal sexual abuse, casual touching, and dissemination or display of pornography will continue to make women feel physically vulnerable and professionally undervalued in the workplace. If these latter forms of employment discrimination against women are to be corrected, and if the norms that permit them to flourish are to be modified, then courts must employ a standard that reflects women's perceptions of sexual harassment.¹⁰³

be sexually harassed. Clearly, they can be the recipients of sexual overtures or innuendos, but it seems unlikely, when the perpetrator is a woman and the object of the harassment is a man, that the treatment has any of the effects that make it harassing. The fact that many men do not find sexual overtures by a woman threatening coupled with the fact that men generally are senior and more confident concerning their position in the workplace reduce the likelihood that sexual harassment will be experienced in a coercive or devaluing way. These conclusions might be different if a man were harassed by a gay male employer or supervisor. Although the recipient might still feel confident in the workplace, he might feel sufficiently threatened by the fact that the perpetrator is another man to make the experience disturbing to him. Examination of the experiences men describe as the targets of sexual conduct, however, is nonetheless important because it suggests the perspectives they bring to the evaluation of women's accounts of sexual harassment.

98. B. GUTER, *supra* note 57.

99. *See id.* at 47-48.

100. *Id.* at 47-54.

101. *Id.*

102. *Id.*

103. My approach, in this regard, is consistent with MacKinnon's pathbreaking analysis of sexual harassment, which had the goal of shaping the law "so that what *really* happens to women, not some male vision of what happens to women, is at the core of the legal prohibition." C. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 26, at 26 (emphasis in original). It is also consistent with

The foregoing analysis suggests that sexually oriented behavior in the workplace produces at least two responses among women that contribute to their subordination. Eliminating the behavior that produces these responses should become the primary focus of hostile environment adjudication under Title VII. One response is a fear of sexual coercion.¹⁰⁴ Sexually oriented behavior brings into the workplace echoes

feminist scholarship in several areas of the criminal law that asks advocates and judges to adopt the perspective of the woman (usually the victim) in formulating and adjudicating the elements of a crime. See Estrich, *supra* note 6, at 1091-94 (arguing that "[i]n rape, the male standard defines a crime committed against women," and urging, *inter alia*, revision of standards used for adjudicating force and resistance to reflect women's perspective); Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. CR.-CL. L. REV. 623, 630-38 (1980) (arguing that legal rules governing the reasonableness of self-defense, in cases involving homicide by battered women, evaluate women's conduct by a male standard and should take the perspective of the battered woman). Progressive scholars writing in the areas of civil rights and criminal procedure also have criticized the courts for adopting a perpetrator-oriented, rather than a victim-oriented perspective. See Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 96 (D. Kairys ed. 1982) (criticizing courts for adopting perpetrator perspective in antidiscrimination law); Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669 (1988) (criticizing courts for constructing fourth amendment doctrine from "police perspective").

One might ask why courts and employers should not adopt instead a perspective that reflects both men's and women's views of sexually oriented conduct in the workplace. My answer is that a standard reflecting both perspectives may be acceptable in such areas as parenting and promotion, in which the male perspective, a preference for uninterrupted work with limited time commitment to family, does not subordinate women (unless all employees are expected to conform to it). See *infra* notes 147-162 and accompanying text. In the area of sexual harassment, those "male" perspectives discussed previously all contribute, either intentionally or negligently, to the subordination of women. In my view, this disqualifies them as appropriate sources for an employer's or a judge's perspective.

104. See C. MacKINNON, *SEXUAL HARASSMENT*, *supra* note 26, at 54. The coercive aspect of sexual harassment is crucial for MacKinnon. She notes that "the instances of sexual harassment described present straightforward coercion: unwanted sex under the gun of a job or educational benefit." *Id.* She observes that women who are exposed to sexual harassment describe their experience in terms similar to those used by rape victims: they "feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry." *Id.* at 47. Although this latter evidence suggests that the coercion in question may simply be the coercion implicit in any unwanted sexual encounter, MacKinnon suggests more generally that the coercive aspect is the "nexus between a sexual demand and the workplace." *Id.* at 31. Our analyses differ slightly in this sense: I suggest that sometimes the coercion is simply the introduction of sexual pressure (suggesting a context of inequality) into an employment context of ostensible equality. My analysis also differs from MacKinnon's in those features of the workplace that it identifies as creating vulnerability in women employees, thus making sexual pressure, which is itself problematic, a particularly potent threat. MacKinnon, writing at a time when women were working almost exclusively in traditionally female jobs, focused on the inherent inequality of "women's work": women held jobs for which they were paid poorly, required to be the subordinates of men, and often expected to provide "aesthetic" satisfaction or sexual titillation in the bargain. *Id.* at 9-23. My analysis, which includes and often focuses on women in traditionally male jobs, highlights women's practical inequality because of factors such as socialization, unavailability of role models and mentors, and employment discrimination, in jobs which are held in common with men and are ostensibly equal. Notwithstanding this difference in time frame, I expect that MacKinnon would focus on coercion, even were she writing today, because coercion is central to her "dominance" analysis, and because the "formal equality" of

of a context in which men and women often are radically unequal. A woman struggling to establish credibility in a setting in which she may not be, or may not feel, welcome, can be swept off balance by a reminder that she can be raped, fondled, or subjected to repeated sexual demands. Her employment setting, already precarious, can be transformed instantly into a unwanted sexual encounter in which she is likely to feel even less control, a transformation that can cast shadows even when demands are not being made. The feelings of anxiety, fear, or vulnerability produced by the spectre of sexual coercion prevent women from feeling, or being viewed as, the equals of their male counterparts in the workplace.

But a woman need not be threatened with sexual coercion to feel, and to be perceived as, unequal in the workplace. Sexual inquiries, jokes, remarks, or innuendos sometimes can raise the spectre of coercion, but they more predictably have the effect of reminding a woman that she is viewed as an object of sexual derision rather than as a credible coworker. A woman who is continuously queried by male colleagues about her sexual preferences,¹⁰⁵ referred to by coworkers as "the fucking flag girl,"¹⁰⁶ or depicted on the walls of men's restrooms in sexual poses¹⁰⁷ is being told that she is not, first and foremost, a credible colleague and an equal.¹⁰⁸ This message would be disturbing to any worker, even one who felt comfortable and secure in the workplace. For a woman worker, who may not have been socialized to feel comfortable in that role, and who may have faced numerous men who have difficulty viewing women as workers rather than wives or dates,¹⁰⁹ this message

the workplace would be, to her mind, an empty promise scarcely worthy of comment.

105. See *id.* at 43.

106. *Gus Constr. Co.*, 842 F.2d at 1012 (plaintiffs were flag persons who directed traffic at road construction sites).

107. *Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1140 (1989).

108. MacKinnon does not analyze sexual harassment as a failure to treat women as equal and respected coworkers. I suspect that she declines to pursue this analysis because in those traditional women's jobs on which much of her argument focuses, women lack even formal equality: their jobs are distinct, subordinate, and not even technically comparable. MacKinnon, however, is sensitive to the contempt implicit in acts of harassment. Discussing several examples of harassment, she notes "[t]he connections between sexual desirability and contempt . . . [and] the denigration of women as workers." C. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 26, at 43.

109. In her research, Barbara Gutek identified a pattern she refers to as "sex role spillover." Spillover occurs when men in the workplace see their female coworkers "as women first and work role occupants second." B. GUTEK, *supra* note 57, at 134. By this, Gutek refers to men viewing women in those traditional roles that women have filled in men's lives, particularly wife, lover or date. She reports that such "spillover" is likely to occur in jobs that men continue to dominate, or in traditional women's jobs that are performed in "work groups" which include men, frequently in supervisory positions. *Id.* at 132-49. As MacKinnon notes, as recently as 10 years ago sex role spillover influenced not only the way women were treated, but also the definitions of those jobs in which they were permitted to work. See C. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 26, at 18-

can be devastating. Treatment that sexualizes women workers prevents them from feeling, and prevents others from perceiving them, as equal in the workplace.

C. *Adjudicating Sexual Harassment*

If targeting behavior that produces these subordinating responses is to be the goal of adjudicative enforcement, then courts must alter their analysis of hostile environment claims. Under a revised approach, the primary element to be considered would be the response of the plaintiff. The plaintiff's description of the defendant's sexually oriented behavior and of the feelings of coercion or devaluation it produced would establish the plaintiff's prima facie case.¹¹⁰ A court could dismiss the complaint at this stage if the allegations were completely trivial, but it could not discount her claims because of a single countervailing factor, such as delay in reporting the harassment, or substitute its own

19 (citing the works of other authors for the proposition that the work performed by most women requires them to attend to their horses in many of the ways women traditionally attend to their husbands).

110. Under current hostile environment analysis, there is only one stage of proof or of inquiry. Based on the evidence offered by both parties, the court determines whether the conduct created a hostile environment. If the answer is affirmative, then there is no further inquiry. The plaintiff is awarded relief, because courts quite justifiably have concluded that no adequate defense can be offered in the usual terms of "business necessity." See *Boben v. City of E. Chicago*, 799 F.2d 1180, 1187 (7th Cir. 1986). I propose, instead, a three-part analysis: the plaintiff's prima facie case; the defendant's attempt to show that plaintiff's response was idiosyncratic and not reflective of the type of response that enforcement was intended to prevent; and plaintiff's attempt to show that the defendant knowingly exploited her idiosyncratic response. As demonstrated below, I believe this analysis better credits the plaintiff's subjective perspective, and better targets what should be our goals in combatting sexual harassment. See *infra* notes 111-25 and accompanying text.

During the establishment of the prima facie case, and again if necessary at the rebuttal stage, plaintiff would be responsible for making whatever showing was necessary to impose liability on the employer for acts of the employees. I advocate a vicarious liability approach in hostile environment sexual harassment cases: in cases involving supervisors, the standard would be fully consonant with the managerial responsibilities delegated to them; moreover, in all cases, the standard would provide incentive for careful supervision and monitoring of the conduct of all employees and would ease the burden on the plaintiff. However, the Supreme Court, which did not directly address the issue in *Vinson*, suggested its support for the revised "knowledge" standard supported by the EEOC. See *Vinson*, 477 U.S. at 70-72. The lower courts have applied vicarious liability in quid pro quo sexual harassment cases, and have applied a "knowledge" standard (requiring the employer to have knowledge of the conduct) in hostile environment cases involving harassment by coworkers. The lower courts have been divided over whether to apply a vicarious liability, respondeat superior, or knowledge standard in cases involving hostile environment sexual harassment by a supervisor. See generally Note, *Employer Liability*, *supra* note 63 (surveying the area and advocating vicarious liability standard for hostile environment harassment perpetrated by supervisors). The Supreme Court's failure to resolve this question has perpetuated a great deal of uncertainty, which is reflected in my analysis as I develop the applicable standard. Though my position is that vicarious liability is appropriate, I identify those occasions on which plaintiffs may be required to demonstrate employers' knowledge of offensive conduct, if courts do not endorse this approach.

view of what occurred.¹¹¹ The plaintiff's characterization will always be "subjective" in the sense that it reflects the perspective of one within the vortex of the controversy. The preceding analysis makes clear, however, that this subjectivity should not disqualify the claim.¹¹² The perspective of the reasonable man who has not experienced the plaintiff's harassment is no more objective, it simply reflects a different type of subjectivity. Precisely because the latter subjectivity has been the dominant influence in the workplace, the courts must accord weight to the plaintiffs' views. They are likely to reflect a perspective within the workplace that has thus far been silenced.

While the subjectivity of the plaintiff's perspective provides no grounds for objection, it would not serve the goals of gender equality to credit a perspective that was pretextual or wholly idiosyncratic. Therefore, the defendant should be able to challenge the plaintiff's response, if he believes it has this character. As I have stated, many forms of sexual behavior produce responses that reflect the socialization that women have received *as women*, rather than the idiosyncratic attitudes of an individual.¹¹³ These responses demonstrate that such behavior is devaluative or subordinating, and that it should be subject to sanctions under Title VII.¹¹⁴ Behavior that does not tend to trigger such re-

111. The focus on triviality, rather than some more substantial inquiry, reflects my view that at the initial stage of the inquiry courts should credit the plaintiff's perspective unless it is patently incredible. In the few cases in which defendants allege that plaintiff's complaint is trivial or incredible, courts should consider "the totality of the circumstances," including factors such as: the harassment complained of; the plaintiff's actions in pursuing it; the reception given her by management; and the power relationships between the plaintiff, the perpetrator, and those to whom she was obliged to complain. A "totality of the circumstances" test is used in the single, unified stage of the present inquiry. See, e.g., *Vinson*, 477 U.S. at 70; *Bohen*, 799 F.2d at 1186. But the directive that judges must evaluate the alleged harassment in light of all circumstances surrounding it is sometimes observed in the breach. See, e.g., *Highlander*, 805 F.2d 644.

112. Elizabeth Schneider argues, similarly, that courts considering a self-defense claim by a battered woman accused of homicide should attempt to approximate the evaluations of equal force and imminence of danger that would be made by a battered woman. See Schneider, *supra* note 103, at 631-34. The fact that the woman is trapped within a dangerous pattern of domestic behavior does not make her perspective suspect. According to Schneider, adopting any other perspective produces legal rules that are ill-suited to the context and denies women an equal right to an individualized criminal inquiry at trial. Schneider pressed this argument as co-counsel and won a reversal of a conviction in *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977). A plurality of the Washington Supreme Court held that the conviction had violated state law by failing to provide an individualized (*i.e.*, victim-oriented) consideration of the accused woman's self-defense claim. *Id.*

113. Some responses may reflect the socialization a woman has received not simply as a woman, but as a woman of a particular racial, ethnic, or socioeconomic group. Such responses should not be considered idiosyncratic. See *infra* note 124 and accompanying text.

114. This inquiry, which considers whether the defendant's conduct is likely to produce one of the targeted responses, helps the court to evaluate the plaintiff's claim in a manner similar to a "reasonable woman" standard. The improvement in the standard proposed below, however, is that it does not imply that there is one "correct" response, even among women, to sexually oriented behavior. See *infra* notes 111-25 and accompanying text.

sponses, however, does not devalue working women, and should not necessarily expose the defendant to liability under Title VII.¹¹⁵ If the defendant can demonstrate that the behavior in question was not likely to create a fear of sexual coercion or a sense of devaluative sexualization among women,¹¹⁶ the court should find that the plaintiff's response was idiosyncratic. In evaluating the defendant's argument, courts should consider several specific features of the sexually oriented behavior as relevant.

The first feature is the nature of the conduct. Conduct such as demands for sexual contact or extensive fondling often have been held to create a hostile environment. This conclusion seems appropriate because such conduct may raise a spectre of sexual coercion, and may suggest to women employees that they are viewed in a sexual, rather than in a professional way. Courts, however, have been less responsive to claims that involve limited touching, or that focus mainly on verbal abuse. Such claims also undercut the equality of women in the workplace by suggesting to women that their sexuality is their most salient feature even in the workplace, and by denying women the sense of professional respect that permits them to function in an unfamiliar environment. Not all forms of touching or sexually based verbal exchange will have this effect, and thus it may be necessary to consider the criteria discussed below. But courts that dismiss such claims out of hand neglect the second critical feature that makes sexually oriented behavior harassing.

115. The exception to this argument—behavior that exploits an unusual sexually related sensitivity of a female employee—can be addressed through plaintiff's rebuttal showing. See *infra* notes 124-25 and accompanying text.

116. In determining whether those features of the conduct described below suggest that the plaintiff's response was idiosyncratic, courts would, of course, bear in mind any evidence from the plaintiff's prima facie case that went to these questions. Yet the burden, at this stage, would be on the defendant to demonstrate that full information about the conduct in question suggests that plaintiff's objection to it was idiosyncratic. This allocation of burdens reflects my conclusion that the defendant should bear the risk of nonpersuasion at this stage of the case. Clearly, it is possible to require the plaintiff to demonstrate affirmatively that the conduct was of a type likely to provoke a sense of sexual coercion or devaluative sexualization among women. I reject this allocation, however, for two reasons. First, both plaintiffs and defendants have access to information about the type of response that the conduct is likely to provoke. Either side might call other female employees as witnesses to offer their perceptions of the conduct, or call an expert witness such as a psychologist or sociologist familiar with female socialization and stereotyping to provide an opinion regarding the ultimate fact. Moreover, as I suggest below, the impact of a particular course of conduct can be evaluated by considering factors such as the nature of the conduct, its frequency, the extent to which it targets the plaintiff, and in the case of verbal abuse, the particular language used. Both the plaintiff and the defendant have access to these types of information. More importantly, because I believe that a great deal of sexually oriented behavior is likely to produce one of these responses and that an effective enforcement effort should cast a wide net, I find it normatively desirable to assume that sexual behavior sufficiently offensive to drive a plaintiff to court is harassing and to put the burden on the defendant to show otherwise.

A second factor that courts should consider is the frequency of the conduct. Consideration of this factor should not suggest that sexual conduct always must be frequent to be harassing. Courts have erred in implying such a requirement in some cases involving sexual demands. Some behavior—such as an unambiguous sexual request from a supervisor—is so inherently coercive, or so powerful in its ability to sexualize, that a single incident may be sufficient to poison the atmosphere for a woman employee.¹¹⁷ Nonetheless, frequency may be more helpful in assessing verbally based harassment claims.¹¹⁸ A plaintiff who was exposed to a sexual insult on a single occasion, or who was given a sexual nickname by a single employee,¹¹⁹ might be able to retain a professional

117. Thus, it would seem that the Fifth Circuit in *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987), erred in finding two instances of such requests to be insufficient to create a hostile environment.

118. These standards' also would reshape the way in which courts consider claims based on the presence of pornographic materials in the workplace. Courts in several cases have rejected pornography as a basis for hostile environment claims. In a leading case on the question, the Sixth Circuit advanced a novel standard for evaluating the impact of pornographic materials on the workplace. *Rabidue*, 805 F.2d 611. The court held that the materials should be considered "in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places," and that in such a context, the defendant's "sexually oriented poster displays had a de minimus effect on the plaintiff's work environment." *Id.* at 622.

The *Rabidue* court's proposed standard is wholly inappropriate for several reasons. Not only did the court overestimate the public consensus on the question of pornography, but the fact that many forms of objectionable speech and conduct may be protected against interference by public authorities in the world at large does not mean that pornography should be accepted as appropriate within the workplace. *See id.* at 626 (Keith, J., concurring in part, dissenting in part). Pornography in the workplace may be far more threatening to women workers than it is to the world at large. Outside the workplace, pornography can be protested or substantially avoided—options that may not be available to women disinclined to challenge their employers or obliged to enter certain offices. Moreover, while publicly disseminated pornography may influence all viewers, it remains the expression of the editors of *Penthouse* or *Hustler* or the directors of *Deep Throat*. On the wall of an office, it becomes the expression of a coworker or supervisor as well.

In this context the effect of pornography on workplace equality is obvious. Pornography on an employer's wall or desk communicates a message about the way he views women, a view strikingly at odds with the way women wish to be viewed in the workplace. Depending on the material in question, it may communicate that women should be the objects of sexual aggression, that they are submissive slaves to male desires, or that their most salient and desirable attributes are sexual. Any of these images may communicate to male coworkers that it is acceptable to view women in a predominantly sexual way. All of the views to some extent detract from the image most women in the workplace would like to project: that of the professional, credible coworker. Not all displays of sexually oriented materials have a sufficiently pervasive effect to create a hostile environment; thus, courts should consider how prominently, how frequently, and in whose offices they are displayed, and whether male conduct in the workplace reflects the views of women expressed by those materials. But to judge pornographic materials in the workplace by the availability of such materials in the world at large, and not according to the message they communicate about the equality and credibility of women workers, wholly misunderstands the threat they pose.

119. Whether this pattern constitutes harassment would probably depend in part on whether it was brought to the attention of the employer or a supervisor. Although I advocate application of vicarious liability in such cases, most courts have required some knowledge on the part of the

self-image and to maintain the respect of others.¹²⁰ But holding on to a sense of equal regard would become more difficult as such instances multiplied.

Another factor useful in assessing the likely effect of verbal abuse is the extent to which the language specifically applies to, or otherwise targets, the plaintiff. This factor assists the courts not only in identifying idiosyncratic responses, but also in drawing a distinction between harassment and nonthreatening vulgarity. A workplace in which sex is a frequent topic of conversation, or in which people are often described in sexual terms, might irritate a woman employee, but it would not necessarily suggest that her male coworkers are dismissing or sexualizing her. An environment in which only women, though not specifically the plaintiff, are described in sexual terms might convey a different message, depending on the frequency of such references or whether there were other signs that men were devaluing their female peers. An environment in which the plaintiff herself was the constant target of sexual inquiries, insults, or jokes would be hostile because of its clear suggestion that she was being singled out and viewed in a primarily sexual way.¹²¹

A final factor, to be considered alongside frequency and targeting in cases of verbal abuse, should be the precise language used. Although there will always be individual variation in response to sexually oriented words, there is a sufficient consensus on which words are sexually

employers, particularly when the harassment was perpetrated by a coworker. *See supra* note 110 (note on vicarious liability and three-part standard); *see also* *Bennett v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988) (finding that sexual depictions of the plaintiff on the wall of the men's room became a more serious matter when defendant's chief executive officer saw them and did not promptly remove them), *cert. denied*, 109 S. Ct. 1140 (1989).

120. It might also be relevant whether the plaintiff was treated as a respected coworker by other employees at other times, because this respect might tend to defeat the impression created by the verbal abuse that she was being viewed in a predominantly sexual way. Courts, however, would need to handle this consideration with great care, as it would be easy for male judges to substitute their perceptions of the balance of positive and negative messages the plaintiff was receiving—a balance that might be very different from that perceived by a junior female employee. It might, for example, be useful for defense counsel to question the plaintiff about the attitudes or responses of coworkers other than those responsible for the verbal abuse. But in most cases the court should accept the plaintiff's view of their countervailing impact.

121. Accordingly, a workplace in which male employees constantly used the expression "fuck you" to chide each other might be described as vulgar, but it would be unlikely to devalue or sexualize women. A strong objection to such a workplace might be found idiosyncratic. A workplace in which "fuck you" was reserved only for female employees would create a more difficult case; it would depend on the frequency of use and the other ways in which male employees and supervisors communicated their views of women coworkers. A case in which a male employee said "fuck you" while backing a female employee into a wall, or reaching under her skirt, would present a strong case for finding a hostile environment. However, some knowledge of this conduct on the part of the employer might be required, if the court adjudicating the case did not subscribe to a vicarious liability approach.

offensive or sexually degrading¹²² that courts can draw on such understandings as an additional index in hostile environment cases.¹²³

If, using such criteria, a defendant demonstrates that the plaintiff's response was idiosyncratic, then the plaintiff should have the opportunity to make a rebuttal showing. The requirement is appropriate because the plaintiff's idiosyncrasy reduces, but does not entirely eliminate, the possibility that the conduct of the defendant's employees was in some way devaluative. Male supervisors or employees can subordinate a female employee not only by treating her as a sexual object, but also by knowingly exploiting her sensitivities about sex. If a plaintiff, offended by sexually oriented conduct that does not have an apparent subordinating character, could demonstrate that employees of the defendant knowingly exploited her special sensitivity, then she should prevail on a hostile environment claim. Not every special sensitivity of a plaintiff should be entitled to such solicitude. Exaggerated examples of those attitudes toward sexual coercion or professional devaluation that arise from female socialization are appropriate. Courts also should consider the exploitation of sensitivities arising from socialization as a woman of a particular racial, ethnic, or socio-economic group. Black women, for example, might be particularly sensitive to sexual remarks or advances from white coworkers or supervisors, because of the long-standing, invidious interaction between sexism and racism.¹²⁴ When a woman who is atypically discomfited by sexual

122. Courts have employed this assumption, even in adjudication under present standards. See *Katz*, 709 F.2d at 254 (4th Cir. 1983) (stating that "[t]he words used were ones widely recognized as not only improper but as intensely degrading, deriving their power . . . not only from their meaning but also from 'the disgust and violence they express phonetically'" (citing C. MILLER & K. SWIFT, *WORDS AND WOMEN* 109 (1977))).

123. For example, a red-headed woman, referred to by her coworkers as "Red," would seem to have little basis for complaint. Although she was called by a nickname that made reference to a part of her body, it is not a part primarily associated with sexuality, and it does not seem inconsistent with being viewed by her colleagues as a capable coworker. A female employee widely referred to as "Hips" would have a somewhat stronger case, because the designation refers to a part of the body more closely associated with sexuality. A defendant would have to present credible evidence of a noncoercive context, or a generally respectful attitude on the part of coworkers, in order to show that this response was idiosyncratic. A woman worker who, like defendant's female employees in *Rabidue*, was referred to by a coworker as a "cunt," would present a strong case for sexual harassment. *Rabidue*, 805 F.2d at 624 (Keith, J., concurring in part, dissenting in part). The term is not only undeniably sexual in its reference, but also generally understood to be hostile or degrading in its connotations. Again, plaintiff might be required to show some knowledge of the use of such language on the part of the employer if the court did not subscribe to a theory of vicarious liability.

124. See generally A. DAVIS, *WOMEN, RACE AND CLASS* (1981); B. HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981). These authors observe that from the time of slavery through the present, white men as a group have sexually exploited black women, and black women employees in particular. They have described and treated black women with an insulting suggestion of sexual availability; sexual assault has been prevalent and was long condoned. This treatment, hide-

language or gestures is increasingly exposed to such conduct by a co-worker aware of her attitude, then she can credibly argue that such treatment is coercive and conveys a view of her as a sexual anomaly, rather than as a credible coworker.¹²⁵

D. Preventing Sexual Harassment

Although revising Title VII standards is a crucial step toward reshaping the norms governing personal exchange in the workplace, it would be unwise to rely on litigation as the sole, or even primary, means of reform. Litigation is vastly disruptive of the plaintiffs' relations with others in the workplace. Such disruption occurs even in areas of employment discrimination in which plaintiffs' allegations are less emotionally charged than in the context of sexual harassment.¹²⁶ The sexual harassment plaintiff typically is subjected to further or intensified harassment as she pursues her claim, and her relationships with both men and women in the workplace may be severed beyond repair, a form of damage that even legal victory cannot undo.¹²⁷ Moreover, changes in

ously demeaning in itself, is made more offensive by the fact that virtually none of the perpetrators would consider entering into a mutually respecting social relationship with a woman who is black. See B. Hooks, *supra*, at 51-86.

The sensitivity produced by exposure to these exacerbated forms of discrimination may cause some black women to object to conduct that might strike white women as less offensive. A plaintiff should be permitted to offer such arguments to defeat the defendant's claim that her response was idiosyncratic. But if the defendant prevails at that stage, a plaintiff should be permitted to demonstrate that the defendant exploited her distinctive sensitivity.

125. For example, in *Jones v. Flagship International*, a sexual invitation from a supervisor so upset the plaintiff that she fled the city where she worked, and refused to return until he promised it would never happen again. 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987). In my opinion, such a single unwanted proposition from a supervisor would be coercive enough to justify recovery. But even if a court concluded that a single incident was isolated and that the plaintiff's anguished flight was idiosyncratic, it should find for the plaintiff when, as in *Jones*, the plaintiff demonstrated that the supervisor knew the extreme character of her response, yet attempted to proposition her again. *Id.* at 716.

In her rebuttal showing, a plaintiff might be obliged to demonstrate that her employer had knowledge of such knowing exploitation by coworkers, depending on the approach to employer liability favored by the court. However, in a case such as *Jones*, which involved exploitation by a supervisor, a court might be more amenable to the imposition of vicarious liability that I endorse. See *supra* note 110 (note on vicarious liability and three part standard noting that courts are divided about whether to apply vicarious liability in hostile environment cases involving harassment by supervisors).

126. See G. LANOUE & B. LEE, *ACADEMICS IN COURT—THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION* 224-27 (1987). LaNoe and Lee vividly document the personal costs facing academic plaintiffs who press claims for promotion or fight tenure denial. While many plaintiffs reported that they would litigate again to vindicate their integrity or help those in other institutions, two-thirds of the plaintiffs surveyed stated that the litigation had an "overall negative impact on their lives," including relationships with family, friends, and colleagues and on their professional progress. *Id.* at 226. Many found the experience of testifying in their own cases extremely stressful. *Id.* at 225.

127. Federal appellate cases involving hostile environment claims document the startling fre-

behavior that are compelled by judicial decree, rather than voluntarily introduced and advocated by the employer, may produce lingering resentment among male workers that affects not only their receptivity to subsequent female coworkers, but also their behavior toward the other women in their lives.¹²⁸ Strategies to end sexual harassment should not require all women to make the difficult choice between enduring continued harassment and seeking costly victory in the courts.¹²⁹

Litigation can also be a comparatively blunt tool for producing changes in workplace norms. Judgments—and even opinions—in sexual harassment cases give employers only an anecdotal notion of what behavior is unacceptable, and otherwise fail to direct employers toward more satisfactory behavior. Nor do these decisions, in and of themselves, organize or educate employees to produce the necessary changes in conduct. An adverse judgment also may put supervisors on the defensive, rather than engaging them as participants in bringing about change. For the protection of women and the education of those who victimize them, it is necessary to explore less coercive means of normative change.

Reliance on nonadjudicative means should not, and need not, alter the focus of enforcement against sexual harassment. Two nonadjudicative strategies might offer an even more effective means of targeting and ameliorating devaluative sexual conduct in the workplace. First, enforcement efforts by the EEOC provide an avenue for reform that is

quency with which women are harassed by the supervisors to whom they complain about harassment by coworkers. The recurrence of this phenomenon led one judge to remark that “[s]exually abusive supervisors are, it appears, short on originality as well as rectitude.” *Katz*, 709 F.2d at 255 n.6. The cases also document the extent to which relationships between plaintiffs and their coworkers deteriorate as the suit progresses.

128. The costs that interpersonal constraint in the workplace can impose on the wives and lovers of male workers are chillingly depicted in Ann Petry's short story *Like a Winding Sheet*. See Petry, *Like a Winding Sheet*, in *WOMEN AND FICTION: SHORT STORIES BY AND ABOUT WOMEN* 133 (S. Cahill ed. 1975).

129. Several additional factors reduce the potential benefits of litigation, even in those cases in which costs are not prohibitive. A repeated theme in the appellate cases is the difficulty that judges have in ascribing credibility to many sexual harassment plaintiffs. Some of them, in fact, may be exaggerating their grievances, but it seems likely that external factors also contribute to making judges unsympathetic. Sexual harassment plaintiffs often are described as aggressive or abrasive, qualities that seem almost a prerequisite to enduring the emotional costs of bringing a lawsuit in the current attitudinal climate. Such plaintiffs may also suffer the stigma attached to the (newly) unemployed. See K. NEWMAN, *FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS* 230-33 (1988). These factors, exacerbated by many judges who instinctively identify with male workers or supervisors, may lead courts to find sexual harassment defendants more credible than plaintiffs. A second problem is that, given the limited set of remedies available under Title VII, a plaintiff who is not fired or constructively discharged may be entitled only to nominal damages and attorney's fees unless she also brings a claim under an applicable state tort or civil rights statute.

less adversarial in nature than a full-blown private action.¹³⁰ Were the EEOC to conciliate under the foregoing standards, it could investigate devaluative sexual conduct and seek agreements to reform workplace behavior that would provide a comprehensive education to members of the defendant's workforce. Conciliation under the proposed standards also would be less coercive than judicial intervention, and would produce few of the costs to the complainant that arise from pressing and testifying in her own litigation.

Another promising approach is for employers to implement the proposed Title VII standards through voluntary compliance programs.¹³¹ Compliance programs have been adopted widely by large and small firms in areas such as antitrust, in which the consequences of legal liability are potentially great.¹³² Although treble damages and criminal sanctions do not threaten defendants in Title VII cases,¹³³ other factors might make compliance programs attractive to employers. The Supreme Court in *Vinson* did not resolve the question of an employer's liability for the acts of employees, but the EEOC has proposed vicarious liability where the employer does not provide an available and effective avenue of complaint to higher management.¹³⁴ A well-administered compliance program reduces the likelihood that an employer will be held liable for harassing conduct, and should reduce the likelihood that such harassment will occur at all. Moreover, a well-publicized program could be an effective recruitment tool for an employer seeking to increase the number of women in its workforce, notwithstanding the possible ambivalence of some of its male employees.¹³⁵ An

130. Because Title VII plaintiffs must file a complaint with the EEOC and receive a "right to sue" letter (signalling the conclusion of conciliation efforts), plaintiffs whose cases cannot be so concluded may still proceed to private litigation if they desire.

131. Some larger firms have introduced such programs. Du Pont, for example, runs an employee relations seminar entitled "A Matter of Respect" on the topic of sexual harassment. This program embodies several of the features explored below: It educates employees concerning company guidelines on sexual harassment; it makes supervisors and managers responsible for reporting and investigation of sexual harassment incidents; and it uses workshops and videotapes to examine specific instances of harassment and how they can be prevented. See DU PONT, *DIVERSITY: A SOURCE OF STRENGTH* 11 (1989) [hereinafter DU PONT].

132. See Brodley, *Compliance*, in *ANTITRUST ADVISER* 505, 517-18 (3d ed. 1985) [hereinafter Brodley].

133. Treble damages may be available, however, in tort claims for intentional infliction of emotional distress arising from incidents of harassment. The large awards generated in these cases, and the attendant publicity, have caused some employers to take belated notice of sexual harassment in their workforces. See, e.g., *Sex Discrimination Verdict Based on Harassment at Job*, Greensboro News & Record, Dec. 7, 1986, at 1, col. 2 (reporting \$900,000 verdict in tort action for intentional infliction of emotional distress).

134. See Brief for the United States and the EEOC as Amici Curiae at 26, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979).

135. Employers could also use a compliance program to re-educate employees and transform workplace behavior after a finding of liability. Such was the origin of some of the more effective

effective compliance program might also bring broader competitive advantages, as it would reduce a source of tension that saps employees' productivity, and might improve the position of the firm in the labor market and among certain groups of consumers.

Although compliance programs do not carry the force of legal sanctions, they have several features that better enable them to modify those norms giving rise to sexual harassment. First, they can provide guidelines for employees regarding proper and improper behavior in a context less emotionally charged, and more accessible to employees, than a court battle. Compliance guidelines in other fields frequently articulate the general goals of the legal regime, and outline examples of behavior that is absolutely proscribed as well as behavior that is sufficiently dubious to necessitate legal consultation.¹³⁶ Guidelines in the area of sexual harassment could explain, for example, that the goal of Title VII in this context is to prevent interactions that will create in female employees a fear of sexual coercion or a perception that they are viewed as sexual objects rather than respected coworkers. This statement of general purpose might inform employees that others may perceive their actions differently than they themselves do, as well as delineating clearly illegal¹³⁷ and legally suspect behavior.¹³⁸

Compliance programs often are supervised by a firm's general counsel, who are sometimes assisted by outside counsel.¹³⁹ This supervision produces a second advantage: the ability to direct and monitor change from a vantage point slightly removed from the workplace. Counsel—particularly outside counsel—are not familiar with potential violators, and are unlikely to be inoculated by the interpersonal conventions of the firm's employees. Without this stake in workplace conventions, counsel will be better able to promulgate the norms of interpersonal behavior embodied in Title VII standards. They can be a reliable source of legal advice for employees who are concerned about committing violations, as well as those who believe they have been victimized.

compliance programs in the antitrust area. See Kerr, *The Westinghouse Experience: One Company Reviews Its Antitrust Program*, Address at the National Industrial Conference Board Meeting (Mar. 7, 1963).

136. See OFFICE OF THE GEN. COUNSEL, FORD MOTOR CO., COMPLIANCE WITH THE ANTITRUST LAWS 1-8 (May 1980); Brodley, *supra* note 132, at 521-29.

137. This category might include sexual demands, the fondling of sexual parts of the body, persistent sexual inquiries, insults or epithets, and the prominent display of sexually objectifying pornography.

138. This category might include touching nonsexual parts of the body, occasional sexual comments or jokes targeting a female employee, or posting nude or semi-nude photographs of women.

139. See Brodley, *supra* note 132, at 513, 519-20.

Counsel, however, are not the only actors responsible for monitoring and revising employee behavior under compliance programs. One of the hallmarks of an effective program is its capacity to make middle managers responsible for the compliance of those whom they supervise¹⁴⁰—a goal achieved only indirectly by litigation against the employer. Supervisors and managers are not responsible for setting the standards, but they can be made responsible for enforcing them. Permitting such employees to play an active role in producing change may be an important factor in generating a commitment to new norms.¹⁴¹ Forms requiring a manager to certify that no violations have occurred in his or her division have been used effectively in the antitrust context,¹⁴² and might be adapted for use here. This requirement would end the pattern of endorsement of and participation in harassing practices by supervisors. It also might encourage supervisors to seek out information about suspected violations—a crucial step in identifying problematic practices that will require future attention.

Perhaps the greatest asset of a compliance program is the opportunity it provides for sustained re-education of a workforce. A judicial decree awards only reinstatement, back pay, or attorney's fees; the preceding litigation may highlight only a few offensive practices.¹⁴³ Neither the decree nor the litigation helps employers or employees understand the injury that the legal standard is intended to prevent, nor do they help workers learn more acceptable forms of conduct. Most authors of legal compliance programs insist that the element most important to the programs' success is a face-to-face education of the workforce at their inception.¹⁴⁴ Thorough introductions accompanied by small-group question and answer sessions can provide new perspectives on widely accepted conduct. Readings, films, or simulations¹⁴⁵—varying perhaps with the background of the workforce¹⁴⁶—can help perpetrators to recognize potential violations and help victims to stand firm in their resistance. These opportunities for exchange can be of crucial value when the goal is to create an awareness of divergent viewpoints. While a

140. See *id.* at 520-21; Kerr, *supra* note 135, at 76.

141. See Du Pont, *supra* note 131, at 11.

142. See Brodley, *supra* note 132, at 531-33.

143. A judicial opinion might explain more, but it is unlikely to be read or analyzed in any detail by a firm's employees.

144. See Murphy, *How to Communicate Antitrust Philosophy to Corporate Personnel*, 44 ANTITRUST L.J. 260, 261 (1975); see also Kerr, *supra* note 135, at 76-83.

145. See Kerr, *supra* note 135, at 76-83.

146. As noted above, perceptions of both men and women concerning harassment may be affected by factors such as age, socioeconomic group, race, or ethnicity. Seminars or workshops convened in the context of a compliance program can be adopted to address practices, expectations, or attitudes characteristic of groups within the workforce.

change in the adjudicative approach to sexual harassment is essential, it need not be the only arrow in the quiver of feminists advocating change. The precise guidelines, shared responsibility, and comprehensive education that compliance programs can provide make them a nondivisive, fine-tuned supplement to adjudicative enforcement.

IV. PARENTING AND THE WORKPLACE

A. *The Work-Family Boundary*

The problems faced by women workers with children are varied and may not at first betray their common source. Women may return from maternity leave to find that they have been reassigned to less interesting or less important projects. They may encounter hostility from male colleagues who were obliged to cover their work while the women spent time with their new infants. They may also confront a "sick day" policy so stringent that child care problems, or even a child's recurrent earache, can threaten their job. They receive varied signals that they are viewed less seriously as workers, which may culminate in the denial of long-sought promotions. Such denials may be based on doubts about women's ability to commit time and effort, or concerns that their new priorities will render them unreliable colleagues—regardless of whether their performance justifies such doubts. Women who question these practices may find that employers view managing the conflict between parenting and work as the responsibility of the worker herself.¹⁴⁷

147. The following discussion reflects the assumption that women are, and will continue for the foreseeable future to be, the primary caregivers to children within the family. I make this assumption not because I believe that women are better suited to this role in some biological (or socially irreversible) sense. On the contrary, I believe that parenting should be shared as equally as is practical between mothers and fathers (or mothers and fathers assisted by professional caregivers), and that parenting responsibilities should be divided according to considerations unrelated to gender. This assumption, however, is appropriate for several reasons. First, at the present time it has substantial empirical foundation. See D. BURDEN & B. GOOGINS, BOSTON UNIVERSITY BALANCING JOB AND HOMELIFE STUDY 16 (1987). The Burden and Googins empirical study showed that substantially more women than men have primary responsibility for child care. Of the women surveyed (all of whom worked) 54% said they had primary responsibility, 39.5% said they shared it with their spouse, and 6.5% said their spouse had primary responsibility; of the men from the same workplaces, 2.1% said they had primary child care responsibility, 27.7% said they shared it with their spouse, and 70.1% said their spouse had primary responsibility. *Id.* But see Du Pont, Press Release 4 (Jan. 5, 1989) (citing firm survey which showed that family obligations increasingly affect career planning and progress for men as well as women). Second, some forms of discrimination against workers who are primary parents is also discrimination against, or devaluation of, women. If we look at this discrimination as it applies to women, then this conclusion is clear. These kinds of discrimination are equally invidious when applied to males who embrace socially female roles, but in that context may be more difficult to recognize as gender discrimination. See Littleton, *Feminist Legal Theory*, *supra* note 24, at 1051-52. Finally, and perhaps most importantly, women will be able to secure the equal participation of their spouses in parenting only when parenting is no longer stigmatized or penalized in the workplace. Men are socialized to derive

As with sexual harassment, these problems arise from a set of norms, prevalent in most workplaces, that reflect their history as institutions shaped by and for men. Most of these norms sharply distinguish work responsibilities from child care responsibilities, and the categories of people who perform each function. Caring for young children is assumed to be the task of someone other than the full-time worker. That "someone" is also usually female. Child care is associated with women biologically, because of its connection with childbirth and breast feeding, and statistically, because women more frequently care for children. The assumptions that child care is done by women and child care is not done by workers come into conflict when the woman with a new child is also a worker. Employers address this conflict differently, depending in part on their views of women. Nonetheless, most responses raise some barrier to working women who wish to be parents.

For some employers, childrearing conjures up an overtly devaluative view of women. Child care was considered the natural responsibility of women at a time when women were not thought fit for most occupations pursued by men.¹⁴⁸ This anachronistic association between women's fitness for childrearing and lack of fitness for other work is provoked in some employers by the presence of women with children in their workforces. It may be expressed directly, as in Senator Gordon Humphrey's recent suggestion that women should be home with their families.¹⁴⁹ It may be expressed indirectly, as in the assumption that women intuitively place parenting above their professional responsibilities, and therefore are less reliable or less committed employees. It may be expressed in an employer's reluctance to place women with young children in positions involving visibility, prestige, or responsibility.

Other employers do not view parenting in a way that is overtly devaluative of women, but they see it as incompatible with the qualities they expect in their workers. They express this view in at least two forms. The first form might be described as the philosophy of the "separate spheres." These employers attest that working and parenting are equal in value and dignity,¹⁵⁰ and admit that both can be well per-

their sense of self-esteem from their work to a greater extent than most women. This factor, and other social influences that support the notion of man as breadwinner, not caregiver, make it difficult for men to make serious time commitments to parenting until the changes I propose are well underway. Thus, I employ the assumption that women are primary parents in order to advocate changes in the workplace that will encourage men to become primary parents as well.

148. See, e.g., *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (stating that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life").

149. See, e.g., Kiernan & Zitner, *Primaries Today in Vermont and New Hampshire*, Boston Globe, Sept. 13, 1988, at B26, col. 3.

150. This argument, like most claims of "separate but equal," is redolent of hypocrisy. The

formed by women. They argue, however, that these activities are distinct and often mutually exclusive. The workplace requires a commitment that does not readily accommodate other demands. In order to serve clients effectively and to support colleagues when necessary, workers must be ready to make their job their primary commitment. They must be reliably present, and prepared to take on extra tasks with little notice. Child care presents a competing demand that makes women, generally the primary parents, less able or unable to meet these expectations.

The second, sometimes overlapping, variant of this view might be labelled "the dubious employer's revenge." These employers were historically reluctant to hire women, but ultimately changed their views, induced by Title VII and its equality-based assumption that women function in the workplace approximately the same way as men. While this assumption held true, the employers were satisfied. But increasingly they find women departing from the male role. Women still want to be evaluated like men when applying for jobs; but they want to be treated like women when seeking parental leaves, flextime, or promotion after caring for children. These employers find it unfair for women to "have it both ways,"¹⁵¹ and, preferring the homogenizing influence of the equality model, resist providing the flexibility primary parents seek.

The latter two groups of employers may not state categorically that no worker can also be a primary parent, but they are likely to scrutinize critically the performance of such employees. They will attribute any increased absenteeism or slackening of pace to parental responsibilities—whether or not this is the source of the problem. Moreover, if these employers are persuaded to provide some accommodative alternative, such as part-time or shared work, then they are likely to persist in their disapproval by devaluing the workers who elect it. Employers may deny such employees interesting or challenging work, require that they abandon the promotion track, or refuse to award promotions they have earned.

claim that the two realms are separate disguises the fact that a hierarchy is quickly established between them whenever they conflict. Working members of the family routinely bring their work into the "separate sphere" of the home, and expect its denizens to provide patience and support. But when a working parent must keep a child, even temporarily, in the workplace, this development is neither expected nor greeted with support from employers.

151. This argument illustrates the narrowness of women's victory over exclusion from the workplace, and the relation between exclusion and subordination. Women are not accepted unconditionally into the workplace, nor are they accepted for the complicated amalgam of qualities that make up their lives. Rather, they are accepted only on the condition that they conform to the overdrawn archetype that formed the basis for their admission. When women fail to conform to the male model of the worker, employers devalue their nonconforming qualities or use them as grounds for ejecting women from the workplace that they so recently entered.

If women with children are to attain equality in the workplace, then we must challenge the notion of a natural or pre-ordained line dividing work and family. This demarcation is the clearest example of a norm that exists because the workplace was built by and around men. Because men traditionally have not had primary responsibility for rearing children, it was possible for male employers to structure jobs to demand extensive, uncompromised commitment. They could ignore the impact that such demands placed on workers' families, because most workers had wives who could take up the slack. Many employers persist in these assumptions, although workers are no longer exclusively male, and although few workers have wives on whom they can rely for full-time child care. Institutions that were directed by women, or had long valued their contributions, would be likely to view these matters differently. Rather than insisting on the narrow view of women that helped open the workplace, employers would understand that to secure the ongoing participation of women, they would have to find means of accommodating their sometimes divergent work patterns.¹⁵²

Progress toward the latter view demands the same revision of male-centered norms required to combat sexual harassment. Accomplishing the necessary changes in this area, however, will be more difficult. This is true first because workers have begun only recently to view the norms and practices described above as problematic. The conflict between parenting and professional success is itself a comparatively new phenomenon. Women long have been present in certain sectors of the workforce; but some women worked intermittently, around their parenting responsibilities,¹⁵³ while others relied on extended families for child care.¹⁵⁴ Few women, until recently, had careers that demanded

152. See A. KESSLER-HARRIS, *WOMEN HAVE ALWAYS WORKED* 141-43 (1981). Kessler-Harris documents the numerous accommodations undertaken during wartime to encourage women to stay in the workforce. "They were offered nurseries for their children, shopping facilities, hot lunches, convenient banking arrangements, and sometimes even laundry services. Hours shrank, shifts were rearranged, new machinery was developed to take the weight off 'heavy' jobs." *Id.* at 141. These practices were discontinued largely at the end of the war in order to encourage women to relinquish their jobs to returning veterans. *Id.* at 142-43; see also D. HAYDEN, *supra* note 28, at 3-6. Hayden describes the construction and design of Vanport City, Oregon, a "new town," constructed during World War II to meet the needs of an industrial population comprised substantially of women. The town design featured abundant 24 hour-a-day child care facilities (including infirmaries for sick children), cooked food services, and public transportation. The plans located all of these facilities, and the apartment residences, in close proximity to the shipyards in which people worked. Accommodation by individual employers, and the operation of "new towns" such as Vanport City, were discontinued at the end of the war in order to encourage women to relinquish their jobs to returning veterans.

153. See A. KESSLER-HARRIS, *supra* note 152, at 17-18 (stating that women "drift[ed] in and out of [the labor force] in response to family needs").

154. See *id.* at 140 (noting that extended families lived together during the Depression, permitting relatives to care for children while mothers worked); see also Cameron, *Bread and Roses*

unlimited time commitments, or that progressed in stages, dependent on the esteem of senior colleagues.¹⁵⁵ Finally, even as the conflict between women's families and careers has become evident, few participants have questioned the appropriateness or inevitability of the current resolution. Most employers view the present boundary between work and family as a natural feature of the workplace, thus making the conflict a problem for parents alone. Some women have acquiesced in or internalized this assumption: they have exhausted themselves filling both roles, or have adopted the practice of "sequencing" if they can afford to leave the workforce.¹⁵⁶

Accommodating the conflict between work and family also may be more difficult because it requires more than simply ending discriminatory behavior. Sexual harassment rests on a male tendency to sexualize women that may be difficult to eradicate. But it is less difficult to take the first step: controlling the visible and audible expressions of that tendency in the workplace. Progress does not always require new models of behavior; offenders can learn to treat women in the businesslike, desexualized manner reserved for male peers in the workplace.¹⁵⁷ Lowering the barriers that face working women with children is a more complicated undertaking. We must first highlight the problematic practices by showing that they arise from a boundary between work and family whose placement is a matter of choice. But we must also re-place that line, by proposing a new relation between the roles and new practices that better reflect the demands on working women with children.¹⁵⁸

Revisited: Women's Culture and Working-Class Activism in the Lawrence Strike of 1912, in *WOMEN, WORK AND PROTEST: A CENTURY OF U.S. WOMEN'S LABOR HISTORY* 42, 50 (R. Milkman ed. 1985) [hereinafter *WOMEN, WORK AND PROTEST*] (stating that some working mothers paid neighbors a modest fee to take care of their children or sent their children to the country during the week).

155. A. KESSLER-HARRIS, *supra* note 152, at 146. The author wrote that jobs held by women before the 1970s tended to be characterized by sexual segregation and low pay, and offered little opportunity for promotion. *Id.*

156. See generally A. CARDOZO, *SEQUENCING* (1986). "Sequencing" resolves the conflict between family and work obligations by alternating lengthy periods of full-time work and full-time child care. See *id.* Some of the women who elect this option may not share their employers' assumption that managing this conflict is their responsibility, but act consistently with it because their employers' endorsement of it leaves them no choice.

157. It may require a serious effort in some cases to treat women in this "familiar" business-like manner. To those accustomed to treating women in a sexualized way, this may feel like "different" behavior. It does not, however, require re-evaluation or recasting of central features of the job itself, as might be necessitated by the accommodation of part-time workers. *But see* C. MACK-INNON, *SEXUAL HARASSMENT*, *supra* note 26, at 18-23 (pointing out that sexual harassment is a part of the job descriptions for many traditionally female jobs).

158. These two tasks, moreover, are related. Only when the line is confidently drawn in a different place will many employers recognize that its previous location was not an inevitable, inalterable feature of the workplace, but rather a demand of those running it.

Moving the boundary between work and family is itself no mean feat. The assumption that one member of a family works while the other attends the children conditions, to varying degrees, contemporary views of what it means to pursue a "career," the day-to-day requirements imposed by employers, and the expectations of clients or consumers. Changing this assumption will be financially costly¹⁵⁹ as well as disorienting. Employers will have to determine which jobs or tasks can be shared or accomplished through flexible scheduling, grant fringe benefits to part-time workers, and re-educate clients to greater confidence in the new arrangements.¹⁶⁰ For their part, women in the workplace will have to think more clearly and comprehensively about the affirmative vision of work and its relation to family that they want to propound.

Moreover, until men begin to share equally in child care responsibilities, moving this boundary will require employers to accept certain differences that may emerge in men's and women's work patterns. In opposing discrimination against women, advocates have been most successful when they have asked men simply to treat women as if they were indistinguishable from men.¹⁶¹ In redrawing the line between work and family, advocates seek a different goal. They ask employers to see some women—and ultimately, some men—with children balancing commitments to work and family in a way that is different from most men, but they ask them not to devalue the difference that they see. They ask employers to evaluate commitment according to a standard more complex than the single-minded shouldering of innumerable tasks that has been the primary gauge.

A final complicating factor in redrawing the boundary between family and work is that advocates have few well-developed legal strategies on which to rely. In contrast to the area of sexual harassment—in

159. Financial expense and efficiency concerns are particular problems under a Title VII "disparate impact" regime that permits employers a "business necessity" defense. See *infra* notes 165-73 and accompanying text.

160. In a thoughtful and prescient article, Mary Joe Frug documents the changes that would be necessary if law firms were to permit lawyers to practice part-time. Firms would have to arrange case loads in order that some cases could be shared by two or more attorneys; provide proportional benefits to part-time employees; and "re-educate" clients to understand that two lawyers can render advice, make themselves available for consultation, and keep confidences as effectively as one. See Frug, *supra* note 29, at 71-72; Rothberg, *Part-Time Professionals: The Flexible Workforce*, PERSONNEL ADMIN., Aug. 1986, at 28, 104-06 (discussing the need for re-education of employers).

161. The phenomenon of sexual harassment, and women's differing response to it, may arise from social construction of gender differences; effective enforcement may require courts to view sexually oriented behavior from a distinctively female perspective. But the conduct that courts and advocates ultimately seek from male employees is treatment of female employees in the nonsexual manner usually reserved for other males.

which women may draw from two legal claims and a wealth of scholarly literature—advocates and scholars have only begun to explore alternatives to the separate spheres approach. No salient legal claims have emerged to challenge those features of many jobs that raise barriers to primary parents.¹⁶²

None of the above, however, implies that advocates lack resources in seeking accommodation of working parents. A small but growing body of precedent can be used analogically to challenge certain of the devaluative norms described above. A dearth of litigation strategies need not, moreover, deter productive reform. In the near future, when the goal is not only to highlight undesirable practices, but also to develop the norms and programs to replace them, focusing on an affirmative vision of a workplace that accommodates workers with families will be crucial. Such a vision may be best developed not through litigation, but rather through legislation or voluntary programs.

B. *Litigating a Change in Boundaries*

Many lawyers view litigation as the instrument of first resort for the reform of institutional ills. In the area of work and family, this view may be unjustified. Although the legal claims available to beleaguered working parents are gradually emerging, the lack of fully conceived alternatives to present programs, and the pervasive grip of the norms on which those programs rest, may make victories in litigation difficult.¹⁶³ The most frequently proposed vehicle for a litigated challenge is the "disparate impact" claim under Title VII. This claim does not require a showing of discriminatory intent, which might be difficult to obtain in such cases, but bases relief on a showing that neutral practices used in hiring or promoting, or affecting the conditions of employment,

162. Some preliminary challenges have been successful. For example, in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), the Supreme Court held that a refusal to consider job applications from women with pre-school-age children could constitute discrimination on the basis of gender. But to my knowledge, there have been no challenges that go to the question of whether it is discriminatory to establish criteria for job performance such that the demands of the workplace cannot be met by workers who are primary parents.

163. Lack of clarity about affirmative replacements for challenged systems, or persistent embrace of the challenged norms, have not always condemned legal challenges to failure. The civil rights revolution sparked by *Brown v. Board of Education*, 347 U.S. 483 (1954), invalidated a range of educational structures at a time when they were still widely supported by participants and alternatives were ill defined at best. What emboldened the courts of that period to push ahead in the teeth of such doubts was the glaring flagrancy of the violations, and the fact that a substantial part of the nation had abandoned the norms that supported school segregation. The comparative subtlety of the barriers facing working parents, the very recent emergence of even limited normative opposition, and perhaps the very difficulties encountered by the courts in implementing *Brown*, make the challenges under consideration a different case.

disproportionately affect women.¹⁶⁴ Under this approach, plaintiffs might challenge a variety of criteria that deter them from obtaining employment, or, if employed, prevent them from achieving success or promotion. Such criteria may include Herculean time commitments, frequent travel, and stringent limits on absenteeism. These criteria distinctly disadvantage any parent who is the primary caretaker of an infant or young child—a parent who is almost invariably a woman. Even those able to afford daytime caregivers—and many are not—find that illness, changes in plans, or transportation difficulties can make these criteria impossible to meet. Professional women also might challenge the protracted evaluation period (often six to ten years) that precedes promotion decisions. A short period of primary parenthood in the years immediately preceding a promotion decision often erases the merit of years of concerted work. Such criteria may put women to a choice that a man rarely would have to make: risk losing a promotion by trying to combine work with parenting, or to delay parenting, perhaps beyond the point at which it is biologically advisable.

Regarding most of these claims, a plaintiff probably could state a prima facie case of disparate impact discrimination. The problem, however, is that a defendant may justify using these criteria by demonstrating that they are mandated by “business necessity.” Several features of this defense present difficulties for the disparate impact plaintiff who is challenging barriers to primary parents. First, an ongoing debate among the courts renders the meaning of “necessity” uncertain. Some courts require “an overriding business purpose, such that the practice is necessary to the safe and efficient operation of the business.”¹⁶⁵ Other courts are satisfied by a reasonable business basis for the challenged practice or by a general “relation” to business goals.¹⁶⁶ Courts also vary in their insistence on evidentiary support for the necessity to which defendants attest. In some cases, courts have refused to consider “speculative” consequences of removing the challenged practice, insisting instead on

164. The availability of such a claim to challenge time, travel, or flexibility requirements was underscored by the Supreme Court's recent decision in *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988). In *Watson*, a case involving racial discrimination, the Court held that disparate impact analysis may be applied to subjective promotion decisions. *Id.* If a plaintiff demonstrates that a particular criterion had a disparate impact on a protected group, then a defendant cannot insulate this criterion by arguing that it is part of a multifactor, subjective process. *Id.*

165. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). Justice Blackmun recently endorsed this view in his concurrence in *Watson*, 108 S. Ct. at 2791 (Blackmun, J., concurring).

166. See, e.g., *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978). A plurality section of the *Watson* majority opinion, authored by Justice O'Connor, appears to lean toward a less stringent interpretation of necessity. See *Watson*, 108 S. Ct. at 2780 (O'Connor, J., plurality).

careful empirical support.¹⁶⁷ Such insistence on empirical support might bode well for plaintiffs: as few defendants have re-examined, and virtually none has removed, the criteria in question, most of the damage they foresee to work and client relations is largely speculative. Yet, other cases suggest such optimism is unwise. One court upheld antinepotism rules, for example, on the basis of stereotypical assumptions about how husbands and wives behave in the workplace.¹⁶⁸ This judicial inclination to rely on sexual stereotypes in a case involving the boundary between family and workplace, as well as the court's explicit deference to widespread practice in locating this boundary, bodes ill for disparate impact plaintiffs. The same reluctance to see beyond one's limited perspective that leads employers to cling to the separate spheres approach also makes it difficult for courts to question business necessity.

When a defendant succeeds in showing "business necessity," the plaintiff still enjoys an opportunity for rebuttal. Proving business necessity may include demonstrating that no alternative can serve the same purposes with less discriminatory impact.¹⁶⁹ If the plaintiff can show an available alternative, then she may be entitled to prevail. This showing permits women plaintiffs to offer employment alternatives and evaluative approaches not premised on a line between working and parenting. Plaintiffs challenging a criterion of unlimited time commitment, for example, might demonstrate how two individuals sharing the tasks usually performed by one could meet the employer's needs.¹⁷⁰ Plaintiffs challenging an extended evaluation period for promotion might argue that using a shorter period would still permit employers to assess the qualities necessary for greater responsibility, but without in-

167. See, e.g., *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972) (in which the court relied on statistical evidence documenting the relationship between flight experience and success in the airline's rigorous training program to uphold an extensive flying time requirement that had a disparate impact on black applicants).

168. In *Yugas*, the court upheld a no-spouse rule for hourly plant employees. *Yugas*, 562 F.2d 496. The court conceded that the defendant failed to support any of its proffered reasons why the rule was necessary with statistical evidence. *Id.* at 499. The court, however, predicated a finding of business necessity on a number of "reasons," apparently generated *sua sponte*, regarding why it is "a bad idea to have both partners in a marriage working together." *Id.* These reasons ranged from the "intense emotions" generated by the marital relationship that might interfere with job performance to the "difficulty [for one spouse] of . . . exercising authority over his or her spouse." *Id.* The court found that these concerns reflected the "sharp dichotomy between the workplace and the home . . . [that] has become widely prevalent in our society." *Id.* Neither the fact that these reasons were pure speculation by the court, nor the fact that several were based on stereotyped views about men and women, prevented the court from giving them controlling weight.

169. See *Robinson*, 444 F.2d 791.

170. See *Frug*, *supra* note 29, at 71-74.

terfering with a worker's plans to begin and commit time to a family.¹⁷¹ Plaintiffs opposing a criterion of full-time work during the evaluation period might juxtapose the possibility of a leave followed by full-time participation, or full-time participation alternating with finite periods of part-time work. Over the long run, such alternatives may show courts the benefits of a workplace that is consistent with women's norms and responsive to their lives. At the present time, however, this showing confronts the same attitudes that support a claim of "business necessity." Courts today find it difficult to envision a workplace that departs from the norm of comprehensive commitment, that accommodates the needs of working parents, or that values the contributions of those following nontraditional work patterns. The plaintiff, therefore, may face a very high burden of persuasion. Unless she is able to paint a comprehensive picture of a reconstructed workplace, or to detail precisely all the related costs¹⁷² and ripple effects change might create with custom-

171. While this alternative has clear advantages over the six to eight year evaluation processes used in many professional settings, it would prove unsatisfactory as a final answer. Not only would it have a disparate impact on young women, in that it obliges them to postpone starting families in a way not required of male workers, but it would even more greatly disadvantage older women who enter a profession already having family responsibilities. Perhaps more importantly, it would not challenge the norm of unmitigated commitment to work that prevails in many professional workplaces. By the time promotion was achieved, these norms would be instilled in young employees. Those who began to accommodate family responsibilities might find themselves devalued by the others—although not necessarily out of a job.

172. The plausibility of such alternatives depends in part on judicial willingness to impose increased costs on defendants. In several cases, courts have accepted alternatives proposed by plaintiffs that imposed increased costs on defendants, yet these cases may be distinguishable because they involved intentional discrimination. *See, e.g.,* Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969) (holding that defendant's seniority system perpetuated past discrimination), *cert. denied*, 397 U.S. 919 (1970). When intentional discrimination has not been established and costs are uncertain, courts may be reluctant to impose alternative approaches.

Arguably, one analogous set of cases that seems to limit the employer's obligation to accommodate divergent work patterns is those involving accommodation of religious observances. *See, e.g.,* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84-85 (1977) (holding that an employer need bear no more than a de minimis cost in order to accommodate employees' religious observances); *see also* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68-69 (1986) (holding that, as long as the employer has offered a reasonable accommodation to the employee, the employer has no duty to accept an employee's proposal for accommodation or to show that the employee's alternative would result in undue hardship before rejecting it). Although these cases might seem to suggest, by analogy, that an employer's obligation to accommodate divergent work patterns is extremely limited, and does not require him to sustain costs, I would argue that they are distinguishable. The Court in *Hardison* stated explicitly that making more than a de minimus attempt to accommodate Hardison, either by hiring another employee to work Saturdays or imposing the obligation on one of Hardison's coworkers, would amount to allocating "the privilege of having Saturdays off . . . according to religious beliefs." *Hardison*, 432 U.S. at 85. This limit, which derives from establishment clause values or concerns about discriminating among employees on the basis of religion, is not present in those cases involving accommodation of family responsibilities.

ers and clients,¹⁷³ the court may be inclined to find her alternative implausible. Although the disparate impact action may be one means of implementing the alternative programs under development, it is unlikely to be useful in formulating or initiating them.

A second type of challenge, which applies to a narrower range of cases, might be brought under a "disparate treatment" theory. This claim does not challenge the formal criteria for employment decisions, but rather the way those criteria are assessed. Claims of this type could be built upon the D.C. Circuit's recent opinion in *Hopkins v. Price-Waterhouse*,¹⁷⁴ which barred the use of stereotypes in the promotions process. Such a claim might be used analogically to highlight and proscribe stereotypic views of women workers who are primary parents.

In *Hopkins*, the court held that a promotions process infected by negative stereotypes of women imposed disparate treatment on the female plaintiff, Ann Hopkins, in violation of Title VII. Price-Waterhouse evaluated Hopkins for partnership through a process in which partners submitted written assessments of the candidate's performance. After several partners stated that Hopkins was "masculine," "aggressive," and needed to take "a course at charm school,"¹⁷⁵ she was not invited to join the partnership, and her branch office declined to renominate her the following year. The court held that these evaluations reflected negative stereotypes of women: that women become personally unattractive when they behave too much like men, or attempt to "compensate" for being women; and that women are most effective when they behave in a charming and ladylike fashion. Because such stereotypes infected the process by which a woman was evaluated, and were not present in the process as applied to men, the use of the same formal process amounted to disparate treatment for the woman in question.¹⁷⁶ The court held that the discriminatory motivation required for a disparate treatment claim could be inferred from the statements made.¹⁷⁷

The relevance of *Hopkins* to cases involving women with children is not immediately obvious. *Hopkins* presented no conflicting commitments: the plaintiff had no young children, and had committed more

173. See Frug, *supra* note 29, at 70-71.

174. 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1108 (1988). Although *Hopkins* has been argued before the Supreme Court, at the time of this writing the Court has not yet announced its opinion. The egregious facts of the case have led many scholars, including myself, to expect that the decision of the D.C. Circuit Court will be affirmed. Nonetheless, I have usual trepidation about theorizing on the basis of a pending case. Should the Supreme Court reverse, or even limit the Court of Appeal's holding, this obviously would restrict the applicability of the following analysis.

175. *Id.* at 463.

176. *Id.* at 465-68.

177. *Id.* at 468-69.

hours to the firm than any candidate under consideration that year. Perhaps more importantly, the stereotypes in question were different. One might interpret *Hopkins* as a judicial effort to hold dubious employers to a tacit bargain: if you require female employees to conform to a male standard of behavior—some idealized vision of the company man—then it is unfair to fault them for conforming too energetically. Women workers with children, however, are not conforming too strenuously to a male norm. They are conforming, in employers' eyes, to a model characteristically associated with women. Such conformity might be regarded as placing them outside the "bargain" enforced in *Hopkins*. An employer may not be able to penalize women when they behave too much like men, but he is not barred from penalizing them when they behave too much like women.

Hopkins, however, can be given a broader interpretation. The case also can be read to invalidate a range of stereotypes, and to view the kind of discrimination that thwarted Ann Hopkins with a broader lens. The assumption that women cannot measure up to male-generated standards of behavior—however awkwardly they try—is only part of the complex of attitudes we identify as gender discrimination. Discrimination also may entail a belief that any other standards by which women might be measured—for example, based on their distinctive socialization or biological endowments—are partial, partisan, or less meritorious. Demeaning or devaluing behavior that is thought to be characteristically female is the complement of the aggressive or unyielding application of male-generated standards: a sword and shield of gender discrimination. A stereotype depicting women as distracted diaper-changers, unable to focus on the work at hand, is just as invidious as one depicting them as artless banshees, the scourge of colleagues and clients alike.

So read, *Hopkins* would invalidate a range of promotions decisions that reflect irrational prejudice against workers who are mothers. These include not only promotion denials based on the categorical view that women with children are incapable of performing other work, but also behavior reflecting the separate spheres or dubious employer perspectives. A decision reflecting the assumption that a woman's every misstep was attributable to her child care obligations might be vulnerable, as might be the conclusion that a woman with children was unable to handle additional responsibility, though she had not been given the chance to try.

Hopkins's ban on stereotypes, moreover, is not limited to those cases in which the employer misreads the plaintiff's behavior, or prejudices her ability to perform. Even in cases where the plaintiff's conduct bears some resemblance to the stereotype, *Hopkins* holds that

it is too burdensome on the plaintiff to require her to show that, but for the stereotypes, she would have been promoted.¹⁷⁸ Once the infecting stereotypes have been documented, the burden shifts to the defendant to demonstrate that stereotypes were not determinative in the decision not to promote.¹⁷⁹ A plaintiff could recover in those cases in which her employer had applied a stereotype to an uncompromised performance. But she also could recover in cases in which her employer applied a stereotype to a partially compromised performance, yet was unable to prove that he denied promotion based on the performance, rather than the stereotype.

Hopkins also may be read as a demand for a broader, more flexible standard of acceptable performance in the workplace. Holding all employees to a single rigid standard is not equality, particularly when the standard reflects the norms of one dominant subgroup. Such a standard applies differently to and reflects less positively on those who are socially, culturally, or biologically different from this norm. The woman with a new baby who is simultaneously struggling to demonstrate the "commitment" worthy of a partner faces the same bind as Ann Hopkins. She lunges with zeal after the dominant standard, despite the fact that it is wholly unsuited to her case, because there is no other standard acknowledged to be applicable. To say that others ought not fault her if the attempt, or the standard, makes her appear awkward, is undoubtedly correct. But it is of little help to the woman, who may feel obliged to repeat the performance, unless the standard can be modified to make it a less awkward fit.

Under this interpretation, *Hopkins* bars not only the use of familiar stereotypes (e.g., the "pushy professional woman") in promotions processes, but also the use of any standard for evaluating performance based on the experience of a single, dominant group within the workplace. Requirements for promotion such as unlimited time commitment or frequent travel thus might be found to be invidious generalizations of the experience of a dominant group—men who could rely on spouses to take responsibility for child care.

As persuasive as it may seem, courts may be reluctant to embrace this interpretation of *Hopkins*. Few of the promotions standards that make women with children appear unfit have the transparent partiality of Price-Waterhouse's "company man."¹⁸⁰ Moreover, the very attitudes

178. *Id.* at 469-72.

179. *Id.*

180. Simply recognizing that such standards are fraught with stereotypes took a long time, and still this view is not accepted in all professional quarters. It is possible that, had the stereotyped images employed in Hopkins's reviews been less glaring, the court might not have found discrimination at all.

that produce these standards make it difficult for employers and courts to see the connection. They are more likely to view such promotions standards as "neutral criteria" that measure commitment to the enterprise and that ensure the satisfaction of clients or other consumers. Judges will find them subject only to disparate impact analysis, and employers will defend them by invoking business necessity. Thus, formal legal challenges of either category may not achieve their greatest potential until the process of normative change is underway. It therefore is essential to consider nonlitigated approaches to altering the boundaries between work and family.

B. Nonlitigated Means of Transforming Workplace Norms

The limited potential of litigation for addressing work-family conflict arises not only from the socialization of the bench, but also from the nature of the task. Recasting the relation between family and work requires participants to develop new conceptions of "professional commitment," "reliability," a "successful career path," and other conceptual underpinnings of the workplace. Even if courts were willing to effect such change, plaintiffs still would need a concrete and comprehensive notion of the reforms they desire to implement. Consequently, much of the task of reformulation probably will take place outside the context of litigation. In this section, I outline some of the norms on which to ground such a change, and explore several means of implementing them. I consider which changes might best be accomplished through legislation, and which will require reliance on voluntary programs. In discussing the latter, I return to Littleton's model of "equal acceptance" and argue that without relying at first on transitional, nongendered programs, it may be difficult to obtain equal respect for gendered career paths in the workplace. These approaches will not only provide the most promising short-term solutions for women, but they also may alter working conditions in such a way that courts will no longer find full-time commitment a business necessity or balk at considering plaintiffs' more accommodating "alternatives."

Women are only beginning the ongoing task of elaborating the norms that will create a new work-family boundary. Nonetheless, it is possible to formulate alternatives to the separate spheres conception, and to the demand for conformity to a male career path characteristic of the dubious employer. Some of these alternative norms have been espoused by feminist scholars and activists in others areas, and now may be applied to the workplace; others can be drawn from the historical experience of women at work. These norms may be, and have been, embraced by both men and women. I identify them as "socially fe-

male,"¹⁸¹ only because they draw upon life experiences and analytic approaches more typical of women.¹⁸²

Many of these norms embody a different view of the worker, and of her relationship to her job. First, the worker is not viewed simply as the performer of a particular set of tasks; nor is it assumed that her commitments run exclusively or uncompromisedly to the employer. Such assumptions are common in the contemporary workplace, and perhaps are consistent with the model of a married male employee, whose wife attends to the nonwork-related aspects of his life. These assumptions, however, are not appropriate to jobs staffed by single workers and two-career couples. Moreover, they are inconsistent with the way many women view their fellow employees.

Scholars such as Carol Gilligan have noted the reluctance of many women to rely on abstract characterizations and hierarchies of controlling principles in describing people and their personal choices.¹⁸³ Schooled by a distinct process of sexual socialization, many women are more inclined to insist on complex, contextualized understandings of those around them.¹⁸⁴ The notion that ordinary people, who have connections and obligations to a range of others, could be expected to make choices systematically in a single direction, without reference to the particular conflict that they face, might seem unnecessarily rigid. Moreover, the personal—and historical—experience of many women also conflicts with a view of a worker who is defined primarily by, and responsive primarily to, a job. Historically, women who have made their way into the workplace rarely have been relieved of their weighty family obligations;¹⁸⁵ women are likely to see that professional obligations,

181. Littleton, *Feminist Legal Theory*, *supra* note 24, at 1051.

182. There is a danger in discussing qualities and perspectives associated with women, of reifying a particular notion of "women's perspective" or "women's contribution," and excluding women who do not meet this description, much as the male perspective excludes women altogether. For a thoughtful discussion of this problem, see Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988). Although this difficulty is implicit in the general approach espoused in this Article, I hope it is mitigated by the fact that I do not attempt here to describe a comprehensive women's view of work. I am attempting, rather, to identify certain values that might arise from various women's various experiences that are not now present in the workplace and might be introduced by feminist advocates.

183. See C. GILLIGAN, *supra* note 19, at 24-65; see also M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* (1986) (describing seven ways in which women learn, understand, and think about themselves and others, including several involving "subjective" or "connected" knowing similar to the types of reasoning described by Gilligan).

184. See C. GILLIGAN, *supra* note 19, at 24-65.

185. Historian Alice Kessler-Harris observes that women sometimes relied on relatives living in the same house or neighborhood to help them care for children while they worked, but that the obligation still rested primarily with the woman of the house. See A. KESSLER-HARRIS, *supra* note 152, at 139-40.

in and of themselves, do not erase other commitments. Women who have remained in the home see workers at precisely those times when they are not on the job; thus, they too are likely to understand that workers enjoy other, crucial components of their lives. For these reasons, it may seem peculiar to assume that a worker's life can be structured solely by reference to her job requirements, or to ask that workers cabin competing demands, and attend to them only when the employer's work is done. A workplace informed by the perceptions of women might recognize its employees' competing obligations, and offer them more flexibility for resolving the conflicts that arise.

This flexibility also flows from a second perspective that women might bring to work: a desire for a workplace that elicits workers' satisfaction, while it respects their humanity.¹⁸⁶ Some feminists trace this desire to women's ongoing connection with a domestic world in which each person is valued and supported.¹⁸⁷ This background has made it difficult for some women to think about work without thinking about the well-being of their coworkers.¹⁸⁸ For other women, the increased sense of self-worth produced by earning a wage¹⁸⁹ has also led them to believe that employment should enhance rather than detract from the satisfaction and self-respect of the worker. Historically, women have not been in positions permitting them to shape their jobs in accordance with these views. Yet, these perspectives occasionally have led women to protest employment practices that neglect or exploit, rather than respect workers.¹⁹⁰ The famous "Bread and Roses" strike of 1911, for ex-

186. Women are not, of course, the only denizens of the workplace who have this perspective. Pope John Paul II, not previously known as a feminist, makes a similar point about respecting the humanity of the worker in work in his encyclical "Laborem Exercens." See *Encyclical Laborem Exercens: On Human Work*, in 11 ORIGINS 225, 228-32 (1981) (Third Encyclical of Pope John Paul II). My point here, as above, is that there are certain influences that have more frequently affected the lives of women that draw them toward this point of view.

187. A. KESSLER-HARRIS, *supra* note 152, at 16-17. Kessler-Harris notes that women's habituation to the home environment gave them sufficient "expectations of freedom and cooperation to demand not merely adequate wages, but some joy in life." *Id.* at 16.

188. See A. KESSLER-HARRIS, *supra* note 56, at 35; Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 Wis. L. Rev. 819, 869-74 (describing how "mill girls" transported a habit of care for others from the home to the workplace); *id.* at 884-85 (describing this tendency among women workers generally).

189. See A. KESSLER-HARRIS, *supra* note 56, at 33-35 (stating that "[a]s important as the feeling of having cash in one's pocket was the sense of choice that many women experienced for the first time"); C. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 26, at 41 (noting that "[f]or the first time in their lives, the job gives these women responsibilities, a real salary, a chance to be creative"); Minow, *supra* note 188, at 870 (stating that "the [mill] girls' writings reveal satisfaction with their economic independence and aspirations for educational and personal accomplishment").

190. See A. KESSLER-HARRIS, *supra* note 152, at 77-95. Kessler-Harris ascribes the increasing reluctance of young women at the turn of the century to work as servants for other women to their belief that the jobs imposed slavish conditions with insufficient independence. *Id.* at 80-82. She also attributes early efforts at organizing women's unions, such as the Women's Protection Union,

ample, proclaimed the right of women workers to a humane and satisfying as well as remunerative job.¹⁹¹ These views question an approach to work and family that compels many workers to perform their tasks exhausted by competing demands, and distracted by their inability to care for their families' needs.¹⁹²

One final element of many women's experience supports a more accommodating response to work-family conflict: the ability to appreciate and value different kinds of contributions and commitments to the workplace. Historically, women have shown greater variation in their contribution and commitment to the workplace than have their male counterparts. Looking at the present century, women have structured their employment to accommodate the family demands during peacetime,¹⁹³ and have mobilized to fill the varied and demanding jobs vacated during periods of war.¹⁹⁴ In addition, the working patterns of women with families have contrasted with those of early feminists and social reformers, who often declined to marry and committed themselves exclusively to their professional pursuits.¹⁹⁵ Contemporary women demonstrate and observe around them even greater variation in their commitment to a job or career. Thus, even women without a self-conscious feminist background are likely to hold a less monolithic view of a valuable contribution to the workplace than their male colleagues. Women whose views are informed by the insights of feminist scholarship have other reasons for resisting a single model of professional contribution. They recognize the danger of devaluing difference that comes from adherence to a single model of performance, and they look criti-

to rising dissatisfaction with the conditions under which women worked. *Id.* at 87-95.

191. *Id.* at 16-17; see also Cameron, *supra* note 154, in *WOMEN, WORK AND PROTEST*, *supra* note 154, at 42-61 (explaining how women's community networks and a longstanding "women's culture" helped the women of Lawrence, Massachusetts, organize and sustain themselves during the strike).

192. A few corporations apparently have awakened to the human values that can animate an approach to work. According to the *Wall Street Journal*, Levi Strauss & Co. recently gave its employees paperweights inscribed with the company's Aspiration Statement: "We want satisfaction from accomplishments and friendships, balanced personal and professional lives, and to have fun in our endeavors." Solomon, *Managing: Defining Values Not Just Goals*, *Wall St. J.*, Jan. 30, 1989, at B1, col. 1. The article cites the opinion of Claremont Graduate School Professor Richard Ellsworth that corporations are "at a point of flux" in how to weigh the "human dimension" in business. *Id.* While several employers have drafted such statements, it remains unclear whether they represent merely lip service or a change in professional norms. *Id.*

193. See A. KESSLER-HARRIS, *supra* note 152, at 17-18.

194. See *id.* at 141-42; see also D. HAYDEN, *supra* note 28, at 3-9 (contrasting work patterns, lifestyles, and home designs suited to women during and after World War II).

195. See A. KESSLER-HARRIS, *supra* note 152, at 108-14. Kessler-Harris notes that "[m]ore than 75 percent of the generation of college women who graduated before 1900 remained single." *Id.* at 109. Many moved into political activism or academic institutions. *Id.*

cally at the assumptions that shape rigid conceptions of quality.¹⁹⁶ All these factors contribute to a view that workers can strike many balances between competing obligations that would be suitable not only from the standpoint of their lives, but also from the standpoint of the employer's performance.¹⁹⁷

1. Nonprofessional Employees

The concrete changes that might be produced by these norms vary in part with the job in question. For nonprofessional workers, the greatest need is for flexibility in accommodating competing commitments. Employers may not see a basic conflict between the obligations of a

196. See generally Littleton, *Feminist Legal Theory*, *supra* note 24; Minow, *The Supreme Court*, *supra* note 23.

197. For a provocative argument urging the valuation of different types of contributions by women, see Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65. Felice Schwartz, president of a nonprofit research and advisory organization that assists corporations in fostering the career development of women, argues that "career-primary" women should be assisted in blazing a path to the top of corporate structures, while "career-and-family" women should be regarded as promising candidates for middle management, substantially superior to the less-talented men who frequently staff middle management ranks. *Id.* at 69-72.

For reasons that are only partly apparent to me, this article has become the subject of enormous controversy in the popular press. See, e.g., Editorial, *Why Not Many Mommy Tracks?*, N.Y. Times, Mar. 13, 1989, at A18, col. 2; Lewin, *View on Career Women Sets Off a Furor*, N.Y. Times, Mar. 8, 1989, at A18, col. 3. Critics seem to me correct in citing certain flaws in Schwartz's analysis. She engages in some degree of oversimplification, identifying two patterns for working women rather than several; the "career and family" patterns bear a superficial resemblance to the rightfully maligned "mommy track," which employers have used to short-circuit the progress of career women with families. Moreover, her dichotomous career path appears to be applicable to women alone, while men are regarded, at least presumptively, as being "career primary." A more sensitive account would have raised the possibility that men can strike various balances between work and family as well—a possibility that is rarely realized today but must be encouraged for the future. On the other hand, the critics seem on several counts to be unjustified. Although Schwartz's "career and family" track may recall the "mommy track," she, unlike most employers, seems serious about advancing the careers of the women on it. She argues that they will prove more talented middle managers than the men currently occupying these positions, and she urges firms to assist them in moving between tracks as their family responsibilities change. It disturbs me that a deliberate effort to re-value and return to the mainstream the careers of those women who wish to devote more time to family is taken as an effort to lead them toward a professional dead end. It may be that journalists and commentators have so internalized the male-centered norm of full-time commitment to work that they cannot conceive of another alternative that does not devalue those who pursue it. Their critiques suggest that there is no way to value the "career and family" woman (or women, for there are clearly many variations) for the different contribution she has to offer a firm. We are obliged to return to the fiction that a person who wishes to devote substantial time to family can still blaze a path to the top of the corporate ladder—a fiction that only hurts those who fail to manage this unmanageable feat. This confused cycle of devaluation supports my sense that, in the short-term, we need gender-neutral solutions that accommodate family without focusing explicitly on the women they will benefit. See *infra* notes 220-33 and accompanying text. Finally, I find it ironic that a popular press that has done so little to expose the devaluation of working parents in the past can mobilize so readily to oppose a thought-provoking, if flawed, effort at change by a woman manager. I only hope that this paroxysm of publicity will end by focusing public attention on the problem, rather than simply on Felice Schwartz.

secretary or office manager and those of a parent. Yet they rarely structure such jobs in ways that permit employees to respond to family demands. Very few grant leave days for the care of sick children, and some discourage or forbid employees to use their own sick days for this purpose.¹⁹⁸ Flex-time working arrangements are not available on a regular basis;¹⁹⁹ part-time arrangements are available but rarely afford benefits.²⁰⁰ Few employers provide on-site child care or vouchers for off-site services, and even the most progressive generally limit themselves to much-touted child care information and referral services.²⁰¹

Technical solutions to these problems are emerging from a few innovative programs. Some employers provide "paid personal time off," which can be applied to family emergencies or appointments, and can be taken in small units and on short notice.²⁰² Others offer "cafeteria style" benefits programs, which include family-oriented options such as child care vouchers and additional leave days in exchange for fractional salary reductions.²⁰³ Still others permit highly popular flex-time options,²⁰⁴ or provide part-time or shared jobs with prorated benefits.²⁰⁵ Devising practical solutions, however, is not sufficient, unless feminists also address the political and economic obstacles that keep such solutions vanishingly rare. Although these expedients do not require a fundamental change in the employer's conception of the job, and in some cases may not require substantial expenditures, many employers are unwilling to undertake them on behalf of a group of employees whose needs are so different from their own and who have so little influence in the workplace.²⁰⁶

198. For a fine, empirically based exploration of the ways in which contemporary employers address benefits, including sick leave, see S. KAMERMAN & A. KAHN, *THE RESPONSIVE WORKPLACE* 66-72, 156-62 (1987). See generally *id.* at 64-186. Kamerman and Kahn note that when employers do not provide leave days for handling family matters, nonprofessional workers are obliged to lie about their leave days or enlist the covert assistance of a sympathetic supervisor. *Id.* at 66-72, 156-62.

199. See *id.* at 234-36.

200. *Id.* at 242-43; see also Rothberg, *supra* note 160, at 30 (reporting that 29% of professional employers offer some type of part-time employment); *id.* at 104-05 (noting that many employers are concerned, in some cases justifiably, about the additional cost of providing benefits to part-time employees).

201. S. KAMERMAN & A. KAHN, *supra* note 198, at 191-93.

202. *Id.* at 228-30.

203. *Id.* at 92-96, 247-53.

204. *Id.* at 236-40.

205. *Id.* at 228-30 (noting that certain limited benefits are available on prorated basis to part-time workers).

206. Employers also may be misled by the fact that in this area, as distinct from the professional area, women have held these jobs for decades without demanding—or apparently requiring—accommodation in managing work-family conflicts. It is partly true that in the past nonprofessional women did not require as much accommodation, because they could rely on family and other community resources to help them care for their children while they worked. It is also

Nonprofessional employees rarely are included on the committees that establish benefits policies, nor are executive policymakers likely to be attuned sufficiently to their views to bring them to the fore.²⁰⁷ Recent empirical studies document the vast demographic differences between nonprofessional employees and the executive personnel who establish leave and benefits policies. Frequently, the latter are older men with nonworking wives. These policymakers may be unaware of the costs that workplace rigidity imposes on nonprofessional workers, or if they are aware, they may rank the costs of initiating new programs above the benefits gained by easing the burden on women with families.²⁰⁸ Women now attaining the ranks of management may provide some assistance,²⁰⁹ but many are not sufficiently senior to play a central role in setting company policy,²¹⁰ while others are seeking accommodation in their own jobs, a challenge that involves many distinct and difficult issues. Although some firms have initiated changes,²¹¹ the pace of voluntary reform is slow. The availability of technical solutions, and the difficulty of negotiating these changes on a firm-by-firm basis,²¹² suggest

the case that many women were strained by their dual obligations, but did not yet recognize that the ground rules of the workplace failed to take womens' lives into account, and that they could demand a recasting of those rules.

207. See S. KAMERMAN & A. KAHN, *supra* note 198, at 104-05 (noting that class and gender differences between nonmanagement workers and management policymakers prevent child care programs or subsidies from being implemented by employers); see also D. BURDEN & B. GOOGINS, *supra* note 147, at 12 (identifying the same problem).

208. See D. BURDEN & B. GOOGINS, *supra* note 147, at 12. The Boston University study notes that the "small minority of married men with wives at home are disproportionately represented in upper management," with the consequence that this group is the most distant from and has the least knowledge of the "multiple job/homelife responsibilities of the great majority of their employees." *Id.*

209. See Rothberg, *supra* note 160, at 32 (noting that women moving into management are starting to press for changes in personnel policy, including part-time work).

210. See D. BURDEN & B. GOOGINS, *supra* note 147, at 10, 12. The firms surveyed in this study reported that 50.7% of male employees were managers, while only 27% of female employees were in management positions. Analysis of comparative salaries suggests that few of these women have attained the highest level management position. See *id.* at 13; see also Rothberg, *supra* note 160, at 32 (citing occasional resistance from women managers).

211. See *supra* notes 198-206 and accompanying text.

212. In some cases, unionized, nonprofessional workers may rely on their unions to seek certain types of family-oriented benefits. Cf. Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986) (arguing that comparable worth might effectively be made a subject of collective bargaining). Several factors, however, limit at least the short-term utility of this strategy. Some labor historians note that the rebirth of feminism thus far has had a surprisingly limited impact on the labor movement as a whole. See Milkman, *Women Workers, Feminism and the Labor Movement Since the 1960s*, in WOMEN, WORK AND PROTEST, *supra* note 154, at 300. This restricted impact is due in part to the fact that many women workers have viewed feminism as a middle class or professional movement with little applicability to their lives. *Id.* at 307-09. But even those feminisms that have gradually emerged among working women have been limited in their impact by the fact that comparatively few women have attained the ranks of union leadership. *Id.* at 301, 311-14. Moreover, union membership is itself declining across many occupa-

that legislation may be crucial in this area.

Legislation could take numerous forms and involve many levels of government. The federal government, for example, requires its agencies to provide flex-time options for their employees, when feasible.²¹³ Congress might extend the reach of this program by requiring flex-time or part-time programs of all employers who receive government funds or perform government contracts,²¹⁴ or of all employers of a certain size. Such legislation might be implemented by state governments, if greater sensitivity to local or regional needs is deemed necessary. State legislative programs in the child care area illustrate numerous ways in which state governments can encourage private employers to offer family-oriented benefits. Some states, such as Massachusetts and Connecticut, make available low-interest loans to employers who seek to establish on-site child care centers.²¹⁵ Other states provide substantial corporate tax credits to employers who include child care in their benefits packages or who establish child care facilities near their workplaces.²¹⁶ Still other states fund programs that provide information to private employers concerning the options available for responding to employees' child care needs.²¹⁷ Legislative efforts not only would improve conditions for their direct beneficiaries, but also might alert employers not affected to the unmet needs of their own workforces.

tional categories. *Id.* at 301 (citing declines in traditionally male jobs). Some scholars who are skeptical at present, however, have greater hopes for union feminism in the future. Shrinking unions are increasingly turning to women workers to fill their ranks. *Id.* at 301-02. Moreover, two traditional union campaigns focused on the recruitment and training of women members and innovative campaigns targeting women's substantive concerns, marking new directions for the labor movement. *See id.* at 311-18 (discussing successes of Coalition of Labor Union Women and Service Employees' International Union Chapter 925); *see also* Bell, *Unionized Women in State and Local Government*, in *WOMEN, WORK AND PROTEST*, *supra* note 154, at 280 (describing success of public employees unions in recruiting women, obtaining female leadership, and placing "women's issues" on their agendas).

213. *See* 5 U.S.C. § 6122 (1982 & Supp. V 1989).

214. *See* Frug, *supra* note 29, at 96.

215. *See* CHILDREN'S DEFENSE FUND, STATE CHILD CARE FACT BOOK 68, 80 (1987).

216. *See id.* at 68, 75.

217. *See id.* at 80. Another useful, if controversial, alternative in the area of child care has been a "linkage" concept applied to developers rather than employers. The City of San Francisco requires developers of downtown buildings meeting certain specifications to set aside space or funds for the construction of child care centers. *See, e.g.*, News Release from Nancy G. Walker, Member, Board of Supervisors, City and County of San Francisco (May 15, 1985) (containing the proposed Office Affordable Childcare Program, § 314, pt. II, ch. II of the San Francisco Municipal Code). Such a bill is pending in the state of Massachusetts. *See* An Act to Provide Child Care Linkage, H.R. 5374, the Commonwealth of Massachusetts (Apr. 1988) (adding MASS. GEN. L. ch. 40N).

2. Professional Employees

The barriers facing professional employees who are primary parents are in some respects distinct. On the one hand, they do not face many of the hardships endured by nonprofessional workers. They are unlikely to be replaced if they extend maternity leave, and they may not face official restrictions on sick leave. They do not live so near the edge of poverty that affordable child care is difficult to find, or that family benefits requiring salary reductions are impossible to consider. Yet they face obstacles that nonprofessional employees rarely encounter. Many professional jobs are organized hierarchically.²¹⁸ If an employee is to sustain her professional self-esteem—and in some cases, retain her job with a particular employer—then she must progress from one level of achievement and responsibility to the next. Professional jobs also have a strong tradition of male occupants and unlimited demands. Though the former condition largely is responsible for the latter, many employers view comprehensive commitment as inherent in the nature of the work, and consider it a useful tool for gauging employees' potential.

Creating a professional workplace that accommodates primary parents thus requires two distinct types of efforts. First, employers must recognize the need for flexibility and for the accommodation of competing demands.²¹⁹ Second, employers must learn not to devalue the more flexible employment alternatives that they create. The latter task, in fact, may prove to be the more difficult. In the few recent efforts professional employers have made to accommodate working parents, many employees have been obliged to purchase flexibility at the price of professional recognition and advancement.²²⁰

218. This organization may be a function of the fact that these environments have been created by and for men. This is another norm that women in the workplace may wish to transform over the long run. However, hierarchy may prove even more resistant to change than the norms discussed above because it is associated with an ethos or philosophy of "possessive individualism" that not only is a prominent part of male socialization, *see Williams, supra* note 37, at 810-13, but also, for that reason and others, has an oddly persistent hold on the American psyche.

219. Although this effort requires many of the changes that are applicable to nonprofessional employees, it also is necessary to rethink job requirements and re-educate clients to facilitate options such as job-sharing. Flexibility will be a particularly important goal for professional workers who are single parents. These parents cannot rely on a spouse to take up the slack if their employer fails to accommodate their family responsibilities. So while they also may be concerned about devaluation, their first priority is likely to be gaining the leeway to attend to their child or children.

220. *See S. KAMERMAN & A. KAHN, supra* note 198, at 242-45. Although anecdotal examples abound, empirical information on the effect of alternative work patterns on valuation of professional employees is extremely difficult to obtain. Kamerman and Kahn observe that comparatively few professionals (approximately 10%) work on a part-time basis, and note that those professionals who participate in job-sharing programs may have "relatively limited prospects for advancement." *Id.* at 245. A survey of legal employers undertaken by the *Stanford Law Review* showed

Alternatives to full-time commitment in professional fields are not yet so common as to exhibit standard patterns. A great deal of part-time work still must be arranged on an individual basis with the employer.²²¹ While this response permits flexibility, it may also isolate the employee who seeks accommodation and may create anxiety about the effect of the arrangement on her career. In some cases this anxiety appears well grounded. Many employers offering part-time work view it as an expedient that alters the character of the employee's contribution, and reduces her potential for advancement. Rather than extending the time horizon for promotion of a part-time employee, some employers require that part-time employees leave the promotion track altogether;²²² others make clear *ex ante* that alternative work patterns affect the employee's chances of promotion.²²³ Part-time or shared-work arrangements seem to be regarded as forms of work that are different in quality, not just quantity. Employees who elect them are viewed not as promising professionals with temporarily conflicting obligations, but as people who have made a crucial choice to participate in the profession in a marginal way.²²⁴

that two-thirds of firms with maternity policies or experience were inclined to permit part-time work arrangements, but that over one-third of these part-time employers indicated that part-time arrangements "would or might affect time toward partnership." See Project, *Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict*, 34 STAN. L. REV. 1263, 1277 (1982). Other employers noted that part-time work raised concerns about "'development as a lawyer'" and "fairness to other associates who work full time." *Id.* at 1277. The study noted that part-time lawyers "are almost always women." *Id.* at 1275.

A limited empirical survey I initiated in connection with this Article suggests that the Stanford findings remain disturbingly current. After seeking information on work-family accommodation from approximately 20 employers of law graduates, I received responses from one municipal corporation counsel, five law firms, three investment banks, and four law schools. Although virtually all were flexible in accommodating maternity leaves (one employer granted leaves to the "primary parent"; only two other employers made parental leaves available to men), they were less willing to attempt the ongoing accommodation required by part-time work. Asked about part-time, flex-time, or job-sharing arrangements, six employers replied that such arrangements could be made on a case-by-case basis; and three responded that they might be made depending on the needs of the employee's department. With one exception these employers noted that men neither sought, nor had been granted, these opportunities. Of the six established programs, two required participating employees to exit the partnership track and apply for re-admission once they resumed full-time work. Whether part-time work would contribute to the seniority of an employee who returned to partnership track would be assessed on a case-by-case basis. A third employer having an established program stated that it was "sympathetic" to the needs of working parents, but added that part-time work "definitely has an impact" on chances for promotion.

221. See *supra* note 220.

222. *Id.*

223. *Id.*

224. In this section I refer to the same process of marginalization that Joan Williams describes. See Williams, *supra* note 37, at 322-36. However, Williams, who takes her bearings from the *Sears* case, focuses on the ways in which women contribute to their own marginalization. I agree that women's acquiescence plays a role in their marginalization, but I believe that women encounter difficulty even when they do not so contribute. Thus, I focus on the attitudes that lead

These judgments may be driven in part by the fact that part-time alternatives diverge from the male-centered, professional norm of unrestricted commitment to work. Yet the fact that such arrangements are requested, almost exclusively, by women who wish to commit time to family seems to exacerbate the problem.²²⁵ A group of employees, who to the employer's mind remain marginal participants in the workplace, seek an alteration in a central workplace norm for the purpose of childrearing—an activity that may be straightforwardly devalued and is at least thought to be incompatible with serious work. The persistence of these subordinating views produces an impasse, in which simply establishing new programs is not enough. When advocates do not attempt to reshape male-centered attitudes even as they create new programs, then we see accommodative programs that are viewed as badges of professional dishonor by those who sponsor them.

This conundrum leads to two conclusions about the means of transforming workplace norms. First, legislation cannot be the sole response in the professional setting, because some of the most salient barriers cannot be lowered by legislative fiat. The major problem lies not in achieving the formal accommodation, but in ending devaluation of these alternatives, so that women with parental responsibilities may achieve respect within their profession. While legislation might make such alternatives more broadly available, it cannot prevent their devaluation without also controlling the promotions process—a move that legislators and employers are likely to resist. These difficulties mean that professional women must rely on voluntary programs either to supplement or to take the place of legislation. The challenge, then, is to create programs that will help re-educate employers and other employees, as they are giving working parents the greater flexibility they require.²²⁶

Here, the mixed results of present programs may have something to teach us. Professor Littleton argues powerfully for “equal acceptance

employers to marginalize women with family responsibilities.

225. In my limited empirical survey, a majority of employers responded that the vast majority of women requesting part-time or job-sharing arrangements sought to commit time to family. *See supra* note 220. As noted above, virtually no male employees in this survey sought such opportunities. *See supra* note 220; *see also* Rothberg, *supra* note 160, at 31 (empirical research on part-time professionals shows that mothers make up a substantial subgroup, who may view part-time work as a transitional means of re-entering the workforce after childbirth).

226. It is possible to imagine legislation sponsoring programs like those I describe below. They appear, however, to be expensive programs that require maximum flexibility on the part of the employer, largely because they are more inclusive than those that simply accommodate parents. Thus, at least in the short run, they are most likely to be undertaken by large, profitable employers. If sufficiently visible, however, such programs may influence norms among other employers, and through their operation it may become clear how to make them applicable to smaller employers.

across difference," and for the equal valuation of gendered complements in the workplace and other social institutions. In some contexts, such as the college sports program Littleton describes, this approach may yield immediate benefits. Yet the devaluation of alternative work patterns for professional women suggests that "equal acceptance"—in this context, at this time—may prove a better goal than a means. It may be necessary to experiment first with nongendered programs, programs whose scope and flexibility make them attractive both to men and women, in order to encourage a more flexible understanding of professional work and commitment. Nongendered programs may be viewed as controversial among feminist advocates because they may appear to accommodate the male-centered assumptions of the employer, rather than to press in explicit, gendered terms for the accommodation that women—and families—require. This normative choice, however, is a valuable expedient advocates should consider. Not only do such programs help establish the attitudinal groundwork for gendered, family-oriented programs, but they also communicate a broader message about understanding and accommodating the conflicting commitments of all employees.

One program, recently introduced by IBM, provides a useful point of departure. This program permits any professional employee, male or female, to take up to three years leave, with job security and full seniority guaranteed on return.²²⁷ Employees may take this leave to raise a family, or to pursue a "once-in-a-lifetime" opportunity.²²⁸ This program rests on many of the premises characteristic of the current boundary between work and family: the leave is a limited, temporary exception to the general rule requiring full-time commitment to professional tasks. Yet it contains several features that bode well for redrawing that boundary. The program imposes tangible costs on the company for hiring and training short-term employees, and it demands policy changes such as the alteration of traditional leave rules and the definition of seniority. Its adoption signals the firm's willingness to bear these costs to accommodate the desire of some of its employees to raise families.

Crucially, the program also reduces the stigma associated by many in the workplace with committing substantial time to parenting. It does so by decoupling childrearing from gender, and by creating an implicit analogy between raising a family and taking advantage of a "once-in-a-

227. This program is an expanded version of an earlier, shorter-term leave program sponsored by IBM. Telephone conversation with Michael Shore, Communications Organization Department of IBM (Apr. 13, 1989).

228. Employees may not engage in a profit-making business enterprise, but may use the leave for enriching purposes such as continuing their education, doing research, or writing a book. *Id.*

lifetime" opportunity. The decoupling acknowledges the possibility that people of either gender can raise children, and offers subtle encouragement to men to take part. It also reduces the stigma employers assign to this alternate balance, because of its exclusive association with women.²²⁹ Although the inclusion of participants seeking a "once-in-a-lifetime" opportunity plainly assists in this task, it is more than just a vehicle for enticing men into the program. It refers to additional conflicts or commitments that may pull employees away from the workplace. Because these competing forces may be more intuitively comprehensible to entrepreneurs or executives, it may help them to understand the employee as a complex individual with conflicting goals and commitments who will find more satisfaction in his or her work when accommodated. The analogy also presents childrearing in a more accurate light—as a rare opportunity that may be exercised by people who have many choices, not as a biological inevitability for a group of workers who are less fit to perform other tasks. Finally, the limited character of the leave highlights the important but poorly understood fact that a substantial family commitment need not define a type of worker, but simply may describe one period of a worker's life.

Despite these advantages, certain limitations implicit in this program restrict its usefulness in re-educating employers and their workforces. The fact that it is a leave program—that all those who are pursuing other commitments are out of the workplace at the time they are doing so—perpetuates the current expectation that all those in the workplace will commit themselves unrestrictedly to its demands.²³⁰ This characteristic deprives employees of the opportunity to see coworkers struggling with different balances between work and other commitments.²³¹ It also permits the company to ignore the burdens imposed on employees who are not on leave, and to neglect alternative ways of structuring existing jobs.

A useful addition to this program would be an arrangement that permits employees to work part-time for a period of two or three years. Like the current IBM plan, it could be available on a gender-neutral basis to employees wishing to raise families or pursue unusual non-

229. Such categorical devaluation does not occur on a conscious level with any but the most bigoted men; however, subconscious or casual devaluation of opportunities available only to or acts performed only by women is far more pervasive. See generally C. MACKINNON, *supra* note 22.

230. The particular program described requires, in fact, that during the second and third years of leave, employees make themselves available for part-time work as needed. The extent to which this obligation will be demanded of employees on leave is not clear, nor does it seem likely that such intermittent participation would communicate a clear message about alternative work patterns to those in the workplace.

231. It also may be of little help to those employees who cannot afford to take extended leave, or may prefer to retain some professional obligations while they raise young children.

family opportunities. It would retain many of that program's advantages, including the gender-neutral depiction of parenting responsibilities, and the analogy between child care and other choiceworthy opportunities.²³² Importantly, however, it also would permit employees to see these competing responsibilities reflected daily in other workers' professional lives. And it would necessitate an additional, crucial level of commitment on the part of the employer in perceiving, accepting, and helping employees manage these conflicts. The employer would have to alter not only its notions of leave and seniority, but also its view of the jobs in question and of what constitutes adequate commitment to work. It would have to consider how tasks could be divided, train temporary, part-time employees to work on a part-

232. It is always useful to look to analogies for changing the ways employees and employers view the relationship between parenting and work. Some feminists have suggested analogizing parenting to military service. Career interruptions for military service do not diminish the esteem accorded the employee, or cast doubts upon his commitment to the working world: they simply require him to begin his professional career later. This analogy, however, is flawed in that military service is viewed by many as a dangerous and burdensome sacrifice one makes for the good of one's polity. While parenting undeniably has its own burdens, few people view them as being as dangerous or onerous as those involved in military service. Moreover, because parenting is not often an all-or-nothing proposition, but one which requires intermittent commitments of time throughout an extended period of one's career, two additional analogies from the legal world might better fit the bill.

Many law firms permit associates and partners alike to undertake pro bono representation of cases the firm judges to have social value. Attorneys may act as litigators or advisors; they may function in or out of their area of specialty; these cases may take them out of the office or out of town; and they may, assuming they do not neglect their "paid" work, devote substantial time to these cases. Perhaps most importantly, while some partnership aspirants engage extensively in these activities, others do little or none at all. Though some firms may describe them as additional training for their young attorneys, pro bono programs primarily reflect the firm's commitment to particular social values, and a willingness to advance them through the investment of the firm's resources. A similar claim can be made about the willingness of law schools to allow their faculties to serve "of counsel" to local law firms or engage in community work. The schools recognize that a position on a law faculty may not satisfy all of the commitments—financial or political—of each individual professor. So they permit faculty members to make these affiliations, without cost to their reputations or chances for promotion.

In a world with a new set of boundaries between work and family, an employee with substantial family commitments would be treated in approximately the same way. The commitment to family would be treated as a social good to which the employer was willing to allow the investment of time and energy by certain interested employees. Employees making this commitment would be regarded as having selected a different—perhaps more varied, perhaps less focused—but no less respectable path to professional success. While their more numerous commitments might in some cases prevent them from attaining the pinnacles of their professions, narrowly defined, these choices would not prevent them from obtaining the respect of their colleagues and superiors. The disparity perceived between parenting and pro bono representation may suggest the need for an even more accurate analogy; but it also may suggest our acceptance of the current placement of boundaries. Feminists such as Democratic Keynote speaker Ann Richards may have much to teach us much about the professional lessons we can learn from parenting. A vision of parenting as a crucial social commitment of a well-rounded professional may go far in transforming the workplace into a place that accommodates all genders and many different gender roles.

time basis, and re-educate clients and consumers who might be discomfited by the change. Finally, in order to send a clear signal about the valuation of part-time work, it would have to make such employees eligible for promotion on a proportionally extended schedule, and regularly promote those whose performance merits advancement.²³³

Another alternative that would be particularly effective in reducing the stigma attached to combining work and family responsibilities is a mandatory leave program. A firm could require that every employee take off one year in five (or, similar to universities, one year in seven), or spend one year out of every five working on a part-time basis. Once firms learned how to train temporary workers, how to divide responsibilities among two or more employees, and how to handle seniority and promotion issues for employees who do not make an uninterrupted full-time commitment, this approach would not necessarily be more difficult than granting leaves on a case-by-case basis. It might even permit more advance planning, because some employees would be able to schedule their time away in advance. When leave or part-time work becomes something that literally everyone in the firm does, it would be difficult to view it as a sign of decreased commitment, or as a barrier to future success.

Such programs would insulate professional women from the liabilities that attend initiating controversial programs from a position of persistent marginality. These programs would communicate a message about competing commitments and the need for accommodation that might lay the groundwork for gendered, family-oriented programs. They might encourage men to commit more time to parenting, because they decrease the stigma and professional penalty associated with this activity. By urging reconsideration of the abstract, instrumental view of the employee now prevalent among employers, such programs would lead them forward from male-centered norms toward a workplace that is also shaped by and for women.

V. CONCLUSION

The task of transforming workplace norms will demand both vigilance and resourcefulness from advocates of gender equality. It will require recognition that formal equality does not always herald a change in attitudes. Devaluation can persist side-by-side with, and even be ex-

233. This last requirement is a crucial part of the program because without it, a larger number of employees simply would be consigned to the "mommy track" that awaits women who combine work and parenting at the present time. My argument, however, is that a gender-neutral, multipurpose program makes it easier for employers to take the step of leaving part-time employees on a (proportionally lengthened) promotion track.

acerbated by, programs intended to assist women. It will require men and women to take careful stock of perspectives and experiences different from their own. Women must learn to be comprehending and pragmatic about the attitudes they oppose; and men must see beyond a workplace made in their own image, to numerous inhabitants who are not. This effort will require reflection on means as well as on ends. Reformers must be shrewd about the strengths and weaknesses of litigation, legislation, and voluntary programs, and be willing to proceed on all fronts at once. Those declaring early victory for working women have mistaken the nature and scope of the enterprise. It is not the challenge of opening doors, but the more complex and elusive task of opening minds that will secure for women the experience, as well as the forms, of gender equality.