KEEPING WOMEN IN THEIR PLACE: STEREOTYPING *PER SE* AS A FORM OF EMPLOYMENT DISCRIMINATION

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I. INTRODUCTION

Despite some evidence pointing to its effectiveness,[1] the high hopes for Title VII of the Civil Rights Act of 1964[2] are as yet unfulfilled. Very simply, sex segregation[3] of the work force has not decreased measurably in the last

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I particularly wish to thank Geraldine E. O'Kane for all her assistance throughout this project. I also wish to thank Alfred Blumrosen, Ruth Blumrosen, Jonathan Hyman, and Susan Ross for their helpful comments on an earlier draft of this article, and I am also indebted to my research assistant Sara Chrisman and to the students in the Women's Rights Litigation Clinic at Rutgers Law School who participated in the *Tomkins* litigation.

[1] *See generally* Kahne, *Economic Research on Women and Families*, 3 SIGNS 652 (1978) and authorities cited therein.

[2] 42 U.S.C. § 2000e to e15 (1970), *as amended by* Equal Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, codified at 42 U.S.C. § 2000e to e17 (Supp. V 1975) [hereinafter cited as Title VII].

[3] Throughout this article, data and examples are drawn primarily from the area of sex discrimination. This relates in part to the special nature of sex discrimina-

decade.[4] Women continue to be clustered in low-paying, low prestige jobs,[5] while white males continue to dominate the more lucrative, challenging and responsible occupations.

Job segregation harms both the individual and society. Individuals are stifled in their quest for self-fulfillment, while society loses the special contribution those persons could have made. On an economic level, the striking wage differentials associated with job segregation have a devastating impact on women workers, and particularly on female single parents.[6] Fifteen years after the enactment of the Equal Pay Act[7] and Title VII, women earn on the average only 58% of what men do, a smaller percentage than in 1964.[8] When all factors other than sex are separated out, women workers earn considerably less than comparably situated men.[9] Such wage differentials ensure

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tion which has depended so greatly on internalized controls, but it is also a matter of readability. While the case is not made here, the theory proposed is fully applicable to other types of discrimination.

[4] In fact, the proportion of occupations with a high female concentration (70 to 90 percent) as well as those with a high male concentration, have steadily increased over the last thirty years. Laws, *Psychological Dimensions of Labor Force Participation by Women*, EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE 60 (P. Wallace, ed. 1976). More than one-quarter of all women workers work in jobs that are 95% or more female, and over three-fifths of all women work in jobs that are at least 75% female. U.S. Department of Labor, 1975 HANDBOOK ON WOMEN WORKERS, 89-91 (1975) [hereinafter cited as 1975 HANDBOOK ON WOMEN WORKERS]. In 1978, the United States Commission on Civil Rights concluded that at least one-third of the minority males and two-thirds to three-fourths of the majority females would have to change their occupations in order for their groups to have occupational distributions similar to the majority males. U.S. Commission on Civil Rights, SOCIAL INDICATORS OF EQUALITY FOR MINORITIES AND WOMEN, 45-46 (1978).

[5] For example, in 1973 nearly two-fifths of all women workers were employed as secretaries, retail trade salesworkers, bookkeepers, private household workers, elementary school teachers, waitresses, typists, cashiers, seamstresses and stitchers, and registered nurses. 1975 HANDBOOK ON WOMEN WORKERS, *supra* note 4 at 91.

[6] In 1973, single parent families headed by a woman aged 25-44 had an average income of only $5,951 per year compared to an income of $11,931 for families headed by a similarly situated man. H. ROSS & I. SAWHILL, TIME OF TRANSITION: THE GROWTH OF FAMILIES HEADED BY WOMEN 10 (1975).

[7] 29 U.S.C. § 206 (d)(1).

[8] Table prepared by Women's Bureau, U.S. Department of Labor, Fully Employed Women Continue to Earn Less Than Fully Employed Men of Either White or Minority Races (Women's Bureau, U.S. Department of Labor, Washington, D.C., August 1978).

[9] For example, one study concluded that in 1971 the woman worker received an average of $3,458 less income than comparably situated men, solely because of her sex, i.e., $3,458 less than she should have received on the basis of achievement, factors of education, tenure with one's employer, tenure on one's specific job with that employer, number of hours worked each week, amount of supervisory responsibility, and occupational prestige. Levitin, Quinn & Staines, *Sex Discrimination Against the American Working Woman*, 15 AM. BEH. SCI. 237, 245 (1971). Similarly, *The 1973 Report of the President's Council of Economic Advisors* calculated the gross earnings differential due to sex discrimination at approximately 20%. Bergman & Adelman, *The 1973 Report of the President's Council of Economic Advisors: The Economic Role of Women*, 63 AM. EC. REV. 509 (1973). *See also* Buckley, *Pay Differences Between Men and Women in the*

that women will be dependent on and subservient to men,[10] and they preclude tolerating labor market segregation under some unexpressed "separate but equal" rubric. It may have been assumed that wage differentials would be reduced gradually as Title VII's proscription of discriminatory practices allowed members of the protected classes to move into positions formerly reserved for white men.[11] But the walls have not tumbled down—even though legal developments now permit systemic attacks.[12]

In the face of the persistent wage differentials associated with continued job segregation, some advocates have sought to attack wage inequities directly. Thus, under the slogan, "equal pay for equal value," it is argued that women grouped in typically female jobs should receive pay equal to that received by men holding male jobs where their work involves equivalent skill, effort, responsibility, and working conditions.[13]

There is a sound theoretical basis for this approach. As Professor Ruth Blumrosen has demonstrated,[14] where jobs are, or were, segregated by race

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Same Job, 94 MONTHLY LAB. REP. 36-39 (1971); Flanders & Anderson, *Sex Discrimination in Employment: Theory and Practice*, 26 IND. & LAB. REL. REV. 938 (1973); U.S. Dept. of Labor, Bureau of Labor Statistics, REP. 417 SELECTED EARNINGS AND DEMOGRAPHIC CHARACTERISTICS OF UNION MEMBERS (1970).

[10] *See* Hartmann, *Capitalism, Patriarchy and Job Segregation by Sex*, WOMEN AND THE WORKPLACE 137 (M. Blaxall & B. Reagan, ed. 1976) [hereinafter cited as HARTMANN].

[11] *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[12] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[13] *See* Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protection under Title VII*, 8 LOY. CHI. L. J. 723 (1977). Attempts to include equal pay for jobs of equal value have failed under the Equal Pay Act because of the courts' narrow interpretation of the language of the Equal Pay Act which requires equal pay "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). Although the jobs in question need not be identical, they must be substantially equal. Brennan v. J.M. Fields, Inc., 488 F.2d 443 (5th Cir. 1974); Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973).

Plaintiffs attempting to secure relief from sex biased wage rates under Title VII have generally been unsuccessful because the courts have construed the Bennett Amendment to Title VII as restricting Title VII claims to those recognized under the Equal Pay Act. Orr v. Frank R. MacNeill & Son, Inc., 411 F.2d 166 (5th Cir. 1975); Ammons v. ZIA Co., 448 F.2d 117 (10th Cir. 1971). *But see* Fitzgerald v. Sirkin Stockade, 22 FEP Cas. 266 (12th Cir. 1980) (finding of sex discrimination in compensation in violation of Title VII does not violate Equal Pay Act or the Bennett Amendment although discrimination was not within scope of Equal Pay Act). The language of the Bennett Amendment provides that:

> It shall not be an unlawful practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. § 2000e-2(h). The problem with this interpretation of this amendment is that it ignores the fact that differentiation is authorized by the Equal Pay Act only when the wage differential is pursuant to a merit or seniority system. There is no affirmative mandate in the Equal Pay Act authorizing unequal pay for jobs of comparable value.

[14] Blumrosen, *Wage Discrimination Resulting From Job Segregation As a Violation of Title VII*, 12 MICH. J. OF LAW REFORM 397 (1979).

or sex, the same discriminatory considerations that influenced initial job assignments and restrictions on transfer or promotion also influenced the rates of pay.[15] Therefore, where jobs have been restricted to minorities or women, the rate of pay for these jobs has been discriminatorily depressed. Thus, it is appropriate to provide redress for such inequities in pay under our fair employment laws. Unfortunately, however, courts have thus far declined to accept the principle that workers are entitled to equal pay for work of equal value,[16] despite some favorable precedent provided by decisions of the Equal Employment Opportunity Commission.[17]

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[15] For example, as Professor Blumrosen points out, in job evaluation systems used to establish wage rates, the ranking of compensable factors to determine the "value" of a particular job can reflect the attitudes and values of the committee members assessing the factors. This is particularly true where the worth of jobs is pegged to the wage rates in key jobs which are male or female oriented. In addition, jobs are "valued" in relation to the community wage structure which reflects market bias. *See Wage Discrimination*, *supra* note 14 at 428-444. The National War Labor Board recognized the bias inherent in job evaluation systems in General Electric Co. and Westinghouse Electric Corp., 28 BNA WAR LAB. REP. 666 (1945) and required higher pay for women in women's jobs whose pay had been undervalued pursuant to such systems. The board noted that Westinghouse utilized an evaluation system wherein

> Each labor grade carries a range of point value, and any job falling within that range of point value is automatically paid the wage rate for that labor grade. There are, however, separate key sheets for men and women, the effect of which is that labor grades carrying the same point value pay two different sets of wage rates.

Id. at 678-79.

The General Electric scheme was more explicit. For female operators, the value of their jobs was set at two-thirds the value of adult male workers. *Id.* at 681.

While evaluation systems today no longer utilize separate sheets for men and women, the problem of underevaluation remains due to the evaluation of jobs against key jobs which continue to be male or female oriented.

[16] *See* Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1977) (wage differential between predominantly male job categories and predominantly female job categories does not violate Title VII although employer had objectively valuated jobs as involving comparable worth); Lemons v. City and County of Denver, 17 FEP Cas. 906 (D. Colo. 1978), *aff'd* 620 F.2d 228 (10th Cir. 1980) (no Title VII violation where female dominated occupation paid less than male dominated occupation where pay differential due to historical and market reasons); Tacoma Pierce County Public Health Employees Ass'n v. Tacoma Pierce County Health Dep't., City of Tacoma, 586 P.2d 1215 (Wash. App. 1978) (Washington state fair employment law, like Title VII, does not reach comparable worth cases). *But see* Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979) (Title VII's prohibition of discrimination in compensation is broader than that of Equal Pay Act despite Bennett Amendment).

[17] *See* E.E.O.C. DEC. No. AU7-173 (April 25, 1968) (unpublished decision on File at the Women's Rights Litigation Clinic, Rutgers School of Law, Newark, New Jersey) in which the charging party worked for a cafeteria chain in the female job classification of head of the pantry. The two other areas of employment in the cafeteria, the kitchen and bake shop, were classified as male jobs. The charging party, as "head salad lady," not only was paid less than the heads of the kitchen and the bake shop, but less than all the other male workers with the exception of one man in an entry level helper position. The Commission found reasonable cause to believe that the respondent had violated Title VII by establishing "separate and different wage rate schedules for male employees on the one hand and females doing reasonably comparable work." The Commission made similar rulings regarding black workers in E.E.O.C.

As advocates of "equal pay for equal value" continue to address the problem of wage inequities, it is essential to identify and eliminate those barriers to equal employment opportunity that continue to confine workers to particular occupations according to their sex. In addressing that task, this article first reviews pertinent social science data regarding the causes of occupational discrimination in general and job segregation in particular. While those causes are not completely understood, it is apparent that attitudinal factors figure significantly on both the supply and demand sides of the picture. Employers' preconceived notions of appropriate role behavior influence the definition of jobs, the evaluation of work performance, and the assignment of workers to jobs, thus detracting from the maximal contribution that the individual worker's abilities would allow. At the same time, employer and society role expectations of women have a negative impact on a woman's motivation and performance in a work environment. Thus, the first section concludes that attitudinal factors internalized by both employer and employee constitute a primary obstacle to equal employment opportunity, and that such attitudinal factors are reinforced continually by adverse employment decisions grounded in stereotypical role expectations. The first section of this article proposes that such stereotypically based decisions be recognized under our fair employment laws as discrimination *per se*.[18] Following this review of social science studies, the case law concerning sexual harassment is examined in detail to show the inadequacies of present concepts of discrimination in addressing discriminatory employment decisions that reflect and reinforce these attitudinal barriers. The capacity of present concepts to explain other instances believed to constitute discrimination is also explored. From this review it is again concluded that an additional concept of discrimination is needed. In the final section, this proposal is related to present concepts of discrimination and evaluated in terms of its feasibility.

II. The Social Science Data

Economists have supplied fairly clear empirical evidence of significant occupational discrimination by showing that criteria other than productivity determine the numbers of men and women who have the opportunity to enter particular occupations.[19] Although they have not agreed on the causes

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decisions Nos. 5-12-3275 through 5-12-3179, where it was held that "relatively skilled Negro employees [were paid] little or no more than the base rate because of their race rather than their skills.") (unpublished decisions on file at the Women's Rights Litigation Clinic, *supra*). *See also* Empl. Prac. Guide (CCH) Empl. Prac. Dec. ¶ 6108, 6148, 6300 for a series of decisions challenging the use of the prevailing community wage scale as a salary setting mechanism. The EEOC held that such scales discriminated against women on the basis of sex since the use of such wage scales frequently operated to favor male employees, but virtually never operated to favor female employees.

[18] In view of the substantial body of case law which has developed under Title VII, and its impact on the interpretation of state legislation, this article utilizes Title VII as the basis for exploring statutory concepts of discrimination.

[19] *See* Madden, *Economic Dimensions of Occupational Segregation Comment III*, Women and the Workplace 245, 246 at n.2, (M. Blaxall & B. Reagan, ed. 1976).

of this discrimination, they all point to non-economic factors to account for the failure of women and minorities to enter successfully higher-paying occupations.[20] On the demand side, the tastes or prejudices of employers, co-workers, and customers operate to restrict women's employment opportunities. On the supply side, employee taste, as determined by worker expectations and socialization, as well as by family and group pressures, tends to restrain women from seeking certain jobs and from acquiring the skills necessary for certain positions. There is, moreover, a circular quality to the process since employer and employee attitudes and behaviors reinforce and perpetuate each other.[21]

The major neoclassical economic theories posited to date that attempt to explain wage differentials between men and women are the "overcrowding" hypothesis, the human capital approach, and the monopsony model, while the institutional school has utilized a dual labor market formulation to address the question. The demand-focused models, overcrowding and the dual labor market formulation, are examined first, followed by a discussion of the supply-focused models, the human capital theory, and monopsony.

Overcrowding results when there is a relatively low demand for a particular kind of worker and a large labor supply from which employers can meet their demand. Under the overcrowding hypothesis,[22] women are restricted to a relatively small number of occupations because of employers' aversion to women and minorities.[23] As a result, there is an oversupply of workers to meet employer demands. This oversupply of labor not only depresses the wage structure of jobs available to women,[24] but it has a corresponding inflationary effect on the wage structure of "male" jobs.

The obvious question raised by this approach is why employers would maintain such segregation when, as a consequence, they must pay higher

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[20] *See generally* Blau & Jusenius, *Economists' Approaches to Sex Segregation in the Labor Market: An Appraisal* WOMEN AND THE WORKPLACE 181, (M. Blaxall & B. Reagan, ed. 1976) [hereinafter cited as BLAU & JUSENIUS].

[21] It has been suggested, for example, that an apparent taste for overcrowded "women's jobs" is a rational reaction on the part of women to the limited options which face them in the present job market. Likewise, given their limited earning potential as a result of employer attitudes, it is not unreasonable for women to withdraw from the market during recessions and occupy themselves with homemaking. These rational adaptations to employer attitudes in turn reinforce employer expectations. An analogous "perceptual equilibrium" has been suggested in the racial context. Arrow, *Economic Dimensions of Occupational Segregation, Comment I*, WOMEN AND THE WORKPLACE 233, 234 (M. Blaxall & B. Reagan, ed. 1976).

[22] *See generally* Bergmann, *The Effect on White Incomes of Discrimination in Employment*, 79 J. POL. EC. 294 (1971) [hereinafter cited as BERGMANN]; Bergmann, *Occupational Segregation, Wages and Profit When Employers Discriminate by Race or Sex*, 1 EASTERN EC. J. 103 (1974).

[23] BERGMANN, *supra* note 22, at 294, 295.

[24] Through collective bargaining, unions may have a short term effect on wage structure. Only one out of eight working women, however, belongs to a union, Raphael, *Working Women and Their Membership in Labor Unions*, 97 MONTHLY LAB REV. 27-28 (May, 1974), and only 350 out of 4,800 reported positions on the governing boards of unions and associations are held by women. 1975 HANDBOOK ON WOMEN WORKERS, *supra* note 4, at 78.

wages to men than they would under a sex-blind hiring system. In response, it is suggested by one writer that pervasive sex role stereotypes lead employers to believe that women would be such inefficient workers in non-traditional jobs that they are not worth hiring, even at lower wages, and this prejudice is sufficient to prevent even the limited hiring that would be necessary to dispel such ill-founded beliefs.[25]

Other economists suggest that at least some discrimination by employers may be attributable to employee and customer preferences.[26] If, for example, males who perceive their manliness as enhanced by engaging in all male activities demand higher wages for working with women, it may be more expensive for an employer to integrate the work force than to hire men only.[27] Even without an explicit demand for higher wages, employee preferences may result in personnel frictions and attendant increased costs.[28]

The dual labor market model[29] also highlights the importance of employers' predispositions. This model posits two categories of occupations, those filled externally by new workers and those filled internally by promoting and upgrading present employees. Various possibilities for advancement are keyed to particular entry level jobs, and placement in a given entry level job often depends more on the employer's than the employee's choice. Outright employer prejudice in favor of white male preserves, combined with employer perceptions as to the average characteristics of women or minority workers, results in the latter groups' assignment to dead-end jobs. Such "statistical discrimination" or stereotyping may depend as much on myths about the particular groups as on the actual probabilities of an individual group member's success. By definition such stereotyping disregards the possibility that an individual member fails to share the alleged group characteristic.

Empirical data showing segregation even when men and women have similar skills and abilities, as evidenced by their participation in the same narrowly defined occupational categories, emphasizes the importance of the various factors on the demand side identified by both the overcrowding and dual market approach.

The human capitalist approach, utilizing a competitive model, explains job segregation and wage differentials by factors on the supply side.[30] Men

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[25] *See* Stevenson, *Women's Wages and Job Segregation*, LABOR MARKET SEGMENTATION 251 (R. Edwards, M. Reich, & D. Gordon, ed. 1975) [hereinafter cited as STEVENSON].

[26] G. BECKER, THE ECONOMICS OF DISCRIMINATION (1957); Arrow *The Theory of Discrimination*, DISCRIMINATION IN LABOR MARKETS 3 (O. Ashenfelter & A. Rees, ed. 1973).

[27] This is particularly likely to be true where equal pay is required. Where the number of women available satisfies the employer's need for a category, an all female force will result. *See* Madden, *Economic Dimensions of Occupational Segregation, Comment II*, WOMEN AND THE WORKPLACE 245, 250 (M. Blaxall & B. Reagan, ed. 1976).

[28] *See* STEVENSON *supra* note 25.

[29] *See* BLAU & JUSENIUS, *supra* note 20, at 191-92; Piore, *The Dual Labor Market: Theory and Implications*, PROBLEMS IN POLITICAL ECONOMY: AN URBAN PERSPECTIVE (D. Gordon, ed. 1971).

[30] The human capital approach explains wage differentials in terms of differences in productivity between the sexes. As productivity is thought to be correlated

and women differ in the human capital they accumulate through experience in the labor force, even though they may have similar innate intelligence and education. These differences in human capital in turn explain differences in wages. Moreover, to the extent that women choose occupations which permit intermittent labor force participation, occupational segregation and wage differentials are explained. A woman's decision to participate on an intermittent rather than a continuous basis is attributed usually to her role in the family. This model, however, ignores the extent to which labor market discrimination, by lowering available wages, reduces a woman's incentive to engage in market work.[31]

The monopsony[32] model focuses on the interplay between occupational segregation and the supply of labor.[33] The labor supply of women is thought to be less wage elastic due to women's relative immobility. This immobility, in turn is caused by family constraints and the lack of demand for women in alternative occupations because of occupational segregation. An employer, faced with such inelasticity, may make a profit by paying wages that are below the marginal value of the employee's product. Thus, an employer has a motive to limit the employee's mobility through discrimination.

Thus, while the demand-focused models, stress employer or employer-related prejudice, and the supply-focused models emphasize role constraints on the female worker, it is clear that attitudinal factors play a major part in any account of occupational discrimination from the economic perspective. It is equally evident that the attitudinal factors involved are rooted in fixed notions of class-based traits and role appropriate behavior.

Other disciplines are more helpful in exploring these notions and the way they penetrate the employment world. Particularly useful are the findings of sociologists and social psychologists with respect to the nature and consequences of attitudinal barriers to equal employment opportunity.

The importance of attitudinal factors and their close relation to role expectations is underscored by the characteristics common to those jobs in which women and minorities are concentrated. In addition to low pay, such jobs are characterized by a lack of continuity and little opportunity for specialization that would require the worker to acquire skills prior to employment rather than on the job.[34] Women's jobs reflect an expectation that a woman's work force participation is secondary to, and contingent upon, family considerations. It is apparent that what confines women to particular jobs is their cul-

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with education, age, and experience, these variables are often used as stand-ins for productivity. Experience is emphasized since it is believed that market skills are acquired, developed, and perfected on the job. Lloyd, *The Division of Labor Between the Sexes, A Review*, SEX DISCRIMINATION AND THE DIVISION OF LABOR 14 (C. Lloyd, ed. 1975).

[31] BLAU & JUSENIUS, *supra* note 20, at 185-86.

[32] A monopsonist is defined as an employer or group of employers who dominate the labor market and have the power to pay less than a competitive wage. *See* P. SAMUELSON, INTRODUCTION TO ECONOMICS (1976).

[33] *See* MADDEN, THE ECONOMICS OF SEX DISCRIMINATION (1973); BLAU & JUSENIUS, *supra* note 20, at 188-189.

[34] V. OPPENHEIMER, THE FEMALE LABOR FORCE IN THE UNITED STATES, (1970).

tural mandate to serve primarily in the roles of wife and mother; not by any inherent incompatability between these traditional roles and a high status position. The mechanisms by which men routinize their multiple obligations and integrate their family and occupational activities are simply not extended equally to women.[35]

Attitudinal factors affect the employment opportunities available to women in a number of ways. The phenomenon of statistical discrimination, for example, involves the deliberate substitution of generalizations often embodying stereotypes and preconceptions about groups for individualized judgments of productivity. It is engaged in by employers who wish to minimize both their information costs, and the risks of uncertainty.[36] In other instances, even where the employer does make some individual inquiry, group stereotypes may cause the employer to discount or reinterpret the objective data produced by the inquiry.[37]

Social psychologists have documented extensively similar effects in the perception and evaluation of individual competence. The same professional article, for example, has been rated higher when attributed to a male, rather than a female, author.[38] Male artistic endeavors were judged, in the absence of authoritative criteria, superior to those attributed to a female. Male success is attributed to skill, while female success is seen more often as a matter of luck.[39] Other studies show that for a highly competent female to gain recognition for her work, her accomplishments must be regarded as demonstrably exceptional. Not only must a woman be seen as succeeding in a realm outside traditional women's roles within a context requiring unusual drive and dedication, but her worth must be supported by the positive evaluation of an authoritative source.[40] These findings would seem to account for the

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[35] For a forceful presentation of this argument see Coser & Rokoff, *Women in the Occupational World: Social Disruption and Conflict*, 18 Soc. Prob. 535 (1971) [hereinafter cited as Coser & Rokoff]. The authors point out, for example, that support systems are organized around high status professionals whose work is expected to be disrupted simply because they are so important that emergency demands will be made on them. Disruptions suffered by women, on the other hand, are seen as being due to a failure to meet occupational role expectations and are therefore not considered legitimate. Thus an academic institution is likely to tolerate the rescheduling of classes and meetings required when a professor travels for private consulting, but it is unlikely to tolerate a lesser number of absences associated with child care. The authors also point out that since women's occupational status is never quite legitimate, they, unlike men, don't have the leeway to take occasional time off without its being seen as final proof of lack of commitment to work.

[36] *See* discussion in text accompanying note 30. *See also Wage Discrimination*, *supra* note 14, at manuscript pp. 150-156.

[37] *Id.*

[38] Goldberg, *Are Women Prejudiced Against Women*, 5 Transaction 28 (1968); Bem & Bem, *Case Study of a Non-conscious Ideology: Training the Woman to Know Her Place*, Beliefs, Attitudes and Human Affairs (D.J. Bem, ed. 1970) [hereinafter cited as Bem & Bem].

[39] Deaux & Emswiller, *Explanations of Successful Performance on Sex-Linked Tasks*, 29 J. Pers. & Soc. Psych. 80 (1974).

[40] O'Leary, *Some Attitudinal Barriers to Occupational Aspirations in Women*, 81 Psych. Bull. 809, 812 (1974) *citing* findings of Taynor & Deuz, *When Women are More*

phenomenon reported by sociologists of competent women simply "not being heard."[41]

Studies focusing specifically on employment decisions also show the impact of sex-based biases on perception. In simulated hiring situations, male applicants for managerial positions are rated higher and accepted more frequently than equally qualified females, particularly for more demanding positions.[42] On the other hand, when performance in low-level, unskilled tasks such as stocking store shelves is scored, there is a tendency to inflate female performance.[43] Some research suggests that it is the interaction between the applicant's sex and the sex-orientation of the position that influences hiring decisions.[44]

Similar biases have been observed in simulations of post-hiring decisions. An equally qualified woman is less likely to be promoted, to be offered training opportunities, and to have her personnel assessments accepted than her male counterpart.[45] Stereotypic role expectations are particularly evident in findings that married women are less likely to be promoted to positions involving travel than comparably situated males. Similarly, where equally qualified male and female applicants indicate that their families come first, the woman is less likely to be promoted.[46] Consistent with such employer attitude toward male and female family responsibilities, men are less likely to be granted leaves for child care.[47] Similarly, less effort is deemed appropriate to attempt to retain a female employee who has been offered a job elsewhere.[48]

Where the information available to the decision-maker is limited or the decision-making criteria are ambiguous, it is easy to envision a decision-maker

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Deserving than Men: Equity, Attribution and Perceived Sex Differences, 28 J. PERS. & SOC. PSYCH. 360-67 (1973) [hereinafter cited as O'LEARY].

[41] Epstein, *What Keeps Women Out of the Executive Suite*, BRINGING WOMEN INTO MANAGEMENT (F. Gordon & M. Strober, ed. 1975).

[42] Rosen & Jerdee, *Effects of Applicant's Sex and Difficulty of Job Evaluation of Candidates for Managerial Positions*, 59 J. APP. PSYCH. 511 (1974) [hereinafter cited as ROSEN & JERDEE].

[43] Hamner, Kim, Baird & Bigoness, *Race and Sex as Determinants of Ratings by Potential Employers in a Simulated Work-Sampling Task*, 59 J. APP. PSYCH. 705 (1974). Interestingly, the low-skilled position for which Hamner et al. found inflated female ratings is male-dominated [hereinafter cited as HAMNER ET AL.].

[44] Cohen & Bunker, *Subtle Effects of Sex Role Stereotypes on Recruiters' Hiring Decisions*, 60 J. APP. PSYCH. 566 (1975) (hiring for male-oriented position of personnel technician and female-oriented position of editorial assistant).

[45] Rosen & Jerdee, *Influence of Sex Role Stereotypes on Personnel Decisions*, 59 J. APP. PSYCH. 9 (1974) (bank managers as subjects) [hereinafter cited as *Influence of Sex Role Stereotypes*].

[46] Rosen, Jerdee & Prestwich, *Dual-Career Marital Adjustment: Potential Effects of Discriminatory Managerial Attitudes*, 37 J. MARR. & FAM. 565 (1975) (national sample of managers and executives). The failure to promote women but not men who indicate that their families come first would seem to correlate with higher male earnings even where job characteristics are held constant.

[47] *Influence of Sex Role Stereotypes, supra* note 45, at 12-13.

[48] *Id.*

falling back on preconceived notions.[49] Indeed, although they appear increasingly unwilling to intervene in such cases,[50] the courts have recognized the ready opportunity for discrimination that subjective evaluations afford.[51] The problem of biased evaluations in more "objective" situations, however, is not as well known. Nevertheless, there is evidence that bias also affects perceptions of performance on an objectively quantifiable task. Thus a laboratory study found that while whites were generally rated accurately by white raters, blacks with identical actual perfomance levels received significantly lower ratings from white raters.[52]

Despite the fairly persuasive evidence that bias occurs in both subjective and objective evaluations, several factors make it quite difficult to identify in actual operation. Bias is, first of all, frequently unconscious. Second, since the focus is on the individual rather than group performance or capability, often the easier explanation is that the individual is at fault.[53] Third, bias is further disguised by the expression of judgment in terms that appear both neutral and relevant.[54] Indeed, the interplay of these factors is no doubt sufficient to mask differential treatment prompted by stereotypical biases. For example, although research findings have shown that appearance and education are weighted more heavily for female than male applicants, such bias probably would not be recognized in an individual case.[55]

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[49] Interestingly, research findings show that sex stereotypes have a greater relative impact in such cases than other "negative" data. *See* Shaw, *Differential Impact of Negative Stereotyping in Employee Selection*, 25 PERS. PSYCH. 33 (1972).

[50] Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976); Badillo v. Dallas County Community Action Committee, 394 F. Supp. 694 (N.D. Tex. 1975); Fogg v. New England Telephone & Telegraph Co., 346 F. Supp. 645 (D.N.H. 1972). *See generally* Vladeck & Young, *Sex Discrimination in Higher Education: It's Not Academic*, 4 WOMEN'S RTS. L. REP. 59 (1978); Ginensky & Rogoff, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. DET. J. URB. L. 165 (1976).

[51] *See, e.g.*, Rowe v. General Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972); Watkins v. Scott Paper Co., 530 F.2d 1159, 1190-94 (5th Cir. 1976); Pace College v. New York City Human Rights Commission, 11 EMPL. PRAC. GUIDE (CCH) EMPL. PRAC. DEC. ¶ 10,685 (N.Y. Ct. App. 1975).

[52] HAMNER ET AL., *supra* note 43, at 709. It should be noted that blacks received higher rating from evaluators of their own race. This finding may assume importance should racial minorities become supervisors in significant numbers.

[53] This is not to say that it would be impossible to prove bias once it is suspected. For example, where qualifications are judged by discrete work products which can be shown sex-blind or color-blind to outside judges, it may be possible to prove a different standard has been applied to the female or minority applicant. However, where a personnel decision is biased on overall impressions or other data uniquely identifying the applicant, or where there have been no comparable judgments concerning male or majority applicants which can be used to establish a standard of comparison, the proof is much more difficult.

[54] The Goldberg study cited in note 38, *supra*, for example, involved ratings on the value, persuasiveness, writing style, and competence of professional articles.

[55] *See* Cecil, Paul & Lins, *Perceived Importance of Selected Variables Used to Evaluate Male and Female Job Applicants*, 26 PERS. PSYCH. 397 (1973) wherein the authors found that personality, appearance and skills-education were weighted more heavily in evaluating female applicants while motivation-ability and interpersonal relations were more important in evaluating male applicants for the same job.

Other studies, showing overt attitudinal biases, suggest that distortions in perception and evaluation are linked closely with role expectations. One study found that male managers, when asked directly, indicated that women were no less capable than men. They did express, however, a strong commitment to societal norms that call for deference in male-female interaction and to the belief that both males and females prefer male supervisors. They also perceived women, because of their biological and personal characteristics, as lacking dependability.[56]

At times, the connection between group membership and expectations for that group is made explicit in a performance context, as when work is evaluated as "good . . . for a woman." But stereotypical expectations are also manifested in the perception of certain jobs. The managerial model, for example, is articulated explicitly in terms of sex-linked virtues. In the words of one writer:

> The model of the successful manager in our culture is a masculine one. The good manager is aggressive, competitive, firm and just. He is not feminine, he is not soft and yielding or dependent or intuitive in the womanly sense. The very expression of emotion is widely viewed as a feminine weakness that would interfere with effective business processes.[57]

Quite simply, managerial work is strictly perceived as man's work.

The discrepancy between perceived job requirements and assumed worker attributes impacts both on employer decision-making and on employee performance. This problem is well illustrated by the predicament of women seeking to participate on equal terms in the nation's economic life. Apart from very real competing demands of time and energy facing women attempting to meet both work and home obligations, both men and women have been imbued with the notion that there is an inherent conflict between femininity and competence. Female socialization, stressing marriage and family as sources of fulfillment, encourages such female attributes as personal warmth and empathy, sensitivity and emotionalism, grace, charm, compliance, dependence, and deference.[58] Male attributes such as aggressiveness, egotism, persistence, and ambitious drive are discouraged.[59] On the other hand, it generally is believed that success in the work world requires such distinctly unfeminine qualities as drive, personal dedication, aggressiveness, emotional detachment, and "a kind of sexless matter-of-factness equated with intellectual perform-

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[56] *See* Bass, Krusell & Alexander, *Male Managers' Attitudes Toward Working Women*, 15 AMER. BEH. SCI. 221 (1971) [hereinafter cited as BASS ET AL.]. A similar discomfort with the notion of a female boss also appears in other studies. *See* Bowman, Wortney & Greyser, *Are Women Executives People?*, 43 HARV. BUS. REV. 14-28, 164-78 (1965); B. GILMER, INDUSTRIAL PSYCHOLOGY (1961); R. LORING, & T. WELLS, BREAKTHROUGH: WOMEN INTO MANAGEMENT (1972); E. LYNCH, THE EXECUTIVE SUITE-FEMININE STYLE (1973).

[57] D. MCGREGOR, THE PROFESSIONAL MANAGER 23 (1967).

[58] C.F. EPSTEIN, WOMAN'S PLACE 20 (1970) [hereinafter cited as EPSTEIN].

[59] *Id.* at 22.

ance."[60] Working women judged by male supervisors imbued with these conflicting standards are said to be subjected to a "double-whammy" or double bind:

> If she is competent, and successful at the task (which in the work situation is defined as the appropriate and top-priority concern), she will be judged deficient as a female. Conversely, if she satisfies these self-appointed judges as to her femininity, she will not be doing the job.[61]

From the employer's perspective then, any heightened awareness of the worker's sexual identification is likely to interfere with a favorable evaluation of her work. Moreover, conduct that makes this group identification salient is also likely to interfere with an employee's actual performance by arousing any doubts she may have about her competence and appropriate role, and feeding general feelings of inferiority resulting from her socialization.[62]

Against this backdrop, specific stereotypically-based behavior patterns can be seen to hinder women's task performance. In the words of one psychologist:

> The potential conflict between competence and femininity can be aroused—with negative effects on performance—in any situation where women work under the surveillance of men. The appropriate behavior for men in the work situation is to respond to and take seriously the task performance of the women workers. It is inappropriate to invoke other roles—particularly aspects of the sex role, e.g., by being too personal, by flirting, by forms of address which involve diminutives, too much familiarity, and so forth . . . .
>
> For the same reason, constant references—no matter how benevolent—to the personal appearance, social life and potential marriage and family plans of women have the same effect. They

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[60] *Id.* at 23.

[61] Laws, *The Bell Telephone System: A Case Study*, EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE 157, 164 (P. Wallace, ed. 1976) [hereinafter cited as LAWS]; Prather, *Why Can't Women Be More Like Men, A Summary of the Sociopsychological Factors Hindering Women's Advancement in the Professions*, 15 AMER. BEH. SCI. 172 (1971).

[62] *See* LAWS, *supra* note 61; Wolman & Frank, *The Solo Woman in a Professional Peer Group*, 46 AM. J. ORTHOPSYCHIAT. 164 (1975); Komarovsky, *Cultural Contradictions and Sex Roles*, 52 AMER. J. SOC. 184 (1946); Faunce, *Psychological Barriers to Occupational Success for Women*, 40 J. NAWDAC 140 (1977) [hereinafter cited as FAUNCE]. Faunce provides a useful illustration of this process in discussing the detrimental impact of the stereotype of women as housewives:

> This myth is an ideal view, unrelated to fact. It serves the purpose of forming images, so that even the women who are working are convinced that they are not really "workers" and do not think in terms of their ambitions, goals, demands, and rights. They may tell themselves that they are only working temporarily and therefore not to take their occupational identity seriously. If they fail to take themselves seriously, who else will do so?

Id. at 142. *See also* Condry & Dyer, *Fear of Success: Attribution of Cause to the Victim*, 32 J. SOC. ISSUES 63 (1976).

> convey the message that a woman's work and a woman as a worker, are not being taken seriously.[63]

Since role conflict for women appears to be strongly influenced by their perception of what men expect to see in women,[64] the effects of the femininity/competence conflict are likely to be significant.

While stereotypically-based behavior permeates the work world,[65] a particularly unfortunate dynamic has been noted in contexts where previously excluded groups begin to break through. As the literature suggests,[66] the hiring of tokens does not function effectively to break down attitudinal barriers to equal employment opportunity. Indeed, recent studies indicate that so long as the number of "outsiders" introduced is insignificant, attitudinal barriers will be reinforced.[67]

Several explanations may be offered for the failure of tokens to break down stereotypes. First, tokens become highly visible, yet they are viewed as stereotypes rather than individuals.[68] The presence of tokens disturbs the dominant group's commonality and leads its members to reaffirm the group's solidarity by underlining the majority culture and the tokens' differences from it.[69] Such behavior involves making the introduction of a token the occasion for dramatizing the themes which make tokens outsiders. Thus, whether in the industrial management setting[70] or in the construction trades,[71] male be-

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[63] Laws, *supra* note 61, at 165-166. *See also* Fox, *"Nice-Girl": Social Control of Women through a Value Construct*, 2 SIGNS 805 (1977) [hereinafter cited as Fox]. Since control of women in our system is through internalized norms, one must recognize actions which evoke those internalized norms as part of the confinement.

[64] Gordon & Hall, *Self-image and Stereotypes of Femininity: Their Relation to Women's Role Conflicts and Coping*, 59 J. APP. PSYCH. 241 (1974). This is consistent with the general phenomenon that the values and perceptions of the dominant group are internalized by minority groups. *See, e.g.*, Hacker, *Women as a Minority Group*, 30 SOCIAL FORCES 60 (1951).

[65] See text accompanying notes 34-64.

[66] BASS, ET AL., *supra* note 56, R.M. KANTER, MEN AND WOMEN OF THE CORPORATION (1977); [hereinafter cited as KANTER], Laws, *The Psychology of Tokenism: An Analysis*, 1 SEX ROLES 51 (1975); *See also* Wolman & Frank, *The Solo Woman in a Professional Peer Group*, 45 AMER. J. ORTHOPSYCHIAT. 164 (1975); Frank & Katcher, *Perceptions of Freshwomen Dental and Medical Students by their Freshman Peers*, (unpublished paper presented at the Annual Meeting of the American Educational Research Ass'n., Washington, D.C. 1975); Spangler, Gordon & Pipkin, *Token Women: An Empirical Test of Kanter's Hypothesis*, 84 AM. J. SOC. 160 (1978).

[67] KANTER, *supra* note 66.

[68] The sociologist Rosabeth Moss Kanter attributes this to three perceptual tendencies—visibility, contrast, and assimilation which are associated with the proportional rarity of tokens. *See* KANTER, *supra* note 66, at 210-12. *See also* Epstein, *Institutional Barriers: What Keeps Women out of the Executive Suite*, BRINGING WOMEN INTO MANAGEMENT 7 (F. Gordon & M. Strober, ed. 1975) [hereinafter cited as *Institutional Barriers*]; LAWS, *supra* note 61.

[69] *See* KANTER, *supra* note 66, at 221-30. *See also* G. Allport, THE NATURE OF PREJUDICE 41-42 (1954) [hereinafter cited as ALLPORT]; E. Goffman, STIGMA 5-19, 112-14 (1963) [hereinafter cited as GOFFMAN].

[70] KANTER, *supra* note 66, at 222-24.

[71] *See* Affidavits in Support of Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment at Exhibits A-L, Advocates for Women v. F. Ray Marshall, No. 76-0862 (U.S.D.C., filed February 14, 1977) [hereinafter cited as AFFIDAVITS].

havior around token women is likely to involve exaggerated displays of aggression and sexual teasing, and showing off through prowess-oriented war stories.[72] Second, the presence of tokens may provoke questions or apologies about the majority's culture—as in apologizing for swearing in front of women—which pressure the tokens to acquiesce in the dominants' culture, while at the same time making it clear that the group does not expect their behavior to come naturally to the tokens. Third, tokens are pressured to show loyalty to the majority by accepting the position of "exception," or of comic inferior, and foregoing criticism of their treatment. If tokens give in to such pressures, they stand to incur the psychic costs of turning against one's kind.[73] If they resist, they are unlikely to be included in informal interactions important for learning the job[74] or for establishing "political" contacts.[75] In either case, an adverse effect on work performance is likely.

Stereotypical assumptions about what tokens must be like serve to encapsule tokens in limited and caricatured roles that allow tokens to be absorbed into the dominant group's culture without altering it.[76] An important mechanism in this process of role encapsulation appears to be the constant reminder of behavior that is considered appropriate for a member of the token's group.[77]

Likewise, internalized role expectations affect the positions sought by workers and their ability to perform once on the job, thereby precluding individualized judgments regarding the suitability of applicants.[78] It would ap-

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[72] *See* KANTER, *supra* note 66, at 222-24.

[73] KANTER, *supra* note 66, at 230; ALLPORT, *supra* note 69, at 145-48, 150-53.

[74] KANTER, *supra* note 66, at 230; *see also* Affidavits, *supra* note 71.

[75] KANTER, *supra* note 66, at 230. EPSTEIN, *supra* note 58, Albrecht, *Informal Interaction Patterns of Professional Women*, WOMEN IN MANAGEMENT (M. Gerrard, J. Oliver & M. Williams, ed. 1976).

[76] For example, Kanter has observed four stereotypical roles for women in the management context. Women who respond to their image as sympathetic listeners may become "mothers" to their groups, expected to listen to and provide comfort for personal problems. Seen as a source of emotional nurturance and support, such women are unlikely to be rewarded for critical, independent, task-oriented behaviors. Other women who are perceived primarily in terms of their sexuality are reduced to the role of seductress or sex object. Encapsulation of such a role both complicates a woman's relations with male co-workers and supervisors, who may assume the rule of "protector," and serves to provide a ready explanation of any work-related success. Women in the less overtly sexual role of pet or mascot may be considered precious or precocious, and their competency likewise undervalued. Finally, women who resist overtures tending to trap them into the first three roles may be cased as overly tough "iron maidens." As such, they may be isolated and left to flounder on their own. *See* KANTER, *supra* note 66, at 233-38. Focusing on interactions between roles, Bradford, Sargent and Sprague have identified four similar male-female role relationships which likewise reenforce stereotypes and interfere with female employees being viewed as competent at traditionally male tasks. Bradford, Sargent & Sprague, *The Executive Man and Woman: The Issue of Sexuality*, BRINGING WOMEN INTO MANAGEMENT 46-52 (F. Gordon & M. Strober, ed. 1975).

[77] Goffman cites the example of the well-read professional criminal whose tastes constantly evoked expressions of surprise from others who saw him primarily as a criminal. While in the form of compliments, such expressions served to isolate and confirm the man in his stigmatized status. GOFFMANN, *supra* note 69, at 14-15.

[78] FAUNCE, *supra* note 62; O'LEARY, *supra* note 40.

pear, moreover, that in both employers and employees, existing preconceptions are exacerbated by actions on the job that invoke and reinforce stereotypic role expectations. Given these results and the impossibility of constructing a socialization process that does not reflect at least in some way the realities of the work world,[79] it may be that an effective attack on attitudinal barriers in the work context will require the introduction of significant numbers of women and minorities.[80]

Corrective measures short of numerical remedies, however, may work. Common sense would indicate that if we are aware that our evaluations of particular behavior depend on our expectations of what is appropriate for that person's race or sex, it is possible for us to correct for such differential evaluations. Not surprisingly, a number of writers have suggested that making managers and other evaluators aware of their own race and gender biases can be an effective method of reducing those biases.[81]

The material reviewed here suggests a possible approach to reducing the detrimental impact of class-based attitudinal factors. A system that imposes liability on employers for personnel actions that are the product of stereotypic role expectations could provide both a mechanism and an incentive for identifying attitudinal biases. In this way, both the practical weight of the law and its moral force are directed at eliminating the barriers to equal employment opportunity that result from stereotypic role expectations. While such legal intervention may or may not effect changes in underlying attitudes,[82] it could go a long way toward preventing biased attitudes from resulting in adverse employment decisions. As such, it is a healthy first step in their elimination. Employers attempting to minimize their exposure to liability for adverse per-

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[79] Clearly such notions and expectations do not first arise in the work environment, but rather are formed and absorbed as a result of early socialization. *See* BEM & BEM, *supra* note 38. They nonetheless intrude significantly on the work environment, and to the extent that their impact can be diminished the goals of equal employment opportunity will be furthered. *But see* KANTER *supra* note 66, emphasizing the overriding impact of one's location in the work structure on productivity, self-esteem, and competence.

[80] An analogous notion of critical mass has already been recognized in the education context. The mass is said to serve the function of counteracting the effects of tokenism described in note 68, *supra*. *See* Spangler, Gordon & Pipkin, *Token Women: An Empirical Test of Kanter's Hypothesis*, 84 AM. J. SOC. 160 (1978).

[81] See BASS ET AL. *supra* note 56 at 235; HAMNER ET AL., *supra* note 43 at 710 *citing* Schmidt & Johnson, *The Effect of Race on Peer Ratings in an Industrial Situation*, 57 J. APP. PSYCH. 237, 241 (1973); *Influence of Sex Role Stereotypes, supra* note 45, at 14; McKenna & Denmark, *Women and the University*, 5 INT'L J. GRP. TENSIONS 226, 233 (1975).

[82] Allport and others have argued that civil rights legislation will ultimately change prejudicial attitudes initially by creating a public conscience and a standard for expected behavior that checks overt signs of prejudice and by providing a means of breaking vicious circles. Attitudes then change because individuals experience discomfort when there is a dissonance between their views and the official morality. *See* ALLPORT, *supra* note 69, at 469-73. There is some evidence that where individuals feel that they are being forced to comply by external threats, negative attitudes will harden. *See* Bem, *Self-Perception: An Alternative Interpretation of Cognitive Dissonance Phenomena*, 47 PSYCH. REV. 182 (1967).

sonnel actions flowing from stereotypic role expectations may experiment with remedial measures addressed to such biases, and the prospect of liability if such experiments fail should provide an incentive for employers to resolve the basic question of whether educational programs will suffice to deter such actions or whether ultimately numerical remedies will be required.[83]

III. The Need for an Additional Concept of Discrimination

A. *A Detailed Study: Sexual Harassment*[84]

Sexual references, as well as explicit demands for sexual cooperation, convey the message that a woman is a sexual object before she is a contributing worker, and whether it is consciously undertaken or not, such behavior serves to reinforce woman's sexual role. Indeed, such behavior is probably the quintessential expression of stereotypic role expectations. Like other expressions of stereotypic expectations occurring at the work place, it is dysfunctional in two respects. Whether or not perceived as flattering by women,[85] sexual advances remind women of a societally-imposed incongruity between their role as worker and as woman. By thus arousing role conflict in women, advances interfere with their performance. By underscoring their sexual identity in the eyes of male supervisors, sexual advances make it less likely that women will be viewed as persons capable of performing a demanding task, and consequently, less likely that they will have the opportunity to try to do so.

But despite the obstacles it poses to equal employment opportunity, it is difficult to fit sexual harassment into traditional concepts of discrimination, requiring either a showing of hostile motive, differential treatment, or disparate impact. Because those making sexual demands and allusions are often merely acting out the roles they have been taught by society, unaware of the hostile nature of their conduct, the notion of old-time evil motive, equivalent to racial animus, seems inappropriate. Furthermore, it is often impossible to show unequal treatment by showing a male was not harassed, particularly because the overwhelming majority of women work in sex-segregated jobs where there are no similarly-situated males. Finally, harassment, which is composed

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[83] See notes 80 & 81 *supra*.

[84] I gratefully acknowledge the assistance of the Working Women's Institute in preparation of this section.

[85] Little hard data is available regarding sexual harassment altogether. However some recent—albeit self-selecting—studies suggest that most women do not enjoy sexual advances on the job. The great majority seem to find the unsolicited sexual attention of male co-workers and supervisors to be "embarrassing," "demeaning" or "intimidating." Only 15% of 9,000 women polled described such advances as "flattering." *See* Safran, *What Men do to Women on the Job*, 148 Redbook 149, 217 (1976). Likewise in an unpublished survey developed by the Women's Section of the Human Affairs Program at Cornell University, only 3% of the 155 respondents reported that they were flattered by the unwanted sexual advances of supervisors and co-employees. More than 50% of the women said they were angered or upset by these incidents. *See generally* L. Farley, Sexual Shakedown (1978) [hereinafter cited as Sexual Shakedown].

of the acts of individuals, rarely can be said to be a neutral company policy with a disparate impact—although tolerance of those acts may well be such a policy, since in our society it is by and large males who exercise the right to sexual initiative, and mostly females who are subjected to that initiative.

Given these difficulties in fitting sexual harassment into the present conceptual scheme of discrimination, courts seem to emphasize the notion of unequal treatment. Some courts specifically point to male co-workers whose jobs were not subjected to sexual conditions. Others point to the sexual orientation of the aggressor. But throughout the cases there is a preoccupation with the hypothetical female boss who will make parallel demands of her male subordinate.

This section reviews current case law and argues that so long as courts analyze sexual harassment in terms of present concepts of discrimination and do not see it as behavior that serves to keep women in their historical role as persons who can alter their circumstances only by trading on their sexuality, the courts will lack an adequate basis for resolving two important questions—the scope of conduct to be proscribed and the extent of employer liability. In particular, when courts lack an understanding of the discriminatory impact of sexual harassment on the work environment, there is a tendency to restrict unduly the type of conduct they regard as prohibited and to impose narrow limits on employer liability. If, on the other hand, courts ultimately recognize the way sexual demands and allusions function to keep women in their place, they may well expect employers to remedy or even prevent such conduct, whether it comes from supervisors or co-workers.

1. *Commentary on Current Case Law*

Following a series of first-round defeats,[86] women alleging sexual harassment by their superiors appear to have established a cause of action for

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[86] The early case law of sexual harrassment is thoroughly discussed and critiqued in C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 57-99 (1979) [hereinafter cited as MACKINNON].

See Miller v. Bank of America, 418 F. Supp. 233 (N.D. Calif. 1976), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979); Tomkins v. PSE&G Co., 422 F. Supp. 553 (D. N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977); Barnes v. Train, 13 FEP CAS. 123 (D.D.C. 1974), *rev'd and remanded sub nom* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Corne v. Bausch & Lomb, 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded without reported decision*, 562 F.2d 55 (9th Cir. 1977). In failing to find Title VII violations presented by such circumstances, the reasoning of the district courts varied. In *Corne v. Bausch and Lomb*, the court focused primarily on the "personal" nature of the supervisor's behavior, stressing that the employer had nothing to gain from the supervisor's conduct. 390 F. Supp. at 163. The lower court in *Miller* likewise focused on the personal nature of the conduct, having found as a fact that the employer's policy prohibited such conduct. 418 F. Supp. at 235. By this focus, the two courts sidestepped the really pertinent question of whether a term of sexual compliance had in fact been imposed on the plaintiff's employment. In contrast, the district court opinions in *Barnes* and *Tomkins* recognized a condition had been imposed, but denied that the condition was imposed "because of sex." Thus the lower court decision in *Barnes* reasoned that the plaintiff "was discriminated not because she was a woman, but because she refused to engage in a sexual affair with her supervisor," 13

such claims under Title VII. Two courts of appeals have addressed the issue at length, recognizing that sexual demands linked to adverse employment consequences constitute violations of Title VII. No circuit has yet adopted a contrary view, and all lower court decisions holding otherwise have been reversed.[87]

The common factual thread presented by these cases is a demand for sexual relations by a male supervisor of a female subordinate who is then faced with the choice of compliance or adverse job consequences. The cases vary as to whether the supervisor explicitly couples the demand with the threat of adverse action or whether that link becomes explicit only upon later retaliatory action. It generally is not clear whether there are other subordinates—either male or female.

To establish a cause of action under Section 703(a)(1) of Title VII it is sufficient for a plaintiff to show that (1) a term or condition of employment had been imposed (2) because of sex or other prohibited class (3) by the employer.[88] Therefore, in holding that the allegations of sexual harassment before them made out a *prima facie* case of employment discrimination, the D.C. Circuit in *Barnes v. Costle,*[89] and the Third Circuit in *Tomkins v. Public Service Electric & Gas Company,*[90] necessarily found all three elements satisfied. Since clear-cut consequences for career development were alleged in both cases, however, neither court was called upon to define the contours of the

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FEP Cas. at 124. Similarly, the lower court finding in *Tomkins* that "sexual harassment and sexually motivated assault do not constitute sex discrimination under Title VII," was based on the view that "[although] sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse." 422 F. Supp. at 556.

An additional undercurrent running through the cases is a concern that permitting sexual harassment claims to be heard under Title VII would flood the federal courts with unwarranted claims. This concern was rejected by the Third Circuit in *Tomkins*, 568 F.2d at 1049.

[87] Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. PSE&G Co., 568 F.2d 1044 (3d Cir. 1977); *See also* Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Fisher v. Flynn, 19 FEP Cas. 932 (1st Cir. 1979); Garber v. Saxon Business Prod. Inc., 552 F.2d 1032 (4th Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).

[88] Section 703(a)(2) provides an alternative route to liability for sexual harassment, making it an unlawful employment practice for an employer:

> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2).

This provision is not discussed explicitly (1) because it has not been relied on in the sexual harassment cases decided to date; and (2) because as already noted, its requirement that the adverse action be "because of . . . sex . . ." would seem to build in the three concepts of discrimination now employed. Presumably the provision has not been relied on in harassment litigation because the term "to limit" has been assumed to have a meaning akin to "segregate" and "classify."

[89] 561 F.2d 983 (D.C. Cir. 1977).

[90] 568 F.2d 1044 (3d Cir. 1977).

phrase, "terms and conditions of employment," in the sexual harassment context. Similarly, neither opinion appears to have provided a definitive resolution of the question of vicarious liability—that is, when, in the harassment context, *the employer* may be deemed to have imposed the term or condition of employment. While their results seem eminently correct as far as they go, neither *Barnes* nor *Tomkins* reaches many instances of on-the-job harassment, as, for example, when the woman is subjected to obscene remarks, repeated inquiries into her sex life, subtle propositions, body brushes, or grabs.[91] Nor is it clear that either opinion reflects a sufficient understanding of the way sexual harassment interferes with equal employment opportunity to provide adequate guidance for dealing with the full range of factual permutations encountered by women workers. Both circuit opinions explicitly found discrimination "because of sex." Neither court, however, is entirely clear about the way in which its finding relates to concepts of discrimination utilized by the courts to date; that is, whether the conduct is discriminatory because it reflects class-based animus, unequal treatment or a neutral policy having a disparate impact.

In *Tomkins* the Third Circuit based its finding on the plaintiff's allegation that her gender was the "motivating factor" underlying her supervisor's demands.[92] In *Barnes*, the D.C. Circuit rooted its finding in the facts: "the vitiating sex factor . . . stemmed not from the fact that what appellant's superior demanded was sexual activity—which of itself is immaterial—but from the fact that he imposed upon her tenure in her then position a condition which he ostensibly would not have fastened upon a male employee."[93] Both courts understood that discrimination because of sex could occur where predicated in part, but not entirely on sex or where directed against some, though not all, women. Drawing on the legislative history of Title VII (which shows Congress explicitly rejected language prohibiting discrimination only where *solely* on the basis of sex) and the "sex-plus" cases (which indicate discrimination against a subset of the class of women is prohibited), the *Barnes* court stated that "it is enough that gender is a factor contributing to the discrimination in a substantial way."[94] Likewise, in *Tomkins* the Third Circuit averred that "it is only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff 'had been a man she would not have been treated in the same manner.' "[95] For both courts it was necessary only to show that but for the plaintiff's gender the solicitation would not have occurred.

The courts, however, were less clear as to how that but-for factor is to be proved. The *Tomkins* decision gives plaintiffs no clue whatsoever as to how to proceed. It simply leaves that question to the plaintiff at trial.[96] *Barnes* simi-

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[91] *See generally* SEXUAL SHAKEDOWN, *supra* note 85, and MACKINNON, *supra* note 86, at 25-55.

[92] Tomkins v. PSE&G Co., 568 F.2d 1044, 1047 (3d Cir. 1977).

[93] Barnes v. Costle, 561 F.2d 983, 989 n.49 (D.C. Cir. 1977).

[94] *Id.* at 990.

[95] Tomkins v. PSE&G Co., 568 F.2d 1044, 1047 n.4 (3d Cir. 1977) *citing* Skelton v. Balzano, 424 F. Supp. 1231, 1235 (D.D.C. 1976).

[96] *Id.* at 1047. *See also* MACKINNON, *supra* note 85, at 72.

larly leaves the question for trial.[97] Although the opinion has more to say on the subject, it is still highly ambiguous. On the one hand, the *Barnes* court relied on unequal treatment cases, which would suggest that in order to establish sex-predicated discrimination the plaintiff must show that at least one woman, and no men, has been subjected to the treatment at issue.[98] On the other hand, the court seemed to indicate that plaintiff's allegations—which did not explicitly contain such a claim—were sufficient to make out a *prima facie* case of discrimination. It was enough that the plaintiff "flatly claimed that but for her gender she would not have been importuned, and nothing to the contrary has as yet appeared, and there [was] no suggestion that appellant's allegedly amorous supervisor [was] other than heterosexual."[99] Thus "appellant's gender, just as much as her cooperation, was an indispensible factor in the job-retention condition of which she complains, absent a showing that the supervisor imposed a similar condition upon a male co-employee."[100] Presumably, the defendant could have rebutted this *prima facie* case by showing that the supervisor was a bisexual who had made similar advances to male subordinates. Whether a showing of bisexual tendencies on the part of the supervisor is adequate is left unresolved.[101]

The result of putting such questions of proof off to another day is to leave the lower courts with little guidance,[102] and to mask the real theory of discrimination that underlies these cases. The discrimination at issue in *Barnes* and *Tomkins* does not seem to depend directly on the presence or absence of similarly situated workers of the opposite sex.[103] Rather, one suspects that

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[97] 561 F.2d at 989 n.49.

[98] *Id.* at 991-92. This conclusion is drawn from the court's reading of General Elec. Co. v. Gilbert, 429 US. 125 (1976) and Phillips v. Martin Marietta, 400 U.S. 544 (1971) and is bolstered by its reference to Slack v. Havens, 7 FEP Cas. 885 (S.D. Cal. 1973), *aff'd* 522 F.2d 1091 (9th Cir. 1975), a case in which black women were required to perform heavy cleaning, an assignment not required of the one white woman. The *Barnes* court also states somewhat ambiguously that "the circumstance imparting high visibility to the role of gender in the affair is that no male employee was susceptible to such an approach by appellant's supervisor." 561 F.2d at 990.

[99] *Id.* at 989 n.49.

[100] *Id.* at 992.

[101] *See id.* at 989-90 n.49.

[102] Although one trial court has stated that to present a *prima facie* case of sexual harassment, a plaintiff must plead and prove *inter alia* that employees of the opposite sex were not affected in the same way by the supervisor's actions, *see* Heelen v. Johns-Manville, 451 F. Supp. 1382 (D. Colo. 1975) and Bundy v. Jackson, 19 EMPLOYMENT PRAC. GUIDE (CCH) EMPL. PRAC. DEC. ¶ 954 (D.D.C. 1979) other courts appear to assume such allegations and proofs are not necessary. *See, e.g.*, Stringer v. Commonwealth of Pennsylvania, 446 F. Supp. 704 (M.D. Pa. 1978); Munford v. James T. Barnes and Co., 441 F. Supp. 459 (E.D. Mich. 1977).

[103] The simple "but-for" formulation is reminiscent of Justice Marshall's rendering of the *McDonnell-Douglas* approach to pretext in the context of differential treatment of an individual member of a normally favored class:

> "pretext . . . does not mean . . . that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged pretextual deficiencies . . . no more is required to be shown than that race was a 'but-for' cause".

the *Barnes* court, at least, was concerned with the supervisor's mind set. This concern, however, is never fully articulated. It emerges instead in a discussion of employer liability for single instances of discrimination, once a finding of sex discrimination has been made. In this final section of its opinion, nominally addressed to the lower court's characterization of the case as "a controversy underpinned by the subtleties of an inharmonious personal relationship," the court analogizes the dispute to two cases where individual women were fired due to their relationship with a man of another race.[104] While the cases are cited for the proposition that discrimination may occur whether or not others of the same sex or race are subject to like treatment, they are in fact cases closely akin to instances where class-based hostility is displayed so that there is no need to identify similarly situated members of more favored classes who receive preferential treatment.[105]

Yet despite that hint of interest in analogies to instances of class-based animus, and despite the ambiguities surrounding the need for proof of similarly situated co-workers of the opposite sex, neither court fully explored the mechanism motivating the supervisor's adverse treatment of his female subordinate. This failure is perhaps inevitable once the court got caught up in the female supervisor, homosexual supervisor, and bisexual supervisor hypotheticals posed by the defendant and lower courts.[106] Both appellate courts accurately labelled such hypotheticals irrelevant to the cases at hand, and dealt with them through the "but-for" formulation already noted. Thus the hypothetical female supervisor who imposes sexual cooperation on her male subordinates would discriminate because of sex. The hypothetical homosexual supervisor who subjects his male subordinates, while leaving female subordinates alone, also would discriminate because of sex. It is only the hypothetical bisexual boss who makes sexual demands on subordinates of both sexes who would not discriminate on the basis of sex. The results of this approach, as well as the symmetry of the treatment, are appealing.[107] Indeed, it might seem somehow discriminatory not to apply the same analytic framework to both the real and the hypothetical cases.

McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976). There, however, it was clear that there was a similarly situated black co-worker who had been accused of stealing company property, but who unlike the plaintiffs, two white men, had not been discharged. *Id.* at 276.

[104] *See* Barnes v. Costle, 561 F.2d 983, 993-94 (D.C. Cir. 1977) *discussing* Vuyanich v. Republic Nat'l Bank of Dallas, 409 F. Supp. 1083 (N.D. Tex. 1976) and Whitney v. Greater New York Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975).

[105] As the *Barnes* court observed, although the charged filed with EEOC in the *Vuyanich* case was limited to race discrimination, the court noted the assumption that a black women married to a white man did not need her job was sexist as well as racist. *See* 561 F.2d at 993-994 n.78, and discussion in text surrounding notes 206-17 *infra*.

[106] *See* Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); Tomkins v. PSE&G Co., 568 F.2d 1044, 1047 (3d Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976).

[107] *But see* Note, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123, 127-28 (1977).

Nevertheless, the consequence of this symmetrical analysis is to ignore the asymmetrical social reality of the sexual harassment phenomenon, and thereby to underestimate its dimensions and its seriousness. To require an employee to engage in sexual acts in order to remain or progress in a job now seems sufficiently shocking to merit recognition as a violation of our fair employment laws, whether the requirement is imposed on women or on men. But because sexual allusions are so rarely directed by women at men, and because it is so difficult to envision them as interfering with a man's ability to function on the job, a legal analysis that insists on symmetry is unlikely to recognize the detrimental effect that such conduct, when directed by men at women, has on equal opportunity in employment. It is as a result of this symmetric analysis that courts have difficulty in recognizing that sexual harassment that permeates a woman's work environment, but that is not explicitly linked to employment status, violates Title VII.

While it is theoretically possible that both men and women may be subjected to sexual harassment, such conduct harms women workers in particular. The most obvious reason that the failure to offer redress for sexual harassment on the job impacts adversely on working women is that female employees are frequently in subordinate positions where they can be subjected to the sexual demands of male supervisors.[108] But even if supervisory and subordinate positions were allocated more equally, women workers would still be more vulnerable to sexual coercion by their bosses.[109] Males in our society have the exclusive social right to initiate sexual interaction with others. In the words of one well known sociologist, it is "relatively 'normal' for males to seek sexual access to females who are their subordinates."[110] Indeed, the assumption of male initiative is so prevalent that researchers of male-female sexual interaction uniformly divide their samples along gender lines, defining males as initiators or "passmakers," and females as the passive "pass receivers."[111] Standard texts on social etiquette similarly confirm what is common knowledge: that in the realm of purely social interaction, males are invariably the initiators and females are the recipients.[112] That males, rather than females, in our society have the social right to initiate sexual relationships ensures that women bear the brunt of job-related sexual advances.

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[108] National statistical patterns of employment indicate that in 1974 one out of seven men was in a managerial or administrative position compared with one out of twenty women holding such positions. More than one-third of women workers were employed in clerical positions. 1975 HANDBOOK ON WOMEN WORKERS, *supra* note 4, at 86.

[109] *See generally* SEXUAL SHAKEDOWN, *supra* note 85.

[110] L. TIGER, MEN IN GROUPS 271 (1970).

[111] *See, e.g.*, Rosenbaum, *Clarity of the Seduction Situation*, and Cavan, *Talking About Sex By Not Talking About Sex*, in THE SOCIAL PSYCHOLOGY OF SEX, (Wiseman, ed. 1976).

[112] *See, for example,* A. VANDERBILT, ETIQUETTE (1972). Compare, for example, the rules for men which deal with such things as asking women to dance, and the corresponding rules for women which concern such things as refusing a dance. *Id.* at 219, 319. *See also* the similar pattern evident with respect to teaching adolescent males to ask for dates and teaching adolescent females to accept or reject engagements gracefully. *Id.* at 703, 707.

As compared to its impact on male employees, sexual harassment leaves a disproportionately large number of female employees with a range of undesirable choices—acceding to the demands; being dismissed or leaving their employment before they can advance; or remaining in their jobs with decreased chances of future advancement. It therefore constitutes a barrier to employment and advancement that many women simply cannot overcome.[113] Women who comply may be faced with the same barrier if the sexual liaison between subordinate and supervisor later becomes untenable.[114] In short, sexual harassment is one more reason that many women do not advance beyond the inferior position they traditionally have held.

In addition to its disproportionate numerical impact, sexual harassment is likely to have a disproportionate emotional impact on women, which makes it particularly difficult for them to function effectively in the face of such treatment. The situation in which a person is asked to exchange sexual services for continued employment is uniquely disturbing to women. It is a reminder, a badge or incident of a servile status, which women are striving to leave behind.[115]

Women's dependent role has resulted from the interaction of a number of factors. Women have been denied educational and employment opportunities, and prohibited from participating in public life in other respects.[116]

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[113] *See generally* SEXUAL SHAKEDOWN, *supra* note 85.

[114] *Id.* at 185.

[115] For black women, presumptions of sexual availability are a reminder of the conditions of their servitude under slavery. In the words of Gerda Lerner, under slavery, in addition to their exploitation as unpaid workers, "[t]he sexual exploitation of black women by white men was so widespread as to be general. . . . Black women bred children to the master's profit and were sexually available to any white man who cared to use them. Mulattoes or especially beautiful black girls were sold at fancy prices as concubines." BLACK WOMEN IN WHITE AMERICA, A DOCUMENTARY HISTORY 44-45 (G. Lerner ed. 1973).

The condition of women under the institution of marriage has also presupposed their sexual availability to their husbands, see note 118 *infra*, and has otherwise been analogized to slavery. *See, e.g.*, Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. REV. 723, 742-44 (1935); Mill, *On the Subjection of Women*, ESSAYS ON SEXUAL EQUALITY 134-37 (A. Rossi ed. 1970) [hereinafter cited as MILL].

[116] *See generally* A. Sachs & J. Wilson, SEXISM AND THE LAW 69-132 (1978) [hereinafter cited as SEXISM AND THE LAW]. The degree and the nature of the exclusions has varied between different periods in the country's history; as the authors point out, for example, the legal position of women was much stronger during the early colonial period than it was two centuries later. *Id.* at 69. Nevertheless, even during the colonial period women were excluded from certain professions—such as attorney-at-law—and their participation in a wide variety of occupations frequently came about because they were substituting for dead or absent husbands. *Id.* at 71. *See also* Bloch, *Untangling the Roots of Modern Sex Roles: A Survey of Four Centuries of Change*, 4 SIGNS 237, 244-45, 252 (1978) [hereinafter cited as BLOCH], arguing that in sixteenth and seventeenth century America, women were divested of many traditional sources of authority, qualitative sexual distinctions were undermined, and men and women assumed more immediately hierarchical relationships in various areas of life while in the nineteenth century sexual distinctions again sharpened.

Regarding exclusion from educational opportunities specifically, *see* Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd by an evenly divided*

As a result, to achieve economic stability, they have had little choice but to marry. Access to the woman's body has formed an essential element in forming the marital relation. Yet once married, women lost significant rights—the right to manage or control property or earnings, the right to contract or conduct a business, and the right to establish a separate domicile.[117] Women thus have been able to sustain themselves at least in part by trading on their sexuality, but at the cost of their legal, economic and physical autonomy.[118]

The twentieth century has brought substantial changes in the legal status of women, and to some extent improved their socio-economic status. Women have access to the labor market to earn their own living, and theoretically no longer need to depend upon their sexuality for survival. Presumably, women are to receive recognition as persons in their own right, valued according to individual capability and achievement in their chosen realms of endeavor. But to make a woman's advancement on the job depend on her sexual acquiescence is to continue her status as man's property or plaything. And to suggest that a female employee is of worth only in terms of her gender is to say once again that she is not entitled to equal opportunity on the job.

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court, 430 U.S. 703 (1977) (exclusion of otherwise qualified female student from all male high school for the academically gifted not unconstitutional).

Regarding exclusion from the professions, see Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upholding a state supreme court's refusal to admit women to the practice of law).

Regarding exclusion of women from the trades, *see* Goesart v. Cleary, 335 U.S. 464 (1948) (upholding a state statute which prohibited women from bartending unless they were the wives or daughters of male bar owners). *See generally* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 19-53 (1975) [hereinafter cited as BABCOCK, FREEDMAN, NORTON & ROSS].

[117] Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 U. WIS. L. REV. 55, 56, 70-73 [hereinafter cited as POWERS]; *Sexism & the Law*, *supra* note 116; BLOCH, *supra* note 116 BABCOCK, FREEDMAN, NORTON & ROSS, *supra* note 116, at 562.

[118] See note 117 *supra*.

As of 1979, only three jurisdictions recognized spousal rape. *See* Comment, *The Common Law Does Not Support a Marital Exception for Forcible Rape*, 5 WOMEN'S RTS. L. REP. 1181 (1979). *See also* 65 AM. JUR. 2d *Rape* § 27 (1972); English, *The Husband Who Rapes His Wife*, 126 NEW L. J. 1223 (1976); Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1973).

The consequences of these various factors is well described by John Stuart Mill:

> When we put together three things—first, the natural attraction between opposite sexes; secondly, the wife's entire dependence on the husband, every privilege or pleasure she has being either his gift, or depending entirely on his will; and lastly, that the principal object of human pursuit, consideration, and all objects of social ambition, can in general be sought or obtained by her only through him, it would be a miracle if the object of being attractive to men had not become the polar star of feminine education and formation of character. And, this great means of influence over the minds of women having been acquired, an instinct of selfishness made men to avail themselves of it to the utmost as a means of holding women in subjection, by representing to them meekness, submissiveness, and resignation of all individual will into the hands of a man, as an essential part of sexual attractiveness.

MILL, *supra* note 115, at 141-42.

That allusions to sexual availability have an especially pejorative meaning for women is also apparent from our language. An examination of epithets relating to females indicates that they are primarily references to women in solely sexual terms, i.e., as the objects of sexual desire.[119] Moreover, as a scholar of language has observed, this is not a gender-neutral phenomenon:

> Words indicating the station, relationship or occupation of men have remained untainted over the years. Those identifying women have repeatedly suffered the indignity of degeneration, many of them becoming sexually abusive. It is clearly not the women themselves who have coined and used these terms as epithets for each other. One sees today that it is men who describe women in sexual terms and insult them with sexual slurs, and the wealth of derogatory terms for women reveals something of their hostility .... [T]he largest category of words designating human in sexual terms are those for women—especially for loose women. I have located roughly a thousand words and phrases describing women in sexually derogatory ways. There is nothing approaching this multitude for describing men.[120]

It is apparent, then, that the making of sexual allusions as well as the requiring of sexual cooperation reflects stereotypic assumptions concerning male-female power relations and woman's proper place. So, for example, the supervisor's sexual demands embody his implict assumption that that is what his female subordinate is there for, and that to the extent she is unwilling to cooperate sexually, she is dispensable.

Similarly, sexual allusions, whether "friendly" or hostile, emphasize that the female is a body, not a person capable of working. The link between sexual demands and denial of equal employment opportunity is illustrated vividly by the experiences of women attempting to break into the constuction trades. Particularly where they are the lone female on the job, craft apprentices report a combination of sexual advances, allusions, teasing, jokes and crude comments. At the same time, they complain of minute scrutiny of their work and "chivalry" that denies them opportunities to participate in work assignments.[121] Variations on these patterns have been reported when women enter other male preserves.[122] Sexual references and demands, however, are also directed at women holding traditional jobs.[123]

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[119] *See* Schulz, *The Semantic Derogation of Women*, LANGUAGE AND SEX 67 (B. Thorne & N. Henley, ed. 1975) [hereinafter cited as SCHULZ]. *See also* R. Lakoff, LANGUAGE AND WOMAN'S PLACE 24, 36 (Paperback ed. 1975).

[120] SCHULZ, *supra* note 119, at 71-72.

[121] *See, e.g.*, Affidavits, *supra* note 71, at Exhibits A ¶ 15-16; B ¶ 17; and D ¶ 20.

[122] Examples of sexual harassment in non-traditional jobs are provided by a recent commentator:

> A woman who was transferred from the shoe department of a suburban branch of a major department store to a downtown store were few women had ever worked was subjected to a systematic campaign of physical and sexual assaults by her male co-workers in full view of the public. "On her

Obviously, there is a range of male on-the-job conduct which in varying degrees embodies such messages about woman's place. The more explicit the reference to a woman's sexual identity and the more explicit the demand for actual performance by the woman, the easier it is to see the minimization of her contribution as an individual worker. But it is clear that reference to sexuality—without explicit demands attached—is part of an arsenal of weapons that serves to exclude women from a male domain.

In terms of bodily privacy, there is, of course, a difference between requiring sexual compliance either to obtain, remain in, or progress in a job, and subjecting a worker to physical and verbal invitations and sexual allusions. But in terms of impact on equal employment opportunity, the two types of sexual harassment are closely related. Had the early court decisions permitting recovery for sexual harassment utilized a concept of discrimination that illuminated the stereotypic aspects of the prohibited behavior, these simple hiring and firing cases could have provided a basis for imposing liability for the behavior at issue in the more elusive work environment cases.

2. *Work Environment*

Recognizing that sexual advances—even those that stop short of actually coercing sexual cooperation—invoke woman's historically inferior position, her socialization as sex objects, and her inability to be seen as a capable worker, litigants and commentators have argued that sexual harassment is *per se* impermissible.[124] The argument is based on the statutory prohibition on discriminatory "conditions of employment,"[125] and draws on court and EEOC

> first day on the job, the assaults, which included hands up her skirt and on her breast, reached such proportions that a customer complained to the management and threatened to cancel her charge account." When the employee complained, "management told her there was nothing that could or would be done to help her. She quit the job rather than endure the insults."
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> Women, employed in a ship-building plant where yard jobs in skilled crafts, like welding and shipbuildings, had recently been sex-integrated, were daily made the victims of abusive and suggestive language, explicit offers of sex for money, and physical assaults. Refusing or resisting would sometimes result in oppressive work assignments and job disputes which ended in dismissals. The result was that where 150 women once held yard jobs, only 30 or 40 now remain.

Goodman, *Sexual Demands on the Job*, 4 CIV. LIB. REV. 55-56 (1978) [hereinafter cited as GOODMAN]. *See also* SEXUAL SHAKEDOWN, *supra* note 85, at 54-65.

[123] See GOODMAN, *supra* note 122, and SEXUAL SHAKEDOWN, *supra* note 85, at 90-124.

[124] *See, e.g.*, Appellant's Brief at 14-27, Tomkins v. Public Service Electric and Gas Co., 568 F.2d 1044 (3d Cir. 1976); Note, *Employment Discrimination—Sexual Harassment and Title VII-Female Employees' Claim Alleging Verbal and Physical Advances By A Male Supervisor Dismissed as Nonactionable—Corne v. Bausch & Lomb, Inc.*, 51 N.Y.U.L. REV. 148, 153-59 (1976) [hereinafter cited as *Sexual Harassment and Title VII*]; Comment, *Civil Rights: Sexual Advances by Male Supervisory Personnel as Actionable under Title VII*, 17 S.T.L. REV. 409 (1976). The argument is developed with some variations using slightly different terminology in MACKINNON, *supra* note 84, at 174-192.

[125] *See* Section 703(a)(1) codified at 42 U.S.C. § 2000e-2(a)(1). As previously indicated, an additional argument could be based on the language of § 703(a)(2) pro-

decisions directed at psychologically debilitating work environments. The principal authority for this argument is Judge Goldberg's opinion in *Rogers v. EEOC*,[126] a Fifth Circuit case involving the rights of an employee working for an optical company that segregated its patients on the basis of race. In finding such segregation unlawful, Judge Goldberg read the phrase "terms, conditions, or privileges of employment" to be "an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination."[127] Further support is derived from *Gray v. Greyhound Lines, East*,[128] which recognized the potential psychological impact on a black employee flowing from the improper limitation of black hiring, and held that such arbitrary treatment was actionable under Title VII.

It is clear, moreover, in the context of racial and national origin discrimination, that directing racial and ethnic slurs at employees can violate the fair employment laws. Without specifically referring to the concept of work environment, first agency decisions[129] and then court rulings[130] found de-

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hibiting employer practices which "limit" or otherwise adversely affect applicants' or employees' opportunities because of membership in a protected class. See note 88 *supra*.

[126] 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

[127] *Id.* at 238. As a recent note says:

> Technically, the only issue before the Rogers court was whether the EEOC should have been granted access to information on the employer's patient applications. Resolution of that issue, however, required a determination of whether the practice alleged—patient segregation—could indeed constitute a violation of Title VII. Judge Goldberg and Judge Godbold agreed that a violation had been alleged, but divided on the nature of that violation. Judge Goldberg found that the segregation of patients alone could create an impermissible condition of employment. Judge Godbold opted for the narrower alternative holding suggested by the EEOC: requiring the employee "to attend or to have contact with only segregated patients," was an act of discrimination directly against the employee.

Sexual Harassment and Title VII, *supra* note 124, at 154 n.29 (citations omitted). *See also* Johnson v. Shreveport Garment Co., 422 F. Supp. 526 (W.D. La. 1976) (maintenance of segregated restrooms constitutes an unlawful employment practice); Harrington v. Vandalia-Butler Bd. of Ed., 418 F. Supp. 603, 606 (S.D. Ohio 1976) (inferior work conditions and treatment of female physical education instructor).

[128] 545 F.2d 169, 176 (D.C. Cir. 1976). Technically, the issue before the court in *Gray* was one of standing.

[129] EEOC Decision, No. 71-1677, April 12, 1971 (ridicule of Polish employee by co-workers unlawful); EEOC Decision No. 71-720, Dec. 12, 1970 (foreman calling black employee "little black sambo" discriminatory); EEOC Decision No. 72-0779, Dec. 20, 1971 (supervisor called employee "nigger"); EEOC Decision, No. 72-0957, February 2, 1972 (racially derogatory remarks); EEOC Decision, No. 72-1561, April 12, 1971 (unlawful to require workers to work in an area covered with racially derogatory graffitti); Rattner v. Trans World Airlines, City of New York Commission on Human Rights, Decision No. 4135-J, September 11, 1973 (anti-semitic graffitti).

[130] Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio, 1976) (supervisor's barrage of verbal abuse using anti-semitic terms discriminatory); Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138 (E.D. Pa. 1977) (employer liable for harassment where supervisors conducted unusually close supervision, made comments concerning dress and used racially demeaning language). *See also* Johnson v. Lillie Rubin Affiliates, Inc.,

rogatory remarks and graffiti discriminatory. More recently the City of Buffalo was found liable under Title VII for the "working environment heavily charged with racial discrimination" faced by black firefighters and police officers as a result of racial slurs from fellow officers, police radio broadcasts, bulletin board displays, and the circulation of Ku Klux Klan cartoons.[131]

The courts, however, have been reluctant to recognize that sexual harassment may lead to a similarly charged work environment. As already noted, faced with allegations clearly linking the demand for sexual favors with employment status, neither the *Tomkins* court nor the *Barnes* court was required to address the work environment argument.[132] Indeed, the *Tomkins* court expressly declined to reach the question.[133] But subsequent decisions by and large have rejected sexual harassment claims in the absence of explicit employment ramifications.[134]

Apparently only one decision has recognized the debilitating effects of sexual allusions, as well as their role in maintaining a sex-segregated work force as a violation of Title VII. The case, *Kyriazi* v. *Western Electric Company*,[135] involved a successful class-action challenge to a wide range of hiring,

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5 EMPL. PRAC. GUIDE (CCH), EMPL. PRAC. DEC. ¶ 8542 (D. Tenn. 1973) (referring to black women by their first names while using "Miss" or "Mrs." for white women racially discriminatory); Murry v. American Standard, Inc., 373 F. Supp. 716 (E.D. La. 1973) (calling black employee "boy" discriminatory).

[131] United States v. City of Buffalo Fire and Police Depts., 457 F. Supp. 612, 635 (W.D.N.Y. 1978).

[132] In establishing the employment ramifications of the sexual demand in *Tomkins*, the Third Circuit pointed to the context of the advances—a lunch to discuss plaintiff's upcoming job evaluations and promotion possibilities—and her explicit allegation that the supervisor had stated that her continued success and advancement were dependent upon her agreeing to his sexual demands. Tomkins v. PSE&G Co., 568 F.2d 1044, 1047 (3d Cir. 1977). The *Barnes* court referred to plaintiff's allegations that her supervisor repeatedly solicited her sexual favors and implied her employment status would be enhanced by cooperation and ultimately relied on the plaintiff's "thesis that her supervisor retaliated against her by abolishing her job when she resisted his sexual advances." Barnes v. Costle, 561 F.2d 983, 985 (D.C. Cir. 1977).

[133] Tomkins v. PSE&G Co., 568 F.2d 1044, 1046 n.1 (1977).

[134] *See, e.g.*, Fisher v. Flynn, 19 FEP Cas. 933 (1st Cir. 1979) (insufficient nexus between romantic overtures by department head and termination); Cordes v. County of Yavapai, 17 FEP Cas. 1224 (D. Ariz. 1978) (refusal of prior sexual advance not tied to subsequent retaliatory termination); Neeley v. American Fidelity Assurance Co., 17 FEP Cas. 482 (W.D. Okla. 1978) (no Title VII violation where vice president's touching female employee and telling "dirty jokes" did not condition employment-related benefits on employee's acquiescence in vice-president's misbehavior). Smith v. Rust Engineer Co., 18 EMPL. PRAC. GUIDE (CCH) (N.D. Ala. 1978) (advance by co-worker lacking employment consequences not actionable under Title VII); Bundy v. Jackson, 19 EMP. PRAC. DEC. ¶ 9154 (D.D.C. 1979) (although plaintiff had been subject to advances by numerous supervisors, the court found no Title VII cause of action in absence of specific employment consequences). By contrast, newly promulgated EEOC guidelines do recognize work environment permeated by sexual harassment to be violative of Title VII. 45 Fed. Reg. 25025 (April 11, 1980). *Cf.* Corne v. Bausch & Lomb, 390 F. Supp. 161 (D. Ariz. 1975) *vac. and remanded on other grounds*, 562 F.2d 55 (9th Cir. 1977).

[135] 461 F. Supp. 894 (D.N.J. 1978).

promotion, training, and layoff practices.[136] Along with statistical and other evidence of massive systemic discrimination by Western Electric, the court reviewed the claims of the named plaintiff, an engineer who the court concluded had been underrated, underpaid, denied promotions, and terminated in violation of Title VII.[137] And though not establishing a Title VII violation in and of itself, a significant portion of the testimony regarding Kyriazi's individual claim concerned "teas[ing] and torment[ing]" by her co-workers in the form of speculations and "wagers concerning her virginity," and an obscene cartoon[138] designed to "humiliate [her] as a woman as part of an overall effort by them to make life generally unpleasant for her."[139]

Little sense can be made out of this assemblage of authority. Courts recognize that the work environment can be discriminatorily polluted by certain practices, but they insist that claims of sexual harassment must be tied to specific retaliatory consequences. Obviously the cases cannot be harmonized by a narrow reading of Title VII that would limit the meaning of impermissible "terms, conditions and privileges of employment" to those involving clear-cut ramifications for employment status. On the contrary, it would seem that the courts do accept the concept of psychological conditions of employment where they conceive of the practice being challenged as one that amounts to true discrimination. Thus recognizably hostile remarks—be they racial, ethnic, or, if the thrust of *Kyriazi* is developed, sexual—are impermissible, whether or not they are part of a larger pattern of discrimination.[140]

Practicing racial segregation—be it in patient services or restrooms—is likewise impermissible.[141] But what is significant about such practices is the

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[136] As certified the class consists of approximately 7,500 women i.e. all females who are or have been employed or sought employment at Western Electric's Kearny operation since June, 1971. (Personal communication with Esta Bigler of Vladeck & Elias, 1501 Broadway, New York, NY, attorneys for plaintiffs, June 29, 1979).

[137] 461 F. Supp. at 945.

[138] *Id.* at 934. This was the basis for finding a conspiracy to deprive her of her federal right to be free from sex-based employment discrimination in violation of 42 U.S.C. 1985(3). *But cf.* Great Am. Fed'l Savings & Loan Ass'n et al v. Navotny, 442 U.S. 366, 99 S. Ct. 2345 (1979) (since Title VII provides the exclusive federal remedy for sex discrimination in private employment plaintiff has no cause of action under § 1985(3)).

[139] Kyriazi v. Western Elec. Co., 461 F. Supp. 894, 935 (D.N.J. 1978).

[140] *Compare, for example*, the trial judge's reaction to the harassment in *Kyriazi* which from context is clearly hostile, 461 F. Supp. 894, 935, *with* the reaction of the same judge to the sexual advances at issue in *Tomkins*: "While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse." 442 F. Supp. 553, 556.

Interestingly, a psychiatrist who has reviewed a number of instances of sexual harassment has observed:

> [I]t often seemed that the male aggressor did not actually wish to have sexual relations, nor even an extended social contact, with his female target. Indeed, one often suspected that he chose his victim precisely because he knew she would never agree to his suggestions. His intention was merely to tease. The target, however, took him seriously and became upset. Such harassment has been called "little rape" by one author.

C. BRODSKY, THE HARASSED WORKER 27 (1976) [hereinafter cited as BRODSKY].

[141] Evoking the historical specter of Jim Crow, unequal treatment of this sort easily gives rise to an inference of intentional discrimination. See note 127 *supra*.

psychological debilitation that flows from the environment they create, not the class-based animus that prompts them.[142] Thus with an additional theory of discrimination which focuses on the consequences of stereotype-reinforcing practices for equal employment opportunity, instances of sexual harassment might also be perceived as truly discriminatory.[143]

Should the debilitating effects of sexual harassment on work environment be recognized as discriminatory, a question arises as to the quantum of harassment which should be deemed necessary to violate Title VII.[144] Two countervailing considerations come into play in answering that question. On the one hand, for understandable reasons, men may genuinely not know that their conduct is offensive and debilitating to women. On the other hand, women are extremely vulnerable, and to expect them to express their rejection of a man is often to expect them to invite retaliation.[145] In this respect, the analogy between sexual harassment and rape is particularly close:

> A victim who resists [rape] is more likely to be killed, but unless she fights back, it is not rape, because she cannot prove coercion. With sexual harassment, rejection proves that the advance is unwanted, but also is likely to call forth retaliation, thus forcing the victim to bring intensified injury upon herself in order to demonstrate she is injured at all.[146]

Given these competing pressures, and in the absence of an objective means of measuring the degree to which such harassment interferes with per-

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[142] The same psychiatrist has recently written of harassment by people: "Conscious or unconscious harassment . . . ultimately relates to the issue of control. Who has sufficient power to keep someone else in line?" BRODSKY, *supra* note 140, at 47.

[143] Such a theory would seem necessary to explain certain EEOC decisions. *See, e.g.*, 1968-1973 CCH EEOC DEC. ¶ 6324, at 4580 (1971) (practice of referring to women as "girls" violates Title VII); 1968-1973 CCH EEOC DEC. ¶ 6346 (1971); 1968-1973 CCH EEOC DEC. ¶ 6085 (1969) (racial or ethnic jokes violate Title VII). *Accord*, EEOC Decision No. 70-683, 2 FEP Cas. 606 (1970); EEOC Decision No. 71-909, 3 FEP Cas. 269 (1970); EEOC Decision No. 71-1442, 3 FEP Cas. 493 (1971); EEOC Decision No. 72-0649, 4 FEP Cas. 441 (1971).

Interestingly, however, the EEOC guidelines on sexual harassment describe the impermissible environment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

45 Fed. Reg. 25025 (April 11, 1980).

[144] *See* Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977) (ethnic slurs did not rise to level necessary to constitute violation of Title VII). This problem does not arise in the case where job status is explicitly conditioned on sexual compliance.

[145] MACKINNON, *supra* note 86, at 45-46.

[146] *Id.* at 46.

formance,[147] it seems fair to require as a general matter that the woman attempt to make known to the harasser that she finds his conduct offensive. In extreme cases, however, the harasser should not need to be advised that his conduct is unduly intrusive or humiliating. Included in this category would be physical advances, such as grabbing the woman's breasts or buttocks, putting hands under the women's clothes or attempting to undress her, or masturbating in front of her;[148] and verbal abuse, such as references to the size of the woman's breasts or the man's penis.[149] In determining whether the woman

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[147] The Working Women's Institute, 593 Park Avenue, New York, New York, an agency which counsels victims of sexual harassment anticipates undertaking a research project to determine whether such a measure is possible. Personal Communication, Susan Meyer, Executive Director, Aug. 13, 1979.

[148] For example, one woman quoted in SEXUAL SHAKEDOWN, *supra* note 85, at 84 describes an incident at a Christmas party which she attended because it was part of her job to supervise all social functions for the laboratory:

> At one point the man asked her to dance; she refused several times because of her past experiences and because she was managing the party. He insisted, however, and yanking her arm he pulled her forcibly onto the dance floor, where he then shoved his hands under her sweater and vest, pushing them up and exposing her back and rubbing her bare skin.

Another describes a job interview, and subsequent work environment:

> "In the first interview, Mr. S., who was fifty-four, sat in front of me; he was sitting at the end of the table handling his penis. I tried to pretend that nothing happened. He offered me the job but I turned it down."
> About two weeks later Genevieve still hadn't found a job so she checked to see if the job was still open. As it turned out, the man had hired another woman, although he had already fired her, and Genevieve got the job, but only after agreeing to a salary of $185; he had been paying $235. The sexual harassment began on the second day, when dictation involved her new boss sitting alongside her and rubbing his leg against hers. "I moved away, but his leg just kept coming over and over. I thought I'd fall off the chair." The following day the Executive Vice-President, who was forty-eight, played with himself as Genevieve delivered the mail. "I ran back to my desk and collapsed, but I said nothing as I couldn't figure out what prompted it." Genevieve eventually determined the politic way to handle the entire situation was to complain to her boss about the other man's behavior. "He answered me by saying the only reason any man would behave like that is because you're probably no good and have been through the gutter. Those are his exact words. I was so shocked the only thing I could think was that he knew I was single. Nothing changed; about a fortnight later he was standing across from me and he suddenly started playing with himself."

Id. at 101.

[149] *See, e.g.*, Fuller v. Williams, No. A 7703-04007 (Portland, Oregon) described in MACKINNON, *supra* note 86, at 43, 168-69. Other statements complained of include:

> "Did you just have sex with your husband? What was it like?" "Is that all you do is have sex with your husband?", "Do you sleep with your husband?", "Do you sleep naked with your husband?" pointing out that women were "better off in bed," meant "only for the bedroom or the kitchen," that plaintiff and other women employees were "only interested in sleeping with the male employees," that the former photofinishing "girl" "was a good lay. We screwed her down in the basement. We all had sex with her.", "Do you think your husband would let me take his pants off in

in fact had given the harasser sufficient notice that his actions were unwelcome, a court should be particularly sensitive to circumstances such as the presence of customers preventing the woman from making her reaction known.[150] Thus Title VII should prohibit acts of sexual harassment that the harasser knew or should have known were unwelcome.

3. *Employer Liability*

The question of the proper extent of employer liability for employee conduct is also crucially affected by the perception of what constitutes discrimination. Employer liability for employee conduct is considered fair and essential to effective anti-discrimination laws when the challenged conduct is recognized as presenting a real obstacle to equal employment opportunity. A black man fired by a bigoted foreman, for example, is not expected to seek redress from a well-intentioned plant manager, nor need he point to a company policy behind the supervisor's act. There is no general requirement that an employee exhaust internal remedies before initiating a Title VII complaint in order to implicate the employer. Yet such requirements have been imposed in sexual harassment cases, largely because existing concepts of discrimination shed so little light on the relation between sexual harassment and equal employment opportunity.

On its face, the question of employer liability is determined by statutory language. Title VII, for instance, makes it unlawful "for an employer" to do certain proscribed acts,[151] and defines "employer" to include with certain ex-

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front of my camera if I lined him up with a nude female model?", "Tell your husband I want to do nudes of him. I must photograph him," that plaintiff was unfit to perform her duties, that women, including plaintiff, were "not fit for the photography business," "incompetent," "unable to work under pressure without bursting into tears," "couldn't take it," "Often stayed home due to headaches," "can't be relied upon," "possess a lesser ability to photograph," "don't know which end of a camera is up," "get shows in galleries by sleeping with gallery directors," "We've never had a girl selling cameras here. It might be an interesting experiment." "We can't hire a woman who has a boyfriend or a husband and have them last any length of time because their partners become very jealous of all us good looking males."

Id.

[150] The formulation presented here substantially conforms to that suggested in the student comment on *Corne v. Bausch & Lomb*.

> To allow one incident to suffice would create a problem in the case of sexual advances because, while derogatory epithets are generally known to be unwelcome, prior to his first advance a supervisor may not realize that his attentions will be. Where sexual attentions take an extreme or coercive form, however, even one incident may be one too many. A single physical advance made in an offensive or humiliating manner may have serious psychological consequences—as may an isolated verbal advance, for example, if made in conjunction with knowledge of a request for promotion. For such incidents, Title VII should offer immediate protection. To hold that an isolated incident is proscribed by Title VII only if extreme or coercive seems a reasonable course, since few women would bring suit after only one unwelcome advance unless it could be thus characterized.

Sexual Harassment and Title VII, supra note 124, at 164 n.76.

[151] 42 U.S.C. § 2000e-2(a) (1970).

ceptions "any agent" of a person engaged in an industry affecting commerce having the requisite number of employees.[152] Personnel actions explicitly affecting job status, such as hiring, firing or promoting an employee may be based on the recommendations of a supervisor, but are ultimately taken by the employer. Other actions, such as providing a worker with less favorable assignments or working conditions, do not implicate the employer so conspicuously. Whether, in these different situations, the *employer* is discriminating against an individual with respect to terms, conditions, or privileges of *employment* or is limiting an employee or applicant in a way which would tend to deprive the individual of *employment* opportunities or is otherwise affecting the individual's status *as an employee* is inevitably a question of social policy.[153]

In resolving these questions of employer liability, two principles serve to organize the relevant policy considerations. On the one hand, antidiscrimination laws must be effective in achieving their end of equal employment opportunity. And on the other, they must be perceived as fair. These twin concerns underlie the general rule that employers are responsible for the discriminatory acts of their supervisory employees, whether or not the actions were known, approved by, or contrary to employer policy.[154] The concern for effectiveness was captured well in the words of one court: "little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action."[155] But such a rule is not just practical, it also seems fair, because the supervisor is, at least in theory, perceived to be someone whom the employer controls and someone whom the employer has chosen to promote. Moreover, vicarious liability seems equitable because the employer clearly benefits from being able to assign the power to make personnel decisions to the supervisory employee—though presumably not from the discrimination itself.[156]

Additionally, the costs in lost productivity and damage to persons that result from discrimination can be analogized to those flowing from the more standard type of industrial accident. Like the costs of industrial accidents, they

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[152] 42 U.S.C. § 2000e(b) (1970).

[153] While tort and agency concepts may help illuminate the policy choice to be made, the traditional law of tort and agency cannot be imported wholesale into the law of employment discrimination without significantly undercutting its effectiveness. So, for example, had common law fault concepts rather than later notions of strict liability been read into Title VII, *Griggs* and all the progress it represents would not have been possible. *See generally* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co., and the Concept of Discrimination*, 71 MICH. L. REV. 59, 67-95 (1972) [hereinafter cited as *Strangers in Paradise*].

[154] Anderson v. Methodist Evangelical Hosp., Inc., 464 F.2d 723, 725 (6th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348, 355-59 (5th Cir. 1972); Kober v. Westinghouse Electric Corp., 480 F.2d 240, 246 (3d Cir. 1973); Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522, 537 (W.D. Pa. 1973), *aff'd in part and vacated in part on other grounds* 541 F.2d 394 (3d Cir. 1976); Stewart v. General Motors Corp., 452 F.2d 445, 450 (7th Cir. 1976).

[155] Tidwell v. American Oil Co., 332 F. Supp. 424, 436 (D. Utah 1971).

[156] At times of course, employers may seek to benefit from discriminatory policies leading to sexual harassment, as when the employer requires a female employee to wear a scanty uniform.

may be reduced by encouraging the employer to introduce prophylactic rules, for the employer, if anyone, is in both instances in the best position to prevent the injury by taking care in selecting, training and establishing rules for its employees.[157] Like the costs of industrial accidents, the costs of discrimination also may be to be certain extent inevitable as we make our way from a society steeped in prejudice to the bias-free world we envision as ultimately possible.[158] Given our commitment to make that transition, it would seem essential to recognize that there are costs *en route*, and, to determine who is best able to bear these interim costs. There is little reason to believe that members of the historically disfavored classes should be the ones to carry this burden.[159]

The general rule imposing liability for discriminatory practices without a showing of involvment on the part of the upper echelons of management is not accepted uniformly in the area of sexual harassment. Even for those cases explicity involving employment status, as opposed to work environment, some courts appear hesitant to impose liability without a showing that the employer knew of and acquiesced in the demand for sexual acts. Of the circuit courts that have addressed the question,[160] two have indicated their willingness to follow the general rule in cases of harassment. Indeed, the *Barnes* majority

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[157] It is apparent that we do not assume there are innate limits on what responsible parties can achieve. For we are certainly willing to insist, even on pain of individual criminal liability, that those in a "position of authority[s] in business enterprises whose services and products affect the health and well-being of the public that supports them," both "seek out and remedy violations when they occur" and "implement measures that will insure that violations [of the pure food laws] will not occur. U.S. v. Park, 421 U.S. 658, 672 (1975). At least according to dissenting opinon of Justice Stewart, this is a duty which exceeds that imposed by the common law of negligence. *Id.* at 683. (Stewart, J., dissenting).

[158] The history of worker's compensation helps illuminate this point. At common law, the very limited duties of master toward servant combined with the formidable obstacles posed by the defenses to such duties resulted in the great majority of industrial accidents going uncompensated. Even more than an effort to foster safe working conditions, the shift to strict employer liability under worker's compensation legislation represents a significant change in social/economic policy. No longer would industrial development be encouraged by making the burden on employers as light as possible. Rather human injuries must now be recognized as a producer's cost of production. *See generally* W. PROSSER, LAW OF TORTS (4th ed. 1971) [hereinafter cited as PROSSER].

[159] Indeed this would seem to be the justification for requiring an employer to adopt narrowly tailored selection procedures under the *Griggs* rationale. Alternatives to tests having a disparate impact may be more costly, if ultimately more accurate. Certainly test validation and other methods of showing job relatedness have their costs. But these are costs we expect the employer to shoulder—and pass on—in the interests of equal employment opportunity. *But see* Beazer v. New York City Trans Auth., 438 U.S. 904 (1978).

[160] Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. PSE&G Co., 568 F.2d 1044 (3d Cir. 1977); Garber v. Saxon Business Products, Inc., 552 F.2d 1032 (4th Cir. 1977). Although faced with a question involving sexual harassment; the First Circuit has not reached this question. *See* Fisher v. Flynn, 19 FEP Cas. 932 (1st Cir. 1979).

went out of its way to make clear its view on this issue.[161] But the impact of the majority's opinion is somewhat blunted by the separate concurring opinion of Judge MacKinnon.[162] Judge MacKinnon would limit the employer's liability to managerial misconduct, such as knowingly ratifying the supervisor's conduct, misleading the employee regarding her complaint, or retaliating against her for complaining.[163]

More recently, in *Miller v. Bank of America*,[164] the Ninth Circuit confronted allegations by a black woman that she had been fired because she refused her supervisor's demand for "sexual favors from . . . a 'black chick.' "[165] Assuming, without deciding, that the discharge was on account of sex within the meaning of Section 703(a)(1),[166] the court held that the Bank could be found liable under the doctrine of *respondeat superior* in the instant case

> where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy.[167]

The *Miller* court reasoned that Title VII defined wrongs that are a type of tort, and that should "[t]he usual rule, that an employer is liable for the torts of its employees, acting in the course of their employment" not apply to such torts, "an enormous loophole" would be created in the statute.[168] Implicit in this holding is a finding on the allegations before it that the supervisor was acting within the scope of his employment. Not all judges share this view.[169] Faced with practically identical allegations, Judge MacKinnon wrote:

> The present case offers no suggestion that the sexual harassment was even arguably within the scope of employment and certainly it would not be so understood by any federal employee. The sexual harassment furthered no objective of the government agency, nor

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[161] Barnes v. Costle, 561 F.2d 983, 993. The court did, however, suggest that in keeping with the general rule, the employer may be relieved of responsibility where the supervisor's acts which contravened company policy were rectified on discovery. *Id.*

[162] *Id.* at 995-1001.

[163] *Id.* at 1001.

[164] 600 F.2d 211 (9th Cir. 1979).

[165] *Id.* at 212. The complaint also alleged discrimination on the basis of race in violation of 42 U.S.C. § 1981.

[166] 600 F.2d at 212 n.1.

[167] *Id.* at 213.

[168] *Id.*

[169] The *Miller* court cites both *Barnes* and *Tomkins* as supporting its view. *Id.* As discussed *infra*, this reliance on *Tomkins* would seem misplaced. Although the district court in *Tomkins* suggested *respondeat superior* would apply were sexual harassment discriminatory, it did not decide the scope of employment question. *See* Tomkins v. PSE&G Co., 422 F. Supp. 553, 556 n.1. *See also* Neeley v. American Fidelity Assurance Co. 17 FEP Cas. § 482 (W.D. Okla. 1978); Price v. Lawton Furniture Co., 16 EMP. PRAC. GUIDE (CCH), EMP. PRAC. DEC. ¶ 8342 (N.D. Ala. 1978); Bundy v. Jackson, 19 EMP. PRAC. GUIDE (CCH), EMP. PRAC. DEC. ¶ 9154 (D.D.C. 1979).

> was it part of the supervisor's actual or ostensible authority, nor was it even within the outermost boundaries of what could be perceived as his apparent authority.[170]

Different perceptions of what the wrong was may account for the difference in the two views. The *Miller* court, perhaps because it had assumed without extended consideration that the firing was discriminatory, apparently saw the "tort" as a wrongful discharge, indistinguishable from other discriminatory discharges. The supervisor's involvement in that clearly employment-related act justified employer liability.[171] Judge MacKinnon, on the other hand, failed to see the connection between sexual advances and employment opportunity, even when the opportunity was truncated upon rejection of the advance.[172]

Additionally, the *Miller* court, rejecting the bank's argument that the plaintiff's failure to utilize internal grievance mechanisms available under the bank's policies should preclude suit, "decline[d] to read an exhaustion of company remedies requirement into Title VII."[173] Here the court relied on cases rejecting analogous exhaustion requirements as not being among the preconditions to suit specified by Congress.[174]

The Third and Fourth Circuits were less venturesome. The Third Circuit, finding in the sexual harassment decisions to date a requirement that the term or condition of employment must be imposed "either directly or vicariously" in a discriminatory manner,[175] relied in *Tomkins* on allegations in the

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[170] Barnes v. Costle, 561 F.2d 983, 995 (D.C. Cir. 1977). See also Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975).

[171] Query whether this is properly termed vicarious liability since the firing is ultimately an act of the employer.

[172] Barnes v. Costle, 561 F.2d 983, 995-997 (D.C. Cir. 1977) (MacKinnon, J., concurring). Even assuming the supervisor was not acting within the scope of his employment, liability may arguably be imposed anyway. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958) imposing liablity on the master in situations where the master intended the conduct or its consequences; the master was negligent or reckless; the conduct violated a non-delegable duty of the master; or the servant purported to act on behalf of the master and there was reliance on apparent authority or the agency relation aided in accomplishing the tort. Arguably the duty not to discriminate is non-delegable and thus not excepted from employer liability. *See* Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974) (Title VIII; Civil Rights Act of 1968); United States v. Youritan Constr. Co., 370 F. Supp. 643, 649 (N.D. Cal. 1973), *aff'd in relevant part* 509 F.2d 623 (9th Cir. 1975) (same).

It may also be argued that the employer cannot evade liability since it was the agency relationship which enabled the employer to carry out the discriminatory act. *See, e.g.*, Bowman v. Home Life Insurance Company of America, 243 F.2d 331 (3d Cir. 1957). *But see* Barnes v. Costle, 561 F.2d 983, 995-96 (D.C. Cir. 1977) (MacKinnon, J., concurring).

[173] Miller v. Bank of America, 600 F.2d 211, 214 (9th Cir. 1979).

[174] *Id.* citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973) (EEOC finding of "reasonable cause" not a prerequiste to suit under Title VII); Smallwood v. National Can Co., 583 F.2d 419, 421 (9th Cir. 1978); Gibson v. Local 40, Supercargoes and Checkers, Etc., 543 F.2d 1259, 1266 n.14 (9th Cir. 1976); Oubichon v. North American Rockwell Corp., 482 F.2d 569, 572 (9th Cir. 1973) (employee need not exhaust union remedies as prerequisite to suit).

[175] Tomkins v. PSE&G Co., 568 F.2d 1044, 1048 (3d Cir. 1977).

complaint charging the company with actual or constructive knowledge of the supervisor's likely conduct.[175] The court also referred to the company's failure to take prompt and remedial action after acquiring such knowledge.[177] In view of the particular allegations before the court, and of the possibility of "constructive knowledge," however, this reference would not seem to amount to a requirement that the complaining employee exhaust internal grievance mechanisms, or even explicitly inform management of her supervisor's demands. Thus while employer knowledge of some sort appears necessary, the opinion actually leaves the contours of vicarious liability open to further definition. In *Garber* v. *Saxon Business Products, Inc.*, the Fourth Circuit, while not expressly addressing the issue in its brief opinion, appeared to condition liability on "an employer policy or acquiescence in a practice of compelling female employees to submit to the sexual advances of their male supervisors . . . ."[178]

Lower courts appear even more willing to require managerial involvement. For example, one district court has explicitly "decline[d] to follow the holding in *Barnes* that an employer is automatically and vicariously liable for all discriminatory acts of its agents or supervisors, [although it did] hold that an employer has an affirmative duty to investigate complaints of sexual harassment and deal appropriately with the offending personnel."[179] Another district court has stated flatly, "[s]exual advances by male employees toward female employees do not amount to sex discrimination by an employer unless the employer knows about the discriminatory conduct and either authorizes or acquiesces in it."[180]

There are two probable explanations for the special treatment accorded sexual harassment with respect to employer liability. First, despite their words, the courts fail truly to comprehend sexual harassment as discrimination. Second, they are steeped in a male perspective which presupposes that charges of male sexual misconduct are made easily by females, and are disproved with great difficulty by males. Special safeguards protecting males are, therefore, perceived to be in order.

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[175] *See* Complaint at ¶ 24, Tomkins v. PSE&G Co., 422 F. Supp. 553 (D.N.J. 1976) (Defendant PSE&G Co. and certain of its agents knew or should have known that [such] incidents would take place).

[177] *Id.* at ¶¶ 25-34.

[178] 552 F.2d 1032 (4th Cir. 1977). The one paragraph *per curiam* opinion seems to construe the complaint and exhibits before it so as to find the allegations the court considers the minimum sufficient to state a cause of action.

[179] Munford v. J.T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich., S.D. 1977).

[180] The position stated by the district court in *Miller* was even more extreme. No Title VII claim, the court said, is stated in the absence of specific factual allegations describing an employer policy which imposes or permits a consistent—as distinguished from isolated—conditioning of employment on acquiescence in sexual advances. Miller v. Bank of America, 418 F. Supp. 223 (N.D. Calif. 1976). *See also* Neeley v. American Fid. Assurance Co., 17 FEP Cas. 482 (W.D. Okla. 1978) *Cf.* Williams v. Saxbe, 413 F. Supp. 654, 66 (D.D.C. 1976) (cause of action exists where plaintiff's allegations amount to a policy or practice of imposing the condition).

Certainly there are differences between sexual harassment and other conduct considered discriminatory; and so long as the perception of employment barriers is tied to the three presently accepted concepts of discrimination, it is unlikely that the full impact of sexual harassment will be recognized. First, the search for an evil motive bogs down in the confusion among genuine sexual attraction,[181] rote responses to the presence of a non-club member,[182] and hostility, whether overt or not.[183] Second, a focus on unequal treatment raises the specter of male subordinates subjected to sexual advances from their female superiors, and then permits the harm to be measured in terms of the injury these hypothetical men would suffer. Thus measured, the harm is likely to be found trivial. Third, the neutral rule with disparate impact standard diverts attention from the individual action, and reinforces the illusion that fair employment laws address systemic discrimination only. What is needed is a concept of discrimination that helps to recognize the nature and degree of harm, rather than obscuring its fundamental qualities. With such a concept, the concomitant need to make fair employment legislation effective should lead to the broad notion of employer liability that applies generally in discrimination cases.

The notion that women are inclined to bring false or unfair charges against men for sexual misconduct is familiar from both criminal and tort law. In the criminal area, it is responsible for the special corroboration requirements in the law of rape.[184] In the tort field, it is associated closely with the statutory abolition of "heart balm" torts, such as seduction and alienation of affections.[185] And it is a recurrent theme in the early sexual harassment decisions.[186]

There is, of course, good reason to believe that the contrary is true, that is, that many legitimate complaints go unmade.[187] In addition to the repri-

[181] A growing body of feminist and non-feminist literature argues persuasively that sexual attraction plays little or no role in repeated, unreciprocated or coerced sexual advances. *See, e.g.*, M. AMIR, PATTERNS IN FORCIBLE RAPE 129-161 (1971). A. MEDEA & K. THOMPSON, AGAINST RAPE 78 29-36 (1974); C. HURSCH, THE TROUBLE WITH RAPE (1977).

[182] *See* KANTER, *supra* note 66.

[183] *Compare, e.g.*, Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) *and* King v. International Laborers, Local 818, 443 F.2d 273 (6th Cir. 1971).

[184] *See, e.g.*, People v. Rincon-Pineda, 14 Cal. 3d 867, 874, 123 Cal. Rptr. 119, 126, 538 P.2d 247, 254 (1975); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L. J. 1365 (1972); Lidwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 BROOKLYN L. REV. 378 (1970); Note, *Rape Instructions—Requiring Jury to Examine Rape Victim's Testimony with Caution is Inappropriate to Modern Trial Proceedings*, 16 SANTA CLARA L. REV. 691 (1976). *See generally* BABCOCK, FREEDMAN, NORTON AND ROSS, *supra* note 114, at 819-75 (1975).

A related problem in rape trials is the extent to which evidence as to the victim's prior sexual conduct is admissible. Similar issues arise in harassment cases. *See* Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978) (evidence as to plaintiffs sexual relations with other employees admitted, though ultimately termed irrelevant).

[185] *See* Prosser, *supra* note 158, at 887. MACKINNON, *supra* note 86, at 169-70.

[186] *See, e.g.*, Miller v. Bank of America, 418 F. Supp. 233, 236 (N.D. Cal. 1976); Tomkins v. PSE&G Co., 422 F. Supp. 553, 557 (D.N.J. 1976). *See generally* MACKINNON, *supra* note 86, at 95-99.

[187] *See* MACKINNON, *supra* note 86, at 95-97; SEXUAL SHAKEDOWN, *supra* note 85, at 22-27.

sals risked by all discrimination complainants, a woman charging sexual harassment inevitably risks the counter charge that she invited this, and perhaps other, incidents. She may be greeted with condescension, ridicule and disbelief, compounding the humiliation and intimidation of the original incident. Since many women have internalized the view that they are to blame, shame and guilt, as well as concern for the aggressor's honor, further inhibit reporting. Underreporting in the analogous case of rape is well known,[188] no doubt for similar reasons. But whether underreporting is likely or not, what is really at issue is the complainant's credibility. There would seem to be no reason, other than a sexist stereotype of women, why the issue of credibility should not be dealt with in the same manner as other issues of credibility—by the trier of fact. Here again, a new approach to discrimination may be helpful. To the extent that the court determines the conduct alleged amounts to discrimination, it uses a theory that sharpens its awareness of stereotypes, and it is less likely to impose unwarranted and sex-based obstacles to recovery.

There remains the question of whether, as between employer and sexual harassment complainant, it is fair to impose liability on the corporation for the individual acts of employees, which simply may reflect societal conditioning, rather than conscious hostility.[189] The argument for distinguishing conscious hostility from social conditioning for purposes of imposing vicarious liability must rest on one of two propositions. Either it is assumed that the means of controlling or eliminating the detrimental consequences of class-based animosity—as opposed to social conditioning—are available to the employer, or conscious hostility is considered sufficiently aberrant and offensive that it is somehow fair to single out these costs for the employer to bear.

Both propositions, of course, assume that it is possible to tell the difference between class-based animosity and social conditioning, which presumes different roles and spheres of action for members of different groups. The assumption is questionable—particularly since we often attribute prejudicial attitudes to environmental influences.[190] To the extent that it implies that hostile acts may be recognized more easily and therefore may be controlled more readily by the employer, it may build in a self-fulfilling prophecy. Certainly, the employer is in no better position to know whether antipathy to the complainant's class as opposed to a rejected advance was responsible for an

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[188] United States Department of Justice, FBI UNIFORM CRIME REPORTS, CRIME REPORTS, CRIME IN THE UNITED STATES 1977 at 15 (1978). The Uniform Crime Reports attribute this underreporting to the victim's fear of the assailant and sense of embarrassment over the incident. *Id.*

[189] While sexual attraction may play a role in the behavior, it is societal mores which authorize the male to act aggressively on the basis of that attraction, and which place the obligation on the female to control male behavior. Thus courts which attribute sexual harassment to "personal proclivity, peculiarity or mannerisms," or "personal urges" miss the mark. *See, e.g.*, Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975). For a thoughtful discussion of the meanings of the term "personal," see MACKINNON, *supra* note 86, at 83-90.

[190] ALLPORT, *supra* note 69, at 221-40.

employee's unfavorable work evaluations.[191] The notion that hostile acts, once recognized, are more easily prevented or corrected by the employer is also questionable. People of good will who act from social conditioning may well be more amenable to changing their ways than are those steeped in animosity once the detrimental consequences of those ways are pointed out.

The notion that it is somehow fair to impose vicarious liability only for those unusual and unsympathetic adverse acts prompted by evil motive seems to amount to no more than a belief that an employer cannot be expected to absorb all the costs of its enterprise.[192] But even if this notion were correct, the particular limitation is illogical. Again, selecting animosity as the basis for limiting liability must be premised on a view that such discrimination is in some way more serious. But with regard to the seriousness of an act the only sensible distinction is one between the adverse actions which employees can try to ignore and those which inevitably intrude on their job functioning. Not being hired, promoted, or favorably evaluated is difficult to work around—irrespective of the motivation which lies behind the adverse action. Minor insults, on the other hand, may be absorbed—though at some cost. While a distinction of this sort may justify some limitation on employer liability for work environment,[193] it cannot justify precluding employer liability for the non-hostile acts of supervisory employees which nevertheless have clear-cut consequences for job status.

Employer liability for sexual harassment that permeates the work environment, but that is not explicitly tied to job status, may present a different case; for in this area law of sexual harassment may not depart so drastically from the law regarding other types of harassment. Yet here, too, an expanded understanding of the barriers to equal opportunity in employment may lead to an expanded understanding of the proper bounds of employer liability.

Judge MacKinnon probably provides an accurate statement of the law when he describes a spectrum ranging from "a supervisor's persistent use of racial epithets" which "would undoubtedly lead to an employer's Title VII liability" to "a foreman's unprovoked and unforeseeable attack upon the black workers on a particular job" for which the employer would not be liable.[194] It

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[191] In his concurring opinion in *Barnes*, Judge MacKinnon rather inexplicably asserts the contrary. *See* Barnes v. Costle, 561 F.2d at 999 (D.C. Cir. 1977). In both cases, the employer will be in the position of attempting to determine whether the supervisor's judgment had a legitimate basis. As compared to the complaining employee, the employer is better able to answer this question primarily because it has access to information about similar judgments concerning other employees, and not because the employer has any real way of knowing in either case what transpired between the supervisor and complaining employee.

[192] In refuting the employer's claims in *Miller* that it should not be liable for the actions of its supervisors, the Ninth Circuit analogized the bank's responsibility to that of a taxi company which would be liable not only for the negligent driver but for the intentional harm caused by an enraged driver. Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979).

[193] The case law makes clear, however, that it does not entirely preclude such liability. See discussion in text surrounding notes 135-39 *supra*.

[194] Barnes v. Costle, 561 F.2d at 999 n.5 (D.C. Cir. 1977). (MacKinnon, J., concurring), *Compare* U.S. v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978); and

appears, in other words, that under current decisional law, the employer's duty of care does not extend beyond the duty to take corrective action after having notice of a persistent problem.[195] The employer's limited duty regarding harassment is highly reminiscent of the employer's limited duty to provide suitable fellow servants and promulgate and enforce work rules. It is also reminiscent of the fellow servant rule under which employees are deemed to have assumed the risk of negligence by their co-workers. Indeed, the duty to prevent harassment may be even more limited, since complaints as to prior acts may be the only way to show that the incident at issue was foreseeable.[196]

Given these parallels between the common law of employer liability and current interpretations of the anti-discrimination laws, developments in the area of employer liability for discrimination in the work environment may mirror the slow progress of decisional law in the area of industrial accidents prior to statutory change. The duty not to discriminate may come to be considered non-delegable,[197] or, based on the power they exert over the worker's life, certain employees may be considered "vice-principals" and thus become exempt from the fellow servant rule.[198] Similarly, certain situations—such as the introduction of a small number of female or minority workers into a traditionally male or white job—may come to be seen as posing a foreseeable risk of harassment, which the employer reasonably could be expected to take steps to prevent.[199]

As understanding grows concerning the phenomena of harassment and job stress in general, and class-based harassment in particular, however, it is possible that anti-discrimination statutes will be seen as a fitting analogue to workers' compensation laws. Two facets of harassment are particularly relevant to making this possibility of strict liability a reality. One is understanding the important relation sexual harassment bears to mental health, physical health, and worker productivity.[200] The other is recognizing the way management can use harassment as a low-cost way of conveying status: the privilege to harass is a benefit management can confer in lieu of salary or other perquisites without obvious expenditure.[201] Just as strict liability is now seen as an appropriate way of acknowledging and distributing the costs of

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Kyriazi v. Western Electric Co., 465 F. Supp. 1141 (D.N.J. 1979) *with* Howard v. National Cash Register Co., 388 F. Supp. 683 (S.D. Ohio, W.D. 1975), and Bell v. St. Regis Paper Co., 425 F. Supp. 1126 (N.D. Ohio, E.D. 1976).

[195] 561 F.2d at 1000.

[196] See note 195 *supra*.

[197] *But see* Judge MacKinnon's concurring opinion in Barnes v. Costle, 561 F.2d 983, 995-998, 1001 (D.C. Cir. 1977) (finding no liability under common law principles).

[198] *See* PROSSER, *supra* note 158, at 529.

[199] Employment and Training Administration, U.S. Department of Labor, *Women in Traditionally Male Jobs: The Experience of Ten Public Utility Companies* 76 (R&D Monograph No. 65) (1978). *See also* Brief *Amici Curiae* of the National Organization For Women and Working Women's Institute at 35-37, Continental Can Co. v. State of Minnesota, 49988, Minnesota Supreme Court.

[200] *See generally* BRODSKY, *supra* note 140.

[201] *Id.* at 6-7.

industrial accidents, so too strict liability ultimately may be viewed an appropriate way of acknowledging and distributing the costs of discrimination.

B. *Other Case Law*

The thrust of the foregoing sections is that recognizing conduct motivated by stereotypic role expectations as discriminatory behavior will assist in identifying and eliminating significant barriers to equal employment opportunities. Thus it should lead to different results in certain cases where the courts have failed to find discrimination under present concepts. For example, stewardesses in all female classifications who have been forced to quit under "no-marriage" or "quit-at-32" rules are unable to recover for lost seniority and other injuries under a differential treatment standard;[202] yet they have been adversely affected by stereotypic role requirements, *i.e.*, that to continue employment they must qualify as sexually available ornaments. Similarly, rules prohibiting stewardesses from wearing eyeglasses—based no doubt on the old saw that "men don't make passes at girls who wear glasses"—should be held violative of Title VII even where there are no male flight attendants.[203]

Indeed weight and grooming standards in all work settings are suspect. Although a full exploration of the questions raised by rules governing appearance is beyond the scope of this article, it is important to note the roots of such rules in stereotypic expectations of role appropriate behavior and the part they play in reinforcing such expectations. The question of "who will wear the pants"—in the house or the office—is of tremendous concern in our society, and thus an employer rule prohibiting females from wearing pantsuits in executive suites is not without significance. As one plaintiff has said, such a prohibition "significantly affects employment opportunities because it perpetuates 'a sexist, chauvinistic attitude in employment' " particularly where "the employer could offer no exuse whatsoever as to why his secretary could perform a job in a more efficient manner in a skirt rather than in a pantsuit, and could only speculate as to whether or not a skirt could be considered more business-like."[204] While a rule of this sort arguably repre-

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[202] Loper v. American Airlines, 18 FEP Cas. 1131, 1133 (5th Cir. 1978); EEOC v. Delta Air Lines Inc., 578 F.2d 115, 116 (5th Cir. 1978); Stroud v. Delta Air Lines, Inc., 544 F.2d 892, 894 (5th Cir. 1977). In *EEOC v. Delta*, the Fifth Circuit, in dismissing the EEOC's argument that the no-marriage requirement preserved the stereotypical image of the single stewardess which the EEOC argued would not have been forced upon a male if Delta employed male attendants, found that Delta's policy of excluding males "eliminates the possibility of establishing discrimination against females in the resulting all-female job category." EEOC v. Delta, 578 F.2d at 116.

[203] *Cf. Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976) (differential application of grooming standards cognizable as Title VII violation). This case would seem to preclude any argument for a no-eyeglass requirement based on safety since male flight attendants were allowed to wear eyeglasses under Northwest's rule. *Id.* at 454, n.170.

[204] *Lanigan v. Bartlett & Grain*, 19 FEP Cas. 1039, 1041 (W.D. Mo. 1979) (plaintiff failed to demonstrate "how defendant's dress code policies impermissibly restrict equal employment opportunities . . . her contention that policies perpetuate a stereotype is simply a matter of opinion."

sents a company decision to project a cerain image, not all images are permissible. A company presumably would not be permitted to post posters throughout its premises advertising itself as dedicated to the suppression of blacks, nor would it be able to require all Negro employees to wear blackface. The problem is thus one of recognizing how potent and how detrimental are the messages conveyed, a matter perhaps best handled on a case-by-case basis.[205] An *ad hoc* approach, however, will only succeed in eliminating sex based barriers to equal employment opportunity if judicial concepts of discriminatory behavior are expanded.

This additional concept of discrimination should also help explain several decisions that have identified individual instances of discriminatory conduct without fully articulating a satisfactory theoretical basis for doing so. Perhaps the paradigm case is the "uppity" black. The limited case law in this area suggests that adverse job actions directed at blacks because they are "uppity" are discriminatory whether or not black or white co-workers suffer similar adverse treatment. For example, the Supreme Court suggested in *McDonnell Douglas* v. *Green*[206] that a company's adverse reactions to civil rights activism by an employee are proof of discriminatory intent.[207] The Court did not explain why race-related activism could not be the basis of retaliation, while other types of activism presumably could be. The explanation cannot lie entirely in the protection against retaliation offered by § 704(a) of Title VII, for where the employee claims to oppose discriminatory practices without actually participating in some aspect of a Title VII proceeding the employee is protected at most against retaliation for activity in opposition to an employment practice reasonably believed to violate Title VII.[208] Generalized civil rights activism thus does not seem to qualify as such protected activity.

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[205] *See generally* Annot., 27 A.L.R. Fed. 274 (1976) and *compare with* Annot., 89 A.L.R. 3d 7 (1979). For a particularly insightful analysis of the problems presented by appearance rules, *see* MacKinnon, *supra* note 86, at Appendix A.

[206] 411 U.S. 792 (1973).

[207] The suggestion came in the Court's discussion of how pretextuality could be shown. The Supreme Court specifically stated that proof of prior adverse reactions would be relevant evidence of the pretextuality of the company's proffered justification for later firing the plaintiff. 411 U.S. at 804. On remand, the district court found that the plaintiff failed to show pretextuality in view of evidence that the employer had never reprimanded the plaintiff for his extensive civil rights activity prior to his lay-off and that the proportion of non-whites hired had increased substantially since the lay-off. Green v. McDonnell Douglas Corporation, 390 F. Supp. 501, 503 (E.D. Mo., E.D. 1975). In affirming, the circuit court dismissed the argument that the failure to discipline workers involved in non-racial strikes showed discrimination because the workers had bargained for a no-discipline clause 528 F.2d 1102, 1105 (8th Cir. 1976).

[208] Sias v. City of Demonstration Agency, 18 FEP Cas. 981, 982-83 (9th Cir. 1978); *Compare Sias, supra*, and Hearth v. Metropolitan Trans. Comm'n, 436 F. Supp. 685, 688-89 (D. Minn. 1977) (when an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII even if the employee turns out to be mistaken as to the facts) *with* Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969) (protection from retaliation under the participation clause of Title VII is totally independent of merit of the Title VII charge). *See also* B. Schlei & P. Grossman, Employment Discrimination Law 428-429 (1976) [hereinafter cited as Schlei & Grossman].

Speaking most directly to the problem of the "uppity black" is an EEOC decision holding, in conclusory terms, that it is unlawful for an employer to discharge a black worker because his manner was self-confident rather than submissive.[209] While a finding of discrimination in such cases could be explained by attributing the adverse actions to racial animus, in the traditional sense, such an explanation is far from satisfying. The wrong to be corrected is not an evil mental state, but the effect of reinforcing in both the employer and the employee the notion that "shuffling" is proper behavior for black people.[210]

Closely related to the "uppity black" cases are the "afro" hairstyles and facial hair cases. In one such case a court found that the firing of a black teacher who refused to remove his goatee was tainted with institutional racism, "the effects of which [were] manifested in an intolerance of ethnic diversity and racial pride."[211] Likewise, EEOC decisions have considered standards prohibiting such styles discriminatory on racial grounds because such styles are disproportionately prevalent among blacks, and because they are seen as an expression of "heritage, culture, and racial pride."[212] In a procedural context, the Seventh Circuit simply held analogously that an allegation that an employee was fired because she could not represent her employer "with [her] Afro" constituted a clear charge of racial discrimination. Stating that "[a] lay person's description of racial discrimination could hardly be more explicit,"[213] the court saw no need to explain why such a description was legally sufficient.

It might be possible to rationalize these cases in terms of evil motive, or, in the case of company rules, disparate impact. The operative factor, however, is the persecution of expressions of racial pride, whether or not hostility to

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[209] 1968-1973 CCH EEOC DEC. ¶ 6087 (1969). *See also* EEOC DEC. No. 71-1677, 3 FEP Cas. 1242 (April 12, 1971) (violation where supervisor called black female "trouble-maker" and one of those "civil righters"). *Cf.* Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966) *cert. denied sub nom,* Branch v. Johnson, 385 U.S. 1003 (1967) (renewal of black teacher's contract cannot constitutionally be conditioned on foregoing civil rights activities which do not interfere with teaching duties).

[210] That we are more likely to recognize racial hostility in the desire to keep blacks acting submissive, but not in the desire to keep women from wearing pants reflects the fact that the cultural assumptions which support stereotypic thought and behavior are more widely shared in regard to women than in regard to blacks.

[211] Braxton v. Board of Public Instruction of Duval County, Fla., 303 F. Supp. 958, 959-960 (M.D. Fla. 1969).

[212] EEOC DECISIONS No. 72-0979 (1972); CCH EEOC DECISIONS ¶ 6343; EEOC DECISIONS 72-1380 (1972), CCH EEOC DECISIONS ¶ 6364. *But see* Smith v. Delta Air Lines, Inc. 486 F.2d 512 (5th Cir. 1973) and Thomas v. Firestone Tire and Rubber Co. 392 F. Supp. 373 (N.D. Tex. 1975) upholding neutral rules applied equally.

[213] Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 168 (7th Cir.), *cert. denied*, 429 U.S. 986 (1976). Those decisions are particularly interesting in view of the Supreme Court's holding in Kelley v. Johnson, 425 U.S. 238 (1976) allowing police departments to regulate the hair style of police officers consistent with due process, and in view of the almost uniform lower court decisions upholding grooming standards against Title VII challenges in the absence of unequal enforcement. Perhaps the failure to articulate a satisfactory basis for the racial discrimination decisions has limited their impact in these other areas.

that pride consciously motivates the employer. The evil in the employment practice is the imposition on blacks of a certain image and mode of behavior.

A decision to pass over an assertive woman in favor of one who conforms more closely to the traditional female stereotype in allocating promotions similarly reinforces dysfunctional socialization. In the absence of a clearly articulated theory of employment discrimination addressed to the artificial barriers created by this role reinforcement, however, one court faced with this problem apparently concluded that it had to find the employer's conduct motivated by "an antipathy to women" before it could make a finding of sex discrimination.[214]

Just as this court strained to fit the assertive woman case into the evil motive formulation, other courts strain to deal with other stereotypes as instances of unequal treatment. Another district court, for example, utilized a hypothetical male in dealing with a terminated black woman's allegations "that her supervisor told her she probably didn't need a job anyway, because her husband was a Caucasian."[215] Noting that the statement logically could not be made to a male and thus the statement "that the dismissal might not [have] occur[red] had the Plaintiff been a Negro male," the court found that the statement "clearly smacks of sexual, as well as racial, discrimination."[216] While it is certainly important to recognize that males are not often dismissed for such reasons, it is more important to identify the harm done to females by permitting an adverse personnel action to be based on the stereotypical view that women, not men, are dependent on their spouses. A new concept of discrimination could serve the function of acknowledging explicitly that actions based on such stereotypical views of women reinforce the attitudinal barriers to equal employment that exist in the minds of both employer and employee.[217]

IV. Toward an Additional Concept of Discrimination

Previous sections of this article have argued that the goal of equal employment opportunity is continually hindered by personnel actions that reflect and encourage particular role expectations for women. They have also argued that the absence of a concept of discrimination specifically addressed to such actions inhibits the development of a coherent body of antidiscrimination law that would effectively promote this goal. This section proposes that the courts expand their understanding of Title VII by recognizing an additional mode or concept of discrimination. Under this concept, adverse employment actions that can be attributed to class membership because they are, at least in part, the product of stereotypic role expectations for that class

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[214] Skelton v. Balzano, 424 F. Supp. 1231 (D.D.C. 1976).

[215] Vuyanich v. Republic Nat'l Bank of Dallas, 409 F. Supp. 1083, 1089 (N.D. Tex. 1976) (EEOC's failure to appreciate sexual implications of this statement would not bar plaintiff from proceeding on basis of sex as well as race discrimination).

[216] *Id.*

[217] The *Vuyanich* court was clearly aware of the stereotype underlying the statement: "It is implicit in the statement that the male spouse is the more important economically. . . ." *Id.*

should be recognized as unlawful under Title VII even in the absence of a comparative standard.[218] This concept of discrimination—stereotyping as discrimination *per se*—is first explored through two examples. Then it is placed in the context of existing concepts of discrimination to show that it is a logical evolution from these concepts entirely consistent with the goals of current fair employment legislation. Finally, objections to the concept are considered.

A. *Two Illustrations*

Suppose a woman is denied a position involving overtime and weekend work. Under existing concepts of discrimination, to establish a violation of the fair employment laws she would have to show that the denial was due either to animosity directed against her as a woman, to explicitly differential treatment attributable to her sex, or to the application of neutral criteria having an unnecessary disproportionate impact on her sex. In the absence of an identifiable neutral criterion with disparate impact, she would most likely attempt to make out a *prima facie* case of discrimination by satisfying the four-pronged test set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*:[219] (1) that she is a member of a statutorily protected class; (2) that she was qualified; (3) that she was rejected; and (4) that following her rejection, the position remained open and the employer continued to seek applicants with her qualifications. Should she succeed, the burden will then shift to the employer to establish a legitimate non-discriminatory reason for the denial.[220]

Assume, further, that the employer explains his action by asserting that the applicant had young children, and, therefore, could not possibly have made the necessary time commitment. Here, a stereotypic view of woman's primary commitment to her family enters as a justification for the disparate treatment. Existing concepts of discrimination are of little help in determining whether this reason is in fact non-discriminatory. Certainly if the woman lost the job to a man who also had young children, she would be able to establish a case of explicit disparate treatment. If, however, a man or a woman without children[221] was hired in her stead, or if the job remained unfilled, she can point to no similarly situated person of the opposite sex who received better treatment. In such circumstances, she might try to show that there were men in other positions with children who the company had placed in sufficiently comparable positions to demonstrate that she had in fact been subjected to

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[218] 411 U.S. 792, 801. For an examination of the related argument that governmental actions reflecting sex-role stereotypes warrant an inference of illicit motive sufficient to establish a prima facie case of discrimination in the equal protection context, *see* Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55, 82-90 (1977).

[219] 411 U.S. 792 (1973).

[220] *Id.* at 802.

[221] This hypothetical addresses the situation where a position existed and was withdrawn or where it has not yet been filled. In both instances, a complainant may seek to show that the reason for her rejection was discriminatory without relying on the *McDonnell-Douglas* formulation.

differential treatment. This showing, however, may be extremely difficult to make, since the company can easily dispute the comparability of the positions. Moreover, if the company was highly sex-segregated, it is unlikely that there would be comparably situated men, even under a broad definition of comparably situated. Indeed, the availability of the defense that two positions do not involve comparable responsibilities gives the employer an incentive to increase the sex segregation of its workforce.

The woman might also try to establish that the reason given for her denial showed antipathy toward women or was a pretext designed to conceal such a discriminatory motive. But concern that child care responsibilities will interfere with the woman's performance is hardly likely to be considered a pretext. The concern also does not seem to manifest deliberate malevolence toward women. A benevolent attitude toward women might be closer to the mark, but benevolence denotes a conscious desire to help the individual, which probably is not present in the type of decision at issue here. The reason given for the decision seems to represent a genuinely-held, though stereotypically-based, belief that the woman will not be able to meet the job's requirements.

Finally, where the company has no explicit policy about working parents, the complainant may try to show that were some hypothetical man with young children to have applied for the job, he would not have been rejected. This "hypothetical man" approach has a certain plausibility in the sexual harassment case where it is possible to inquire into the sexual orientation of the pass-maker. In this context, however, it seems to amount to little more than an amalgam of the inquiry into how somewhat comparably situated men were treated, and whether the reason given bespeaks a stereotypical attitude toward women, which is, therefore, not likely to be directed at men.

The proposed theory concentrates directly on that latter inquiry. Pursuant to this theory, the complainant would make out a case of discrimination simply upon showing that the basis of her rejection was the stereotypic conception that a woman's primary responsibility is to her family. By focusing directly on the stereotypic nature of the rationale for the adverse decision, this approach, unlike the more traditional approaches, highlights the evils inherent in the unconscious invocation of the stereotype—the preclusion of the worker's own choice of proper behavior, and the reinforcement of her primary identity as mother in her own and her employer's eyes. In addition, the focus on the intervention of an impermissible attitudinal bias avoids some potentially troublesome aspects of the *McDonnell Douglas* test. Because the gravamen of her complaint is based on the intervention of a discriminatory factor which resulted in the failure to accord her application proper consideration,[222] the woman should not have to establish her qualifications for the position.[223] Similarly, it should not be necessary for her to show that the

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[222] *Cf.* Gillin v. Federal Paper Bd., Co., Inc., 479 F.2d 97 (2d Cir. 1973) (in differential treatment context, failure to consider female application constitutes Title VII violation even though male hired was better qualified).

[223] Dispute over qualifications is likely to be a central issue in individual discrimination cases. *See* Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L. J. 519, 521-36 (1978) [hereinafter cited as *Strangers No More*].

employer continued to seek applicants following her rejection,[224] or that a member of the opposite sex was ultimately selected, as would be required under the traditional disparate treatment approach.

The defense may respond by disputing that the reason it gave was in fact based on a stereotype about women. The court then would have to determine whether the given rationale indeed reflected stereotypic expectations.[225] If, however, the employer should respond that the decision was in fact a neutral rule, neither male nor female parents of young children were allowed such positions, it then would seem that the defendant could dispell the charge of discrimination in the same way that an employer charged with denying blacks special opportunities escapes liability by showing all workers were denied that opportunity.[226]

There is, however, the problem of assigning the burden of proving or disproving the existence of such a neutral policy.[227] Normally, the plaintiff, as the party seeking to change the status quo, bears the risk of non-persuasion, but this is by no means universally true, particularly in the discrimination context.[228] Ultimately, the allocation of particular burdens is a question of policy[229] that can significantly enhance or hinder the enforcement of a statute.[230] Here, it is apparent that requiring the defendant to carry the burden of persuasion with regard to the neutrality *vel non* of its seemingly stereotypical employment criteria will significantly further the remedial purposes of fair employment legislation.

The advantage of placing the burden of persuasion on the defendant is apparent in considering the difficulty a plaintiff would face in trying to sustain the burden of showing non-neutrality. Through discovery, she might obtain whatever records exist regarding the parental status of other applicants for the position sought and other jobs with similar responsibilities, as well as whatever documentation there is establishing an explicit company policy. But it is highly unlikely that many records will exist correlating age of children with specific job duties, particularly at the time an employee assumed the

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[224] Although a subsequent company reorganization or funding constraints may cause a position to be withdrawn, the complainant's rejection may nevertheless have been discriminatory.

[225] For a discussion of the court's competence to perform this function, see text accompanying notes 288-91 & 318-24 *infra*.

[226] *See, e.g.*, Morita v. Southern Cal. Permanente Medical Group, 541 F.2d 217, 218-20 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977) (failure to offer training to minority employee to enable him to receive a promotion, absent showing that whites were offered such training was held not to constitute disparate treatment.).

[227] Since Title VII cases do not involve jury trials, rules allocating functions between judge and jury are irrelevant. Thus burden of proof here refers to the burden of persuasion or risk of non-persuasion. *See generally* F. JAMES & G. HAZARD, CIVIL PROCEDURE, 240-53 (1977) [hereinafter cited as JAMES & HAZARD].

[228] In a disparate impact case the defendant must show business necessity. *Griggs*, 401 U.S. 424 U.S. 424, 431 (1971). *See generally Strangers No More*, *supra* note 223; *Strangers in Paradise*, *supra* note 153.

[229] JAMES, & HAZARD, *supra* note 227, at 240-53.

[230] *See* Pettit v. U.S., 488 F.2d 1026, 1033 (Ct. Cl. 1973).

duties.[231] Furthermore, so long as the burden of proof remains on the plaintiff, the defendant employer has an incentive to ensure that such records are not kept. Yet the recordkeeping process is in and of itself important in achieving compliance with the fair employment laws since it means that lower level decisionmakers must be aware of their own conduct, and that upper layers of management are able to undertake their own reviews. To help ensure adequate records are kept, then, it makes good sense to put the burden on the defendant employer.

A second important reason for placing the burden on the employer in this instance is the probability factor, that is, the extent to which a party's contention "departs from what would be expected in light of ordinary human experience."[232] Stereotypes frequently have a basis in fact. It is most often the mother, even if she is a working mother, who has primary responsibility for child care, and in light of that fact of life, it is to be expected that women, not men, are considered unavailable to meet exceptional demands on their time. Where an employer cannot show that such a consideration did not enter into an employment decision, it seems reasonable to assume that in fact it did. Certainly it is possible that there are employers that recognize the more active role some men now take in the home, and consider it a basis for denying jobs. But these particular employers, like others who extend stereotypic criteria of one kind or another to the opposite sex, are surely the unusual ones. In these circumstances it is not unfair to expect such employers to establish that they are the exception by, for example, pointing to their personnel manuals or other written documentation of their policies and practices.

Finally, if the defendant is to bear the burden of persuasion in showing that what on its face appeared to be a stereotypically-motivated individual adverse action was in fact the application of a neutral rule with neutral application, the nature of proof necessary to meet that burden must be established. Is it sufficient to produce any male who has been rejected for a responsible position on the basis of family commitments, or does the notion of similar situation require more precision? The issue is how similar the compared positions must be with respect to the need for the quality to which the challenged rule relates.[233] There appears to be no reason to use a standard of similar situation in the defensive context which differs from that currently in use in the affirmative unequal treatment cases. Therefore, so long as a large degree of similarity is required to sustain unequal treatment claims by women who have worked in female-only jobs, that same degree of similarity should also be necessary to make equal treatment defenses to claims of stereotyping *per se*. But since at times it will be in the plaintiff's interest to show comparable situation and at times it will be in the defendant's interest to make the same showing, adding the proposed concept of discrimination may create some pressure for a more accurate assessment of what work situations are truly comparable with regard to the relevant characteristic.

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[231] It is sometimes suggested that current liberal discovery rules diminish the importance of the access to information factor in allocating burdens. *See, e.g.*, McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 337 (2d ed. 1972).

[232] JAMES & HAZARD, *supra* note 227, at 252.

[233] SCHLEI & GROSSMAN, *supra* note 208, at 16 n.6.

Suppose, for a second example, that two women are in competition for a position involving public contact. One woman is considered too "aggressive," and the job is therefore given to the other, more "ladylike," one.[234] The rejected applicant might attempt to show she had been subjected to disparate standards by showing no male had ever been refused comparable employment on these grounds. This showing might well be difficult to make, and if made, might not be conclusive, since there is no guarantee that an aggressive man had ever applied or been employed. But under the theory of discrimination here presented, it is only necessary to show that women are expected to be demure, not pushy, and that the first applicant was turned down for her failure to conform to role expectations. As already noted, extensive psychological research is available to substantiate such a claim.[235] But, what if the employer claims the first woman was truly offensive? Can "aggressiveness" ever be a legitimate, nondiscriminatory reason for rejecting an applicant? In evaluating this claim, it is important to recall the original justification for focusing on stereotypic role expectations—to reward those who conform to stereotypes and punish those who do not so conform—reinforces the validity of the stereotypes for employer and worker, thereby defeating the goal of equal employment opportunity. For this reason, every effort must be made to avoid the articulation of stereotypic justifications for adverse actions. This can be achieved, while at the same time accommodating legitimate business needs, by requiring the employer to identify specific instances of unacceptable or undesirable behavior in order to successfully rebut a discrimination claim.

The employer has a legitimate business interest in a smooth-running, maximally productive operation. But in seeking to advance this interest by basing personnel decisions on the conclusory attribution of stereotypic traits, the employer may well be using means which are "fair in form, but discriminatory in operation."[236] Sex bias may enter into a decision to reject an applicant who is labelled "aggressive," for example, in two closely related ways. First, the term "aggressive" may refer to conduct that is acceptable in men, but not in women. As used in common parlance,[237] "aggression" refers to a variety of behaviors, only some of which are recognizable as detrimental to a business operation. Thus it might be acceptable in terms of business needs to reject a woman because she is aggressive in the sense that she injures others, but to reject her because she is too energetic, bold or enterprising, hardly appears justifiable in terms of business needs.[238] Indeed, rejection on

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[234] The example is drawn from Skelton v. Balzano, 424 F. Supp. 1231 (D.D.C. 1976). It is not clear how often this fact pattern will occur in practice. A recent simulation study by Florence Denmark suggests that abrasiveness even in women, is valued in college teachers since it might make for exciting teaching. Denmark, The Outspoken Woman: Can She Win, (unpublished paper presented at the New York Academy of Sciences, 1979) [hereinafter cited as DENMARK].

[235] See text accompanying notes 58-60 *supra*.

[236] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[237] As used by psychologists, the term has a far narrower meaning involving the intent to harm others. *See, e.g.*, E. MACCOBY & C. JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES 227 (Paperback ed. 1978).

[238] Webster's Collegiate Dictionary gives two senses of the word "aggressive," one related to behavior tending to dominate or master, attack or injure, and the other

these latter grounds is more likely to reflect a view that the applicant's behavior was inappropriate for her sex. Second, the degree to which the applicant is perceived to possess undesirable traits is likely to be affected by her sex. If a woman performs certain acts, she may be taken as far more aggressive than a man performing the same acts.[239]

The sex bias inherent in subjective judgments of this kind is, however, reduced when the employer is required to specify the actual behavior found offensive and the way in which it would hinder the business operation. Such specificity avoids confusion over the type of behavior in issue. Whether the applicant was considered too hostile or too enterprising will become clear in context. Specificity also helps reduce, if not eliminate, the problem of perceptual bias,[240] for it at least allows a rejected applicant to contest the employer's version of an incident and the appropriateness of any judgments based on it. Thus, for example, an employer concerned that the applicant's behavior will interfere with the ability of her co-workers to perform or that it will cause customers to go elsewhere, should identify a reasonable basis for such concerns in the applicant's prior work history, conduct during the application process, or other relevant experience. While employers are unlikely to record their observations of potential employees with the precision of a trained observer, and it is even more unlikely that courts will insist that they do so, it does not seem too burdensome to ask the employer to specify particular incidents as a basis for its judgment. Then, perhaps with the help of expert witnesses, it should be possible to examine these incidents, first, to determine whether they in fact occurred, and second, to ascertain whether they can be fairly characterized as interfering with the needs of the employer's business.[241]

"marked by driving forceful energy." WEBSTER'S NEW COLLEGIATE DICTIONARY 23 (1974) while THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE at 25 (1969) defines it as "1. Inclined to move or act in a hostile fashion. 2. Assertive, bold enterprising."

[239] *See* DENMARK, *supra* note 234. Denmark's study not only supports the view that being outspoken is perceived as a male trait and being conciliatory is perceived as a female trait, but it also confirms the general tendency for women to be rated less favorably than their male counterparts: "When [a woman] displays *socially* desirable feminine traits, she may be perceived as having less of them than a man who displays such traits. When she displays stereotypical masculine traits, she is rated as having more of the undesirable ones than a man who displays them." *Id.* at 19-20. Denmark's study also suggests that the sex of the rater may influence the influence the judgment, with women scoring other women much more harshly for behavior considered inappropriate to the female role. This latter point is relevant in the employment context only when women are in positions which involve the authority to rate other woman. See also text accompanying notes 43 & 52, *supra*.

[240] Perhaps the only way to eliminate such bias entirely is by using a sex-blind evaluation system which is usually impossible.

[241] In recent years, certain psychologists have put particular emphasis on distinguishing aggressive behavior, which in negatively valued, from assertive behavior, which is positively valued. *See, e.g.*, R. ALBERTI & M. EMMONS, YOUR PERFECT RIGHTS 21-47 (1970). A. LANGE & P. JAKUBOWSKI, RESPONSIBLE ASSERTIVE BEHAVIOR 7-11 (1976). Assertion, it is said, involves "standing up for personal rights and expressing thoughts, feelings, and beliefs in *direct*, *honest*, and *appropriate* ways which do not vio-

The principle that specificity is necessary to minimize bias in areas involving subjective judgments is certainly not new to equal opportunity law.[242] Subjective evaluations must be validated as job-related,[243] uniform,[244] and embodied in written instructions and guidelines.[245] To require an employer to root its adverse decision in detailed judgments regarding the rejected candidate's past functioning is an appropriate response to the recognition that "[to permit] upgrading that depends upon the employer's subjective opinion concerning various traits is . . . to subject the promotion to 'the intolerable occurrence of conscious or unconscious prejudice.' "[246]

B. *The Context*

This section argues that although the concept of stereotyping *per se* does not fit comfortably within any of the definitions recognized in discrimination law to date, it is entirely consistent with the understood goals of fair employment legislation and the dynamic of its interpretation. As already noted, civil rights legislation has been characterized by three successive concepts of discrimination.[247] Initially, discrimination was defined in terms of evil motive, which traditionally required a showing that the respondent was motivated by dislike or hatred of the group to which the complainant belonged. Subsequently, a second, comparative standard evolved under which it is necessary to show explicit unequal treatment. The Supreme Court recently has indi-

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late another person's rights," *id.* at 7, while aggression involves harm to others. *Id.* at 10; ALBERTI & EMMONS, *supra* at 24. In distinguishing the two types of behavior, psychologists look to both verbal and non-verbal components, which might include duration of looking at the other person, duration of speech, loudness and affect in speech. *See* LANGE & JAKUBOWSKI, *supra* at 10, *citing* Eisler, Miller & Hersen, *Components of Assertive Behavior*, 29 J. CLIN. PSYCH. 295 (1973). Aggressive behavior, for example, is said to include eye contact that tries to stare down the other person, a strident voice that does not fit the situation, sarcastic or condescending tone of voice, and parental body gestures such as finger pointing. *Id.* at 11.

[242] A useful summary of the pertinent decisions appears in Ste. Marie v. Eastern R.R. Ass'n., 458 F. Supp. 1147, 1162 (S.D. N.Y. 1978). *See also* SCHLEI & GROSSMAN, *supra* note 208, at 166-181.

[243] Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975), *vacated on other grounds*, 423 U.S. 809, *modified*, 526 F.2d 722 (8th Cir. 1975).

[244] Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 232 n.47 (5th Cir. 1974).

[245] James v. Stockham Valves and Fitting Co., 559 F.2d 310, 328 (5th Cir. 1977), *cert denied*, 434 U.S. 1034 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159, 1193 (5th Cir. 1976), *cert. denied*, 429 U.S. 861 (1976) *quoting* Rowe v. General Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972).

[246] Ste. Marie v. Eastern R.R. Ass'n., 458 F. Supp. 1147, 1162 (S.D. N.Y. 1978), *quoting* Robinson v. Union Carbide Corp., 538 F.2d 652, 662 (5th Cir. 1976), *modified*, 544 F.2d 1258 (5th Cir. 1977), *cert. denied*, 434 U.S. 822 (1977).

[247] This presentation is derived from *Strangers in Paradise*, *supra* note 153, at 67-69. Arguably, only two modes of discrimination have been recognized: one grounded in impermissible motive; the other in impermissible effect. Under this formulation, the first two concepts identified in the text are collapsed into one. For reasons discussed below, I believe Professor Blumrosen's tripartite classification is still viable.

cated that discriminatory motive is still involved in the unequal treatment case, but that the impermissible motive may be inferred once disparate treatment is shown.[248] It would seem nevertheless that there is a difference between the initial concept of evil motive and the latter concept of unequal treatment. In the first case, the discriminatory intent is animus or hostility, an intent to do harm; it has as its common law parallel civil cases involving malice or willful and wanton misconduct and the criminal requirement of *mens rea*.[249] At issue in the second case is an intent to treat a person differently because of that person's membership in a disfavored group;[250] here the mental state corresponds to negligence in tort.[251] Under the first concept, the individual is protected against deliberate denials of employment opportunity on the basis of class prejudice; under the second, the individual is protected against being subjected to unjustified differences in treatment.[252]

With the *Griggs* decision,[253] a third, neutrally-based, concept of discrimination was recognized. Under this formulation, the necessity of showing both intent and explicit differences in treatment between two compared groups is

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[248] In International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court stated:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Id. at 335-36 n.15.

[249] *See Strangers in Paradise*, *supra* note 153, at 67-69. Although the possibility of prejudice *for* as well as prejudice against is acknowledged in the literature, this original concern of the law was with negative prejudice which leads to economic harm. For a development of a definition of the term "prejudice," *see* ALLPORT, *supra* note 69, at 6-9, using as a preliminary definition of prejudice:

> an avertive or hostile attitude toward a person who belongs to that group . . . and is therefore presumed to have the objectionable qualities ascribed to that group. *Id.* at 7.

And finally as the definition:

> Ethnic prejudice is an antipathy based upon a faulty and inflexible generalization. It may be felt or expressed. It may be directed toward a group as a whole, or toward an individual because he is a member of that group. *Id.* at 9.

[250] *Cf.* Personnel Administrator of Mass. v. Feeney, 422 U.S. 256, 99 S. Ct. 2282 (1979):

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least, in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. (cites omitted).

Id. at 99 S. Ct. 2296.

[251] *Strangers in Paradise*, *supra* note 153, at 67-69.

[252] Under this view the Supreme Court's language in *Teamsters*, suggesting that not all cases of disparate treatment constitute discrimination, refers to cases where the inequality is justified. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

[253] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

eliminated; instead it is sufficient to show that purported neutral and equal treatment in fact adversely affects greater numbers of a protected group than of other groups.

A close look at these concepts reveals the difficulties that arise in accommodating fact patterns involving adverse actions based on stereotypes. Taking these concepts in reverse order, the *Griggs* concept of discrimination involving neutral practices with disparate impacts, would seem to be of little utility in this endeavor. The concept has been recognized as explosive precisely because of the broad, systemic attacks it permits.[254] Yet this very benefit makes its analysis unavailable in cases involving conduct directed at an individual. More importantly, where the essence of the conduct at issue is its grounding in stereotypic expectation, the disregard of motivation that distinguishes this third concept from other concepts of discrimination would seem to prevent its direct application to the cases under consideration.

The disparate or unequal treatment model seems far more promising. As already noted, the problem with this approach in many instances where women have been subjected to stereotypic expectations is the lack of a similarly situated male who received different, more favorable treatment. This lack of a comparative standard can be expected to occur most commonly in sex segregated occupations, and in companies inclined toward tokenism that pit women against each other for limited openings; but it could arise in any employment situation. As already noted, a woman with children who loses a position requiring overtime or travel to a woman without children or even to a man without children has no similarly situated male competitor. Yet an employment decision adverse to her may have been based on the role expectation that as a woman with domestic obligations, she was not free to work overtime or to travel.

Two ways of approaching this problem under the disparate treatment standard have already been sugggested. First, a complainant may attempt to expand the notion of comparable situation. While early decisions would support this approach at least implicitly,[255] more recent cases have cast some doubt on its viability.[256] The realities of the employment world may impose even more fundamental limits on this approach. Not only may some jobs genuinely be unique, but in highly sex-segregated establishments, the few male employees often occupy totally dissimilar positions from the majority of female employees. The waitress who is fired when she gets too old to be considered alluring, for instance, is hard put to compare her treatment to that

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[254] So, for example, *Griggs* has been applied to invalidate height and weight requirements, arrest and conviction records prohibitions and garnishments and other financial criteria. *See generally* SCHLEI & GROSSMAN, *supra* note 208, at 132-65, 254-55. *But see* New York City Transit Authority v. Beazer, U.S. (1978) (upholding policy of refusing to employ persons who use methodone).

[255] Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Lansdale v. Airline Pilots Ass'n., 430 F.2d 1341 (5th Cir. 1970); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

[256] Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir.), *cert. denied*, 434 U.S. 844 (1977); EEOC v. Delta Air Lines, Inc., 578 F.2d 115 (5th Cir. 1978).

accorded the restaurant manager. And as already noted, attempts to expand the concept of disparate treatment in this fashion give the employer a further incentive to segregate its workforce.

The second approach using a disparate treatment analysis involves the development of a hypothetical similarly-situated male. One would argue that had a male been employed in a similar position, he would not have been subjected to the same offensive treatment. This tack is available at least in theory under the British Sex Discrimination Act,[257] and has some support in Title VII case law. As noted above, in the sexual harassment case where the complainant-victim has no male co-workers it may suffice to show that the harassing supervisor was heterosexual, and therefore would not have bothered a male subordinate if there had been one.[258] Similarly, in *Skelton* v. *Balzano*[259] where the supervisor's preference for a non-assertive woman over an assertive woman was held to reflect an impermissible antipathy toward women, the court stated: "[i]t is enough to show . . . that if plaintiff had been a man she would not have been treated in the same manner."[260]

While it would seem that the courts are perfectly capable of employing such a "hypothetical person" construct,[261] the approach does not seem totally satisfactory. Except in the case of the heterosexual supervisor who harasses a female subordinate, but who would not bother a hypothetical male subordinate, it is difficult to imagine how a court would go about determining the hypothetical treatment that might be accorded this fictional person. More likely than not, a court would employ sex-based stereotypes about the hypothetical person. If this is so, it would seem far simpler to focus directly on the stereotypic treatment of the actual female and to acknowledge in straight-forward fashion that the statutory violation consists of grounding an adverse decision in stereotypic role expectations.

The fact patterns of cases turning on stereotypic expectations often seem closest to those traditionally decided under the original concept of discrimination as evil motivation. But in stereotypic expectation cases, the behavior at issue may not be a product of conscious animus. This fact points up the illogic in distinguishing between adverse consequences flowing from subjectively malevolent class-based motives, and adverse consequences flowing from subjectively benign motives. It seems no more acceptable, for example, for a woman to be denied a job in the construction trades because the contractor

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[257] Sex Discrimination Act, 1975, c. 65.

[258] Section 1[1] [a] of the Sex Discrimination Act, 1975, defines discrimination to include cases when a person is treated "less favorably than a person of the other sex is *or would be treated*." However, it is said to be difficult to prove a hypothetical claim in practice. *See* Rendel, *Legislating for Equal Pay and Opportunity for Women in Britain*, 3 SIGNS 897, 901 (1978).

[259] 424 F. Supp. 1231 (D.D.C. 1976).

[260] *Id.* at 1235.

[261] The device would seem to be precluded in cases where the job classification is sex-specific and there is therefore no possibility of a hypothetical man being hired. *See, e.g.*, Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir), *cert. denied*, 434 U.S. 844 (1977).

wants to save her from the physically taxing work involved than for her to be denied the same job because the contractor doesn't like women, or at least working with them. In both cases, the employer deliberately imposes an adverse result because of the applicant's gender.

The precise mental state underlying intentional acts is often hard to pinpoint, and for this reason alone it seems wrong to give legal significance to distinctions among class-based motivations.[262] But even assuming that an act based on a class-based attraction could be differentiated from one stemming from a class-based aversion, both categories nevertheless should be recognized as discriminatory, for the essence of discrimination is the substitution of an irrelevant and immutable class characteristic for individualized judgment.[263] This is particularly true with regard to women, who have traditionally been deprived of opportunites by virtue of paternalistic stereotyping that is too often perceived as benign.

The original notion of evil motive discrimination must be expanded in one other dimension to eliminate the obstacles to equal employment opportunity posed by stereotyping. Adverse employment decisions based on stereotypes interfere with two interests: (1) the individual's interest in not suffering economic harm from her failure to conform to stereotypical role expectations, and (2) society's interest in overcoming mutually reinforcing role expectations that promote occupational segregation. Prohibiting the economic harm deliberately imposed because of membership in a protected class is not sufficient to protect these interests. Apart from whether the motivation is benevolent or malevolent, it is rare that decision-makers will be conscious of their class bias. Decision-makers may perceive their actions if they acknowledge them at all, to be directed at a particular individual and based on a reaction to the person as an individual. A common example is the case of the assertive woman who is judged to be too abrasive. Alternatively, decision-makers may actually articulate a rationale, based on a stereotype but simply not recognize the nature of that rationale, as in the case of the mother who is not considered free to travel. Finally, decision-makers may not articulate any rationale at all, but the class-based motivation may still be apparent from the circumstances. This would be the case where a woman is fired when her only transgression was continually wearing pantsuits to work.

Given the detrimental impact of the conduct in each of these cases, there seems to be little reason to distinguish conscious class bias from unconscious class bias. Rather than insisting on the presence of a mental state akin to fault, it would seem more constructive to provide an incentive to identify and eliminate counter-productive class-based behavior without seeking to attribute

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[262] *See* ALLPORT, *supra* note 69, at 17-28.

[263] *See* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 243-44 (1971); [hereinafter cited as FISS]. According to Owen Fiss, equal treatment embodies two principles: (1) using (in his case) race as a criterion violates the principle that one should be judged by criteria over which one has some control; and (2) the merit principle, i.e., that one should be judged by a criterion which can predict productivity with some accuracy. *Id.* at 240-44. *See also* Brest, *Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6-12 (1976) [hereinafter cited as BREST].

blame. In this sense, our definition of individual discrimination should be informed by a more sophisticated understanding of the barriers to equal employment opportunity. Just as neutral rules having an unnecessary disparate impact are recognized as violative of Title VII without regard to the employer's intent, so too individual adverse actions attributed to class-membership should be recognized as violative irrespective of the employer's intent.[264]

In sum, to fit the case of stereotyping *per se*, the original concept of discrimination as adverse acts motivated by class-based animus must be expanded to include benevolent, as well as malevolent, acts, and unconscious, as well as conscious, acts. Once this is done, the question arises whether there is any benefit to be gained by explicitly differentiating this expanded version from the original concept of discrimination. It would seem on balance that separate recogniton of stereotyping *per se* as a fourth concept of discrimination is preferable, for it focuses attention on, and thereby increases awareness of an important mechanism by which equal employment opportunity is denied. If we become aware of such a mechanism, we are far more likely to take it seriously. Once the evocation of stereotypes is seen as an obstacle to qualified workers being given opportunities, and as an obstacle to their optimal performance, certain conduct that is now perceived as trivial (such as sexual harassment) may be understood as truly harmful. Additionally, many day-to-day interactions among employees may be recognized both as discriminatory and employment-related; discriminatory because they serve to confine traditionally disadvantaged groups to their stereotypic roles, and employment-related because they often result from and serve to maintain segregated workforces. For these reasons, an explicit recognition of this new concept of discrimination

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[264] The concept then combines disadvantageous consequence or effect with a broadly defined mental element. The proposed standard thus resembles but is different from an innovative test proposed for housing discrimination cases under § 1982. *See* Brown, Givelber & Subrin, *Treating Blacks as if They Were White: Problems of Definition and Proof in Section 1982 Cases*, 124 U. PA. L. REV. 1 (1975). That test contains two elements: (1) disadvantageous treatment of a non-white as compared to "treatment of similarly situated whites by the defendant or by others engaging in transactions similar to the defendant's" which is (2) "for a reason attributable to race." *Id.* at 18-19.

As used in the § 1982 test, reasons attributable to race include a personal reaction—consciously hostile or otherwise—based on race as well as a policy which has a greater adverse impact on blacks than whites because it is a product of, or reflects the long history of discrimination against non-whites, or because that history has left blacks more vulnerable than whites when there is no "business necessity" for such policies. *Id.* at 21. The § 1982 test is narrower than that proposed here in that it calls for a showing of comparative disadvantage, at least with respect to treatment of similarly situated whites by others. The test proposed here is designed to deal with cases where a convincing showing of this sort is unlikely due to the structure of the job market and/or the nature of the conduct complained of.

The proposed § 1982 test is also broader than the one proposed here in that it appears to reach the *Griggs* situation involving neutral policies with a disparate impact. To the extent that stereotypic expectations are determined by historical discrimination, e.g., the legal and social inability of women to make their way except as sexual partners, the notion here proposed includes the "historical product" as well as the "personal reaction" aspect of the § 1982 test.

may appropriately lead to a general extension of employer liability under anti-discrimination laws, akin to that discussed in the section on sexual harassment.

The recognition of this additional mode of discrimination is consistent with the statutory scheme of Title VII—both its language and its broad purpose, as well as the evolutionary process the concept of discrimination has undergone thus far. A glance at Title VII reveals that Congress avoided providing any definitive definition of discrimination.[265] Indeed it has been suggested that leaving the definition of discrimination to the evolutionary process of litigation was "[p]erhaps one of the wisest decisons made by Congress in 1964."[266] This transmission of responsibility to the judicial branch was achieved by simply making it unlawful "to discriminate" against members of the protected classes.[267] The statutory language is, however, significant. In omitting the term "discriminate" entirely from a second key operative provision, and instead focusing on the phrase "adverse effect," the statute does suggest an emphasis on consequences rather than on state of mind.[268]

The courts consequently have engaged in a dynamic process of statutory interpretation. Rather than a literal reading of statutory provisions,[269] the essence of this process seems to be a quest for a body of legal principles that can deal effectively with continuing occupational inequalities in a manner con-

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[265] The Congressional failure to define discrimination has been specifically noted by the Supreme Court. *See* General Electric Co. v. Gilbert, 429 U.S. 125, 133 (1976). However, the language in *Gilbert* suggesting that the concept of discrimination under Title VII is limited to that of the 14th Amendment is of dubious vitality in view of the Court's pre-*Gilbert* decision in Washington v. Davis, 426 U.S. 229 (1976) and post-*Gilbert* decisions in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) and Dothard v. Rawlinson, 433 U.S. 321 (1977).

[266] Jones, *The Development of the Law Under Title VII since 1965: Implications of the New Law*, 30 RUTG. L. REV. 1, 5 n.19 (1976).

[267] Section 703(a)(2) provides: "It shall be an unlawful employment practice for an employer—

> . . . (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000(e)-2(a)(2) (1970 ed., Supp. V 1975). As Professor Blumrosen points out, this provision was not part of the New York fair employment law on which Title VII was modeled, and it thus provides a new point of departure for statutory interpretation. *Strangers in Paradise*, *supra* note 153, at 74.

[268] It has been suggested by Justice Rehnquist in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977) that intent may be required in a § 703(a)(1) case, though not in a 703(a)(2) case. However both Justice Powell and Justice Stevens disputed this suggestion in their respective concurring opinions. *See* 434 U.S. at 152-53 n.6 (Powell J., concurring) and 434 U.S. at 154 n.4 (Stevens, J., concurring).

[269] *See, e.g.*, United Steel Workers of America v. Weber, 443 U.S. 193, (1979) (argument of white worker that all race-conscious affirmative action plans are prohibited by Title VII "rest[ing] upon a literal interpretation of §§ 703(a) and (d) . . . not without force;" nevertheless voluntary plan upheld in light of overriding statutory purpose to open opportunities for blacks in occupations which had traditionally been closed to them).

sistent with this country's values.[270] The starting point of this quest must be the articulation of the statute's goal. At present, this must be seen at a minimum as a commitment to equality of opportunity.[271] In the now famous words of the Supreme Court:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.[272]

As currently understood,[273] the statute is a guarantee of fair treatment for individuals; that is, a guarantee that individuals will be evaluated according to their own characteristics or merit in relation to relevant neutral criteria,[274] even if they belong to a class that, as a generality, does not satisfy the criteria.[275] This guarantee is tempered by a tolerance for private efforts to

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[270] A critique of these values as articulated by the Court is well beyond the scope of this article. For a critical analysis of their failure to meet the needs of blacks in the United States, *see* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) and of women in the United States, *see* Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55 (1979) [hereinafter cited as POWERS].

[271] Equality of opportunity must be distinguished from a more result-oriented goal of equality of achievement, *see* FISS, *supra* note 263, at 237-49, or of equality of participation, *see* POWERS, *supra* note 270, at 102-22. Such goals carry with them, in Fiss' phrase, "mediating principles" which differ from the anti-discrimination principles described here. *See* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107 (1976) proposing a "group disadvantaging" principle which abandons the focus on the relation between classifications and ends to be achieved in favor of a focus on the extent to which a practice disadvantaging blacks is justified; MACKINNON, *supra* note 86, proposing a similar approach for women which she terms "the inequalities approach;" and POWERS, *supra* note 270, proposing an analysis focusing on the tendency of practices to exclude women from full participation in society. For a discussion of the reasons for choosing between these goals, *see* these sources and BREST, *supra* note 263.

[272] Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

[273] See note 271 *supra*.

[274] The important question of when criteria are truly neutral is also beyond the scope of this article. Commentators are increasingly calling into question the neutrality of criteria which have been formulated by white men or on the basis of a white male standard. *See, e.g.*, POWERS, *supra* note 270, at 88-99; MACKINNON, *supra* note 86, at 126-127. The problem is graphically posed by the neutrality *vel non* of a height requirement for pilots which is necessary to ensure that pilots can see and reach the instruments in airplanes built to the specifications of the average white male. *See* Boyd v. Ozark Airlines, Inc., 13 FEP Cas. 529 (E.D. Mo. 1976) (airline ordered to lower height requirement from 5'7" to 5'5").

[275] *See* City of Los Angeles Dep't. of Water and Power v. Manhart, 435 U.S. 702 (1978):

> The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national ori-

overcome historic disadvantagement, so long as those efforts do not exceed as yet undefined bounds.[276]

As such, the statute's mandate is to identify and eliminate practices that interfere with the fair evaluation of individual capability, particularly as they serve to exclude disadvantaged groups from the full range of employment opportunities. And, although "disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII,"[277] the definition of discrimination by necessity has evolved beyond this concept.

Recognition of the proposed fourth concept of discrimination is a logical continuation of the evolutionary process by which civil rights law has defined discrimination to date. The process has had both a procedural and a substantive component. Procedurally, there has always been a concern that the legal test articulated be practicable. A major motivating factor behind the move away from the initial focus on the state-of-mind test, for example, was the morass of proof problems created by the test. The equal protection approach

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> gin." . . .The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

Id. at 708 (emphasis added by the Court).

[276] United Steelworkers of America v. Weber, 443 U.S. 193, 99 S. Ct. 2721, 2730 (1979). "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action . . . ." According to Justice Blackmun, the *Weber* majority would permit race-conscious affirmative action plans whenever the job category in question is "traditionally segregated." 99 S. Ct. 2721, 2732 (1979) (Blackmun, J. concurring). In upholding Kaiser's plan, the Court pointed to the fact that the plan is a temporary measure and that there is no absolute preference for blacks.

The extent to which such benign purposes will permit individually inaccurate class-based generalization is also not clear. Apparently, there is no need to show that the blacks now benefitting from the race-conscious program are those previously excluded from the occupations at issue. *Compare* Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (split decision invalidating University's special admissions program at Davis Campus Medical School which set aside 16 out of 100 places for ethnic minorities; opinion of four judges based on Title VI of the Civil Rights Act of 1964; one judge's opinion based on the Fourteenth Amendment; four judges voting to uphold the program on both grounds). In *Bakke*, Justice Powell (who did not sit in the *Weber* case) would seem to require total precision both as a statutory and constitutional matter when racial classifications are used to redress past discrimination, 438 U.S. at 302-03; he is far more tolerant of gender classifications based on individually inaccurate generalizations. 438 U.S. at 303. Arguably, such tolerance is more harmful in the case of gender classifications than in the case of racial classifications. The views of Justice Powell notwithstanding, the "romantic paternalism" which has characterized sex discrimination may make it harder to differentiate the benign from the harmful in the sex case, and may lead more readily to a perpetuation of common stereotypes about women. *See* Kahn v. Shevin, 416 U.S. 351 (1974) (Florida statute awarding limited property tax exemption to widows and the handicapped is constitutional as means of redressing past discrimination).

[277] International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

thus evolved to permit an inference of evil motive from a showing of unequal treatment. Similarly, this concern for a workable test has led to an easing of the requirements necessary to make out a *prima facie* case of discrimination, which shifts the burden of production to the defendants—who after all have control of the pertinent information—in both systemic and individual claims of discrimination.[278]

Throughout the evolutionary process, however, there has been a substantive counterpart to such procedural concerns. Substantively, the concern for effective enforcement has meant a shift from a preoccupation with state-of-mind to a focus on consequences. In adopting the disparate impact concept of discrimination, the *Griggs* Court responded favorably to the argument for an objective standard articulated by Cooper and Sobol in 1969:

> This shift away from a restrictive focus on the state of mind of the employer is essential to the effective enforcement of fair employment laws, not merely because specific intent is difficult to prove, but because there is frequently no discriminatory intent underlying the adoption of seniority and testing practices, or a wide variety of other objective and apparently neutral conditions to hire and promotion. These conditions are possibly the most important contemporary obstacles to the employment and promotion of qualified black workers.[279]

Hence, the Court found "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[280] By thus insisting on a strict demonstration of relevance for criterion shown to be obstacles to the protected class, the Court sought to cull out the effects of a history of societal discrimination without abandoning either the societal value in qualified workers or the individual value in fair individualized decision-making.

The proposed extension of the definition of discrimination likewise represents both a further step in the progression toward equal employment opportunity and a continuation of previous values. Like the previous steps, it helps deal with an important proof problem, the frequent lack of a comparative standard. But, perhaps more importantly, it advances the goal of effective enforcement by addressing another manifestation of societal discrimination, which forms a barrier to equal employment opportunity for historically disad-

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[278] Griggs v. Duke Power Co. 401 U.S. 424 (1971); McDonnell Douglas v. Green, 411 U.S. 792 (1973). *See Strangers in Paradise*, *supra* note 153; *Strangers No More*, *supra* note 223. *But see* Furnco Const. Co. v. Waters, 438 U.S. 567 (1978); Sweeney v. Board of Trustees of Keene State College, 99 S. Ct. 295 (1978).

[279] Cooper & Sobol, *Seniority Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1670 (1969). *See also* H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 42-47 (1977), discussing the inadequacies of FEP enforcement prior to Title VII.

[280] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

vantaged groups.[281] And even more clearly than in the disparate impact case, the essence of the concept is a direct continuation of the principles of equal opportunity and fair treatment. When an employer subjects a woman to adverse consequences for failing to conform to a dysfunctional stereotype, that woman is being judged according to criteria over which she has no control. She is, moreover, doomed to play a part in reinforcing the vitality of such criteria in her own eyes, the eyes of other women, and in the eyes of her employer and co-workers.[282] Decisions resulting from stereotypically based role expectations thus violate the merit principle, first, by diverting attention from consideration of merit, and second, by distorting the perception necessary to "merit" evaluations. At a time when our legal system appears to be insisting on a strict application of the merit principle,[283] it is incumbent on the system to develop concepts that will maximize the workability of that principle.

C. *Objections to the Theory*

Two objections may be posed to the additional concept of discrimination suggested here. First, it may be argued that the concept does not offer a standard capable of judicial application. Second, it may be claimed that the concept provides little additional protection to women since the plaintiffs will rarely be able to garner the proof necessary to make out a claim under this approach.

The first objection has been raised most notably by Justice (then Judge) Stevens in his dissenting opinion in *Sprogis v. United Airlines, Inc.*[284] as a matter of statutory interpretation. Judge Stevens there read the majority's invali-

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[281] Particularly in certain areas of employment, men may also be foreclosed from employment opportunities due to sex-based role expectations which result from a history of differential treatment. *See, e.g.*, Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559 (S.D. Fla. 1970) (being female was bfoq for employment as flight attendant), *rev'd*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

[282] The Court has already recognized in the unequal treatment context that "[p]ractices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals," and thus offend the basic policy of Title VII. Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 709 (1978). The self-perpetuating quality of statutory generalizations based on role-typing also appears to be a factor in their condemnation on equal protection grounds. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1975); Orr v. Orr, 99 S. Ct. 1102 (1979); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978); United Jewish Organizations v. Carey, 430 U.S. 144, 173-174 (1977) (Brennan J., concurring).

[283] *See* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978); Lige v. Town of Montclair, 72 N.J. 5 (1976).

[284] 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). It was primarily this opinion which caused NOW representatives to testify in opposition to Justice Steven's confirmation. *See Nomination of John Paul Stevens to Be a Justice of the Supreme Court: Hearings Before the Committee on the Judiciary United States Senate*, 94th Cong., 1st Sess. 78 (1975) (Testimony of Margaret Drachsler). Perhaps because of this exposure Justice Stevens' actual performance has shown far more understanding of the nature of sex discrimination than feminists anticipated. *See* Note, *The Emerging Constitutional Jurisprudence of Justice Stevens*, 46 U. CHI. L. REV. 157, 206-217 (1978).

dation of a no-marriage rule for stewardesses as turning not on the denial of "employment opportunities of one sex as opposed to the other," but rather on "whether the [challenged] rule is an irrational impediment derived from a stereotyped attitude toward females."[285] Arguing both from the language of the statute and its objectives, Judge Stevens rejected this test as untenable:

> I am unable . . . to find any guidelines in the language of § 703 (a)(1) for differentiating between irrational stereotypes and reasonable requirements. Even assuming *arguendo* that great deference should be accorded to the Equal Employment Opportunity Commission, I do not believe Congress intended to to entrust the Commission with authority to draw such lines. In the long run, I believe justice will be served and the objectives of the legislation best accomplished by applying the simple comparative standard suggested by the language of the statute. The benefits of an objective standard will be shared by those enforcing the statute and those faced with problems of compliance.[286]

The short answer to Judge Stevens's conviction that distinguishing the argument that the concept of impermissible does not provide a judicially manageable standard is that the courts themselves have perceived no difficulty in recognizing and rejecting stereotypical rationales when they appear within the frame-work of existing concepts of discrimination. Courts have consistently invalidated practices that perpetuate sex-based stereotypes when the practice overtly differentiates between the treatment of the two sexes.[287] In such

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[285] 444 F.2d at 1205. It is, however, highly questionable whether this was the test that the majority in fact utilized. It would appear that the majority saw the evil as differential treatment:

> Viewing the class of United's married employees, it is clear that United has contravened Section 703(a)(1) by applying one standard for men and one for women . . . . Concededly, the marital status rule applicable to stewardesses has been applied to no male employee, whatever his position. More pointedly, no male flight personnel, including male cabin flight attendants or stewards, have been subject to that condition of hiring or continued employment.

Id. at 1198.

Subsequent decisions would reinforce this reading of the majority's opinion. *See* Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir. 1977).

[286] Id. at 1205-1206.

[287] This process has occurred primarily in regard to questions of gender discrimination, probably because the "romantic paternalism," Frontiero v. Richardson, 411 U.S. 677, 684 (1973), which has characterized sex discrimination has permitted differential treatment to be rationalized in terms which would be far less acceptable politically and socially if explicitly articulated in the context of race discrimination. *See, e.g.*, City of Los Angeles Dep't. of Water and Power v. Manhart, 435 U.S. 702 (1978) invalidating under Title VII an employer requirement that its female employees make larger contributions to its pension fund than its male employees. The court bolstered its argument that the use of sex-based mortality tables is unfair to individual employees by pointing out that although actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, Title VII "could not reasonably be construed" to permit their use. *Id.* at 709.

cases, the stereotype is rejected when explicitly offered to justify the unequal treatment or when the unequal treatment is deemed to be the accidental by-product of stereotypic thinking.

In evaluating alleged denials of the constitutional right to equal protection, the Supreme Court has repeatedly struck down differential treatment schemes as "supported by no more substantial justification than 'archaic and overbroad' generalizations or 'old notions' such as 'assumptions as to dependency,' that are more consistent with 'the role-typing society has long imposed' than with contemporary reality."[288] Thus social welfare programs have been invalidated when based on the "sex stereotypes" that men are family breadwinners and women are not.[289] Fringe benefit programs connected with military service have been invalidated as embodying similar stereotypes.[290] And domestic relations legislation that is justified only by the notion that women will remain in the home likewise has been struck down.[291] The Court has, moreover, acknowledged that the " 'baggage of sexual stereotypes' that presumes the father has the 'primary responsibility to provide a home and its essentials' while the mother is the 'center of home and family life.' "[292]

Far from balking at identifying stereotypical motivation, at least in recent equal protection cases, the Court seems to proceed by first ascertaining whether the concededly legitimate objectives the government has proffered as justifications for its action did in fact motivate the challenged scheme.[293] Then, if it determines that the legitimate objectives advanced by the government were the actual motivating considerations or that they are not in fact served by the legislative scheme, the Court has little trouble in identifying the

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[288] Califano v. Goldfarb, 430 U.S. 199, 207 (1977) *quoting* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) and Stanton v. Stanton, 421 U.S. 7, 10 (1975).

[289] Califano v. Westcott, 443 U.S. 76, (1979) (invalidating Aid to Families with Dependent Children provision allowing assistance to families with unemployed fathers, but not unemployed mothers); Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidating Social Security Survivorship insurance provision granting benefits to all widows of covered workers but only to those widowers who were receiving over half their support from their wives when they died); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating Social Security provisions granting childcare benefits to certain widowed mothers, but denying them to widowed fathers).

[290] Frontiero v. Richardson, 411 U.S. 677 (1973).

[291] Orr v. Orr, 440 U.S. 268 (1979) (statute permitting award of alimony to females and not to males denied equal protection; allocation of dependent role in family to wife is unacceptable state purpose); Stanton v. Stanton, 421 U.S. 7 (1975) (different ages of majority for males and females denies equal protection).

[292] Califano v. Westcott, 443 U.S. 76, 89 (1979) (citations omitted).

[293] *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976). *See also* Califano v. Webster, 430 U.S. 313 (1977) upholding sex differentials in wage averaging scheme for purposes of calculating Social Security benefits. "The more favorable treatment of the female wage earner enacted here was not a result of 'archaic and overbroad generalizations' about women or of 'the role-typing society has long imposed' upon women . . . such as casual assumptions that women are 'the weaker sex' or are more likely to be child-rearers or dependents." *Id.* at 317 (citations omitted).

scheme's actual roots as stereotypical.[294] Indeed, Justice Stevens has come to recognize, at least in the constitutional context, impediments that flow from stereotyped attitudes toward females. Thus, once he is convinced that the legislative action has been prompted by a legitimate end—and it's in the care he takes in this aspect of the analysis which may distinguish him from others on the Court[295] —he will freely find that the discrimination at issue is "the accidental by-product of a traditional way of thinking about females,"[296] or results from "the perpetuation of a stereotyped attitude . . . about the two sexes."[297] Conversely, the Court appears able to agree on what is not a stereotypical reason for state action, although the members of the Court do dispute how important a non-stereotypical interest must be and whether that interest was in fact served in a particular case.[298] For example, the Supreme Court has distinguished as legitimate and non-stereotypic governmental interests in highway safety,[299] in administrative convenience and conservation of the fisc,[300] and in redressing past discrimination[301] from stereotypic expectations about women.

Reference to stereotypical role expectations has also appeared in Title VII decisions concerning sex discrimination, generally in the context of determining whether or not a rule restricting a particular job to one gender constitutes the type of *bona fide* occupational qualification (bfoq) permitted by

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[294] *See* Califano v. Westcott, 443 U.S. 76; Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

[295] At least when the nature of the classification is questionable, Justice Stevens appears particularly insistent that the legislature actually have meant a rule resulting in disparate treatment to have served the interest put forward by the government at argument. *See* Califano v. Goldfarb, 430 U.S. 199, 221 (1977); (Stevens, J. concurring); Craig v. Boren, 429 U.S. 190, 243 (1976) (Stevens, J., concurring); Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

[296] Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring) (rejecting stereotype of females as dependents).

[297] Craig v. Boren, 429 U.S. 190, 213 n.5 (Stevens, J., concurring) (rejecting stereotype that 18-21 year old females considered more mature than males in same age bracket).

[298] *See, e.g.*, separate opinions in Craig v. Boren, 429 U.S. 190 (1976) and Califano v. Webster, 430 U.S. 313 (1977). Difficulties in deriving and applying a constitutional standard of review need not concern us here, since they turn primarily on questions of allocating decision-making between those organs of government seen as democratic and those seen as non-democratic. To the extent that the Court utilizes a constitutional test which requires it to ascertain whether the non-stereotypic state end was in fact the legislature's real reason for utilizing the challenged classification, the constitutional inquiry bears a superficial resemblance to the inquiry into actual motivation behind an adverse employment decision which would be required under the test proposed here. That the first is a legal inquiry into legislative history and the other a factual inquiry into events would seem to undercut the significance of the resemblance. In any event, the feasibility of carrying out the second is discussed in the text accompanying notes 327-36, *infra*.

[299] *See* Craig v. Boren, 429 U.S. 190, 199-200 (1976).

[300] Frontiero v. Richardson, 411 U.S. 677 (1973).

[301] Califano v. Webster, 430 U.S. 313 (1977).

Section 703(e) of the Act.[302] Although there has been fairly extensive litigation under Section 703(e),[303] the Supreme Court has dealt with the bfoq question only twice. The first case, *Phillips v. Martin Marietta Corp.*,[304] took a broad view of the type of consideration that might be a bfoq. It concerned a policy of denying jobs to female applicants with preschool age children, while males with preschool age children were employed. Known primarily for its holding that such a rule does amount to sex-based discrimination inasmuch as it distinguishes between similarly-situated workers, the case also suggested that the policy might be justified as a bfoq if it could be shown statistically that conflicts between job and child care were generally more relevant to job performance for women than for men.[305] However, in returning to the question eight years later in *Dothard v. Rawlinson*,[306] the Supreme Court made clear it would follow a number of lower court rulings that had interpreted the bfoq exception far more narrowly.[307] Despite some variation in verbal formulations, the Court found the lower court holdings had a common core that turns on the notion of stereotyping: "The federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes."[308] Moreover, given EEOC's consistency in interpreting Section 703(e), the Court specifically approved and relied on the agency's guideline, which calls for a narrow in-

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[302] It is theoretically possible for courts to pass on stereotypes in the process of determining whether neutral employment rules having a disparate impact are justified by business necessity. For example, a school board rule denying employment to unwed parents will disqualify women disproportionately given the relative difficulties in detection. If the employer seeks to justify such a rule in terms of providing a "positive role model" for students, it may become apparent that the model is aimed at teaching female students not to get "caught" or to fill their traditional role as "good girls." It is likely, however, that an employer will define business necessity in neutral terms, and thus it is to be expected that stereotypical assumptions will rarely be before the courts in disparate impact cases, since both the rule and the justification will be stated neutrally. Rather, as noted, stereotypical assumptions have been discussed primarily in connection with claims that facially discriminatory employment policies constitute bfoq's within the meaning of Section 703(e). Since the bfoq exception to the prohibition on disparate treatment discrimination does not apply to racial classifications, it is understandable that there are few Title VII cases dealing with racial stereotypes.

Stereotypes may also appear in an employer's efforts to rebut *prima facie* showings of discrimination based on statistics. *See* Ste. Marie v. Eastern R.R. Ass'n., 458 F. Supp. 1147, 1163-66 (S.D. N.Y. 1978).

Discriminatory stereotyping has on occasion been identified in the racial context. For example, black women who, having been told "colored folks are hired to clean because they clean better," were required to do heavy cleaning when their white coworkers were not, were held to have shown discrimination under Title VII "whatever the motivation of the . . . defendant." Slack v. Havens, 7 FEP Cas. 885, 887, 890 (S.D. Cal. 1973), *aff'd*, 522 F.2d 1091 (9th Cir. 1975).

[303] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 333 n.17 (1977) and cases cited therein.

[304] 400 U.S. 542 (1971).

[305] *Id.* at 544.

[306] 433 U.S. 321 (1977).

[307] *Id.* at 334.

[308] *Id.* at 333.

terpretation of the bfoq exception and which indicates *inter alia* that the exception does not apply where the refusal to employ is based on stereotypical notions.[309]

There is, of course, dispute over whether having indentified a standard that barred stereotypes, the Court properly applied this standard in the *Dothard* case. At issue in the case was an Alabama rule barring females from "contact positions" in maximum-security male prisons. Noting the special "jungle atmosphere" in the Alabama prisons and the testimony of the plaintiff's own witnesses indicating that women could not necessarily work safely in the maximum security section,[310] the majority dismissed the contention that the exclusion of woman was based on stereotyped assumptions: [i]n this environment of violence and disorganization, it would be an oversimplification to characterize [the rule] as an exercise in 'romantic paternalism.' "[311]

Justice Marshall dissented on the grounds that the perception that the use of female guards posed an additional threat to prison security had no basis in fact, but rather reflected "precisely the type of generalized bias against women that the Court agrees Title VII was intended to outlaw."[312] The dissent cites persuasively to the record,[313] and is probably right on the merits. But its disagreement with the majority is over whether there is a non-stereotypical reason for a sex-exclusive hiring rule, that is, whether "the *essence* of the business operation would be undermined by not hiring (males) exclusively,"[314] not over the ability of courts to handle the concept of stereotypes. On the contrary, the case as a whole seems to reflect that the judiciary is capable of rejecting rules or statutes motivated by stereotypical assumptions.[315]

That the courts perceive no difficulty in attributing certain discrimination to stereotypical role expectations does not prove that they are equipped to do so. It still must be shown that the courts have guidelines for differentiating irrational stereotypes from reasonable requirements. Nevertheless, it is obviously significant that the Supreme Court in particular has found the notion of

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[309] *Id.* at 334 n.19, *citing* 29 C.F.R. § 1604.2(a).

[310] *Id.* at 336.

[311] *Id.* at 335. The court's holding would seem limited not only to prisons but more particularly to the Alabama prisons in view of its further notations that Alabama's prisons are not typical and that female guards can and have been used successfully in all-male penitentiaries elsewhere. *See id.* at 336 n.23.

[312] *Id.* at 343.

[313] *Id.* at 343-44, 344 n.2: "The witnesses claimed that women guards are not strict disciplinarians; that they are physically less capable of protecting themselves and subduing unruly inmates; that inmates take advantage of them as they did their mothers, while male guards are strong father figures who easily maintain discipline . . ."

[314] Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971) (emphasis in the original), *cited with apparent approval*, Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

[315] Indeed, given the law's role in establishing such cultural assumptions, the courts may feel obligated to assist in rooting out and eliminating stereotypes. *See* Johnson & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675 (1971); POWERS, *supra* note 270.

stereotypes to be a feasible concept; and even more significant that it is a concept the Court is willing to employ in the constitutional as well as the statutory sphere. For, after all, correcting erroneous constitutional interpretations is far more cumbersome and potentially debilitating to the judiciary than correcting errors in statutory construction.[316]

Such judicial willingness probably reflects a widespread consensus that class-based classifications have a settled and generally accepted content. There are two interrelated aspects to this content: the attribution of certain characteristics to group members, and the expectation that certain behavior and certain relations are appropriate for certain groups. The interrelation of these two aspects is apparent in the societal assignment of particular characteristics to males and females in order to enhance their performance in traditional sex roles.[317] A series of studies have in fact found a high degree of consensus about the differing characteristics of men and women, even across groups which differ in sex, age, religion, marital status and educational level.[318] Thus the characteristics valued in men are said to reflect a "competency cluster," entailing "competence, rationality and assertion," while female-valued traits comprise a "warmth and expressiveness" cluster, involving social skills and graces, and warmth and emotional support.[319] The stereotypically masculine person is aggressive, ambitious, analytical, assertive, athletic, competitive, dominant, forceful, individualistic, self-reliant, a strong personality, independent, a risk-taker, self-sufficient, and a leader.[320] The stereotypically feminine person is affectionate, cheerful, childlike, compassionate, eager to soothe hurt feelings, flatterable, gentle, gullible, loyal, sensitive to the needs of others, loves children, shy, soft-spoken, sympathetic, tender, understanding, warm, and yielding.[321]

Expectations as to behavior and relations may be summed up in women's cultural mandate "to expect men to be the providers of economic means and prestige."[322] Two traditional variations on the dependency role are available to fulfill this cultural mandate, and indeed Western attitudes about woman and sexuality have split woman in two: "The housewife and loving mother on

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[316] See the concluding lines of Justice Blackmun's separate opinion in *Weber*, voting with the majority to uphold a private race-conscious affirmative action plan under Title VII: "And if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses." United Steel Workers v. Weber, 443 U.S. 193, 216 (1979) (Blackmun, J., concurring).

[317] *See generally* O'LEARY, *supra* note 40, at 831.

[318] *See generally id.* at 813, summarizing the available literature and, in particular, Broverman, Vogel, Broverman, Clarkson & Rosencrantz, *Sex-Role Stereotypes: A Current Appraisal*, 28 J. SOC. ISSUES 59 (1972), listing 41 sex-role traits and behaviors. Given this research, it is likely that a court can call on expert witnesses to assist it in handling the questions that are likely to arise in litigation under the proposed theory.

[319] *Id.*

[320] Bem, *The Measurement of Psychological Androgeny*, 42 J. CONSULTING & CLINICAL PSYCH. 155 (1974).

[321] *Id.*

[322] COSER & ROKOFF, *supra* note 35, at 540.

the one hand; the exotic lover, temptress of man, on the other [hand]."[323] Of these two options, the first is rewarded by greater social approbation, although the latter may reap greater material rewards. To the extent that there is a third stereotype of woman, it would appear to be reserved for those who choose activities carrying them beyond traditional roles serving men and who thereby lose their femininity.[324]

In rejecting these traditional stereotypes, whether through the application of constitutional or statutory principles, the courts have tended to deal with trait attribution and behavioral expectation in slightly different ways. In the case of trait attribution, rather than permit decisions that are based on an assumption that all women have a particular characteristic, the courts generally will require that the individual in question be allowed to demonstrate that she does not have that characteristic. For example, rather than disqualifying all women as weak, a particular job applicant must be allowed to show she personally is strong enough.[325] With regard to rules embodying assumptions about appropriate behavior for women, the courts generally require that the individual be allowed to elect her own course. For example, it is impermissible to exclude all women from a particular job on the ground that it is too dangerous for them; rather the individual woman must be permitted to make that judgment for herself.[326] These refinements suggest once again that the courts are capable of identifying and manipulating stereotypes.

The major practical objection to developing a fourth concept of discrimination along the lines proposed here is simply that it is pointless since it will only rarely be possible to show that adverse employment decisions are based on stereotypical expectations. This is not necessarily to say that decisions are not in fact made this way, but rather to express skepticism that decision-makers will be so overtly sexist in justifying their actions.[327] Fairly recent evidence does exist to show that managers continue to base personnel decisions on stereotypical expectations, particularly where there is no similarly-

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[323] V.L. BULLOUGH & B. BULLOUGH, THE SUBORDINATE SEX 49 (1974). *See also* Clifton, McGrath & Wick, *Stereotypes of Women: A Single Category?*, 2 SEX ROLES 135 (1976) [hereinafter cited as CLIFTON, MCGRATH & WICK], who argue that despite the suggestions of sociologists that these two roles may be complementary, these roles may in fact be mutually exclusive. *Id.* at 144-45. *See also* FOX, *supra* note 63; Seidenberg, *The Myth of the "Evil" Female as Embodied in the Law*, 2 J. ENVT'L L. 218 (1971).

[324] CLIFTON, MCGRATH & WICK, *supra* note 323 at 145.

[325] Manhart v. City of Los Angeles, Dep't. of Water & Power, 553 F.2d 581, 586 (9th Cir. 1977), *aff'd*, 435 U.S. 702 (1978); Long v. Sapp, 502 F.2d 34, 40 (5th Cir. 1974); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225 (9th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969).

[326] *See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969); Bowe v. Colgate Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971). *But see* Dothard v. Rawlinson, 433 U.S. 321, 335 (1979).

[327] It is, of course, possible that proof of the decision-maker's stereotypic expectations can be gathered from third parties, even if the decision-maker is unwilling to express such expectations officially, as for example, where the decision-maker's remark to others reveal stereotypic concerns. *See, e.g.*, *Skelton v. Balzano*, 424 F. Supp. 1231 (D.D.C. 1976).

situated male to provide a standard of comparison and thus point up the potential for discrimination.[328] So, for example, married women are not likely to be considered for managerial positions requiring extensive travel; employer intervention is considered inappropriate to retain valued female employees when their husbands had an opportunity to move for a better job, since working women are expected to give up their own jobs for the sake of their husbands' careers; and women are more likely than men to obtain leaves of absence for child care.[329]

That employers base their decisions on such expectations, does not mean that they will acknowledge that this is what they are doing. There is good reason to believe that the employer will articulate *some* reason for the adverse action since "to dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.' "[330] The issue raised here, however, is whether the justifications articulated by employers will embody stereotypic role expectations. The case for the utility of expanding the definition of discrimination ultimately must rest on the belief that there are a significant number of employers who will articulate stereotypic motivations for their actions because they have yet to recognize the inequity, counterproductivity, and social unacceptability of such expressions. The belief that a concept of discrimination based on stereotyping *per se* will prove useful is necessarily based on personal experiences and impressions of a general level of consciousness, rather than on hard data.[331]

Certainly in the 1960's even "enlightened" academics had few qualms about using comments implying a lower level of expectation for females or noting physical traits irrelevant to the task at hand in evaluating females.[332]

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[328] *Influence of Sex Role Stereotypes*, *supra* note 45, at 9.

[329] Rosen, Jerdee & Prestwich, *Dual Career Marital Adjustment: Potential Effects of Discriminatory Managerial Attitudes*, 37 J. MARR. & FAM. 565-66 (1975). As the authors point out, the last example makes it particularly clear that both women and men stand to lose options as a result of sex role expectations: women are denied job opportunities because their loyalty to work is questioned; and men are inhibited from participating in family life.

[330] Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978), *quoting* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[331] In a time when the President of the United States perceives that he is politically free to fire as too abrasive the chairperson of the National Advisory Committee on Women and replace her with a woman whose major claim to fame is that she is the daughter of a president, there seems to be some justification for the belief. *See* Dewitt, *New Head of Carter's Advisory Panel on Women, Lynda Bird Johnson Robb*, N.Y. Times, May 10, 1979, at 16, col. 1.

[332] *See, e.g.*, Lunneborg and Lillie, *Sexism in Graduate Admissions: The Letter of Recommendation*, 28 AMERICAN PSYCHOLOGIST 187 (1973). Examples of the discriminatory comments found in letters of recommendation included the following:

> "Pretty she's not, but pleasant and sparkly and energetic she is." "In personality she shows poise, vivacity, good humor and charm. She makes an excellent social impression, being attractive, well-groomed, and appropriately dressed. I believe she has a fine reputation and I would have no reason to question her character, morals, or emotional health. She is the kind of women who should be encouraged to pursue graduate study." "She

The occasional case, as well as contemporary sociological reports, suggest that qualms or inhibitions about articulating similarly stereotypic expressions have yet to develop in the 1970's. So, for example, it is apparently considered acceptable to tell a female lawyer she can be laid off because her husband's salary will suffice,[333] to inquire at length concerning the child care arrangements of female job applicants,[334] or to withhold promotional opportunities from female clericals on the assumption that they would feel "rejected" if it were suggested that they can move on to other positions.[335] Nor is the perception that it is acceptable to express such considerations surprising in view of the stereotypes that continue to bombard us through the media.[336]

It is likely, moreover, that articulating the proposed concept of discrimination will initially encourage complaints by identifying present conduct as impermissible. The response by women to the enactment of Title VII generally as well as the response to its specific extension to sexual harassment, serve as precedents for this prediction.[337]

Another practical objection is that this additional concept of discrimination may in fact be counterproductive in that it will force employers to be more careful about what they say, without altering their attitudes. Thus stereotypic attitudes may be hidden in subjective evaluations that will then be shielded from attack.[338] While it is possible to question whether this will in fact occur, the response to this concern must ultimately be a belief that just as there is a value in attempting to suppress overt expressions of class-based antipathy, there is a value in attempting to suppress overt expressions of stereotypic role expectations. This belief in turn rests on two premises previ-

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> is a quiet yet personable young woman, rather neat and attractive though not likely to unduly distract male graduates." "She is task oriented, self-starting, non-neurotic. An unusual girl graduate student." "She is an attractive young lady with a delightful, pleasing personality and genteel manner. She has a great deal of promise for a career in psychology, although her recent marriage may deter her. She is very attractive in appearance and personality and her character is exemplary."

Id. at 188.

[333] *See* Complaint in Goldring v. N.J. Dept. of the Public Advocate, Office of the Public Defender, Case No. EM 14-WG-15270-C, filed with the New Jersey Division on Civil Rights (March 28, 1979) (alleging *inter alia* that supervisor told furloughed female attorney that she was laid off despite her seniority because they got two pay checks in her house).

[334] As a teacher identified with "women's issues," I am regularly advised of female law students being subjected to such inquiries in interviews.

[335] KANTER, *supra* note 66, at 87. *See also* Goodwin, *Commentary—Opportunities for Women in Small Business*, 22 BUS. & ECON. REV. 2, 5 (1976) reporting on survey of eastern businessmen in 1974-1975 in which some businessmen frankly admitted it had never occurred to them to ask women whether they wished to take on extra responsibilities.

[336] *See* U.S. Commission on Civil Rights, WINDOW DRESSING ON THE SET 1-48, (1977); *see generally* E. Goffman, GENDER ADVERTISEMENTS (1979).

[337] *See* Robinson, *Two Movements in Pursuit of Equal Opportunity*, 4 SIGNS 413, 423 (1979).

[338] This concern is heightened by recent decisions showing an increased judicial willingness to defer to employer's subjective judgments. See note 50 *supra*.

ously mentioned: (1) that, as in the case of class-based animus, the articulation of impermissibly stereotypic motivations is in and of itself bad; (2) that the process of recognizing, so as to eliminate, the expression of stereotypic role expectations is itself beneficial. As already discussed, the damage that flows from the expression of such role expectations is two-fold—by their repetition, these expressions confirm the employer's belief in their validity and legitimacy, while at the same time arousing the worker's role conflict.[339] Objection to such expressions is not merely aesthetic; the expressions promote specific roles and thereby limit employment opportunity.[340] Obviously, it is most desirable to prevent altogether the employer from making employment decisions on the basis of stereotypic expectations; but should the outcome fall somewhat short of this goal, there is still something to be gained. If employers must catch themselves expressing stereotypic justifications for their actions, they will inevitably educate themselves regarding the role such expectations play in their decision-making and may also pause to reconsider whether without that expectation their decision can be justified.

CONCLUSION

Numerous studies show what we know as a matter of common knowledge: stereotypic expectations based on a person's sex or race permeate our judgments about individual capabilities and interests, and prevent us from accurately evaluating individuals on the basis of merit. Moreover, every time an employment decision is made on the basis of role expectations, the stereotypes are reinforced in the minds of both the employer and employee.

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[339] See text accompanying notes 61-64 *supra*.

[340] In this sense, the articulation of stereotypic role expectations is akin to certain insidious non-neutral uses of language and unlike other less damaging ones. In the words of Robin Lakoff:

> Linguistic imbalances are worthy of study because they bring into sharper focus real-world imbalances and inequities. They are clues that some external situation needs changing, rather than items one *should* seek to change directly. A competent doctor tries to eliminate the germs that cause measles, rather than trying to bleach the red out with peroxide. I emphasize this point because it seems to be currently fashionable to try, first, to attack the disease by attempting to obliterate the external symptoms; and, second, to attack *every* instance of linguistic sexual inequity, rather than selecting those that reflect a real disparity in social treatment, not mere grammatical nonparallelism. We should be attempting to single out those linguistic uses that, by implication and innuendo, demean the members of one group or another, and should be seeking to make speakers of English aware of the psychological damage such forms do.

R. LAKOFF, LANGUAGE AND WOMEN'S PLACE 43 (1975). Lakoff thus distinguishes between objections to non-neutral words for "human being" (i.e., "man" and "mankind") and the non-neutral use of words like "mistress" and "professional":

> While [the former usage] is related to the fact that men have been the writers and the doers, I don't think it by itself specifies a particular and demeaning role for women, as the special uses of mistress or professional, to give a few examples, do. It is not insidious in the same way: it does not indicate to little girls how they are expected to behave.

Id. at 44-45.

Nevertheless, our anti-discrimination laws as they currently are interpreted outlaw sexual stereotypes only if they are connected with outright hostility, unequal treatment, or are offered to justify neutral rules having a disparate impact on women.

This article has argued that an additional concept of discrimination is required. Under this concept it would be sufficient to show that the adverse employment decision was based on an expectation that women should conform to a certain pattern of behavior whether or not that expectation was based on hostility, and whether or not there is a similarly-situated male who received different treatment.

The recognition of discrimination as adverse decisions based on stereotypes *per se* means focusing on the effects of acts, not on the intent of the actor. For instance, we need not worry about whether the worker who subjects a subordinate or co-worker to sexual harassment was really attracted to her, as some claim, or whether, as others believe, he was seeking to put her down. What matters is that sexual harassment serves to remind both the employee and the employer, that as a woman she is still seen as a sexual object rather than a contributing worker. As such, sexual harassment is an obstacle to equal employment opportunity.

This focus on effect, not intent, is in keeping with statutory interpretations in the "neutral rule" context and with the great purposes of our anti-discrimination laws. We do not seek to blame employers who use tests that are not shown to be job related and that have a disparate impact on protected classes. Rather, we seek to eliminate those practices that artificially deprive society of the contributions of qualified workers. Similarly, we should seek to eliminate stereotypes that interfere with the employer's proper evaluation of merit and the worker's willingness to participate in traditional and non-traditional work, in order to enhance societal and individual achievement. A fourth concept of discrimination is offered to that end.

BOSTON COLLEGE LAW REVIEW

VOLUME XXI JANUARY 1980 NUMBER 2