

COMPLEX CLAIMANTS AND REDUCTIVE MORAL JUDGMENTS: NEW PATTERNS IN THE SEARCH FOR EQUALITY

*Kathryn Abrams**

TABLE OF CONTENTS

I. Introduction	337
II. New Claimants	338
III. Departures from the Existing Equality Paradigm	341
A. New Harms	341
B. New, Complex Identities	344
C. New Defenses that Target the Conduct of Claimants	350
IV. Shaping a New Paradigm	355

I. INTRODUCTION

This paper will focus on three groups of claimants, whose cases press the boundaries of the dominant legal paradigm for gaining social and political equality. Yet, in this context, it is not clear that “paradigm” is the right word to use.¹ On the one hand, it is possible to talk about the features and the limits of what one might call the “civil rights paradigm”: the statutory and constitutional arguments that have been used to vindicate equality since *Brown v. Board of Education*.² Under this paradigm, claimants are concerned with seeking access to public opportunities, such as education, political participation, or even

* O’Byrne Visiting Professor of Law, Indiana University School of Law; Professor of Law, Cornell Law School; Associate Professor of Ethics & Public Life, Cornell University. Thanks and appreciation go to Martha Chamallas, for delivering this paper at the Second Century Conference, in my absence, and for her thoughtful comments on the text.

1. The paradigmatic work on paradigms, the way they govern the acquisition of knowledge, and the way they change, is THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). The fact that the citation of this work has become virtually a cliché among interdisciplinary legal scholars (myself included) should not diminish our appreciation of the insights it has provided about the dynamics of scientific, and other, investigation, and the contingent character of change. I take it that Kuhn’s conception of paradigms and paradigm “shifts” was part of the inspiration for the central questions posed by this conference.

2. 347 U.S. 483 (1954).

employment. They do so by invoking a particular characteristic—such as race or gender—which has been associated with a sufficient history of stigma, concrete disadvantage, and political marginalization, as to entitle those who bear it to some degree of legal protection. Claimants must also navigate a shifting array of counterarguments and defenses, which must be answered within plaintiffs' cases. Plaintiffs must show that their claims fall on the right side of the *de jure/de facto* distinction,³ that defendants' alleged nondiscriminatory reasons for the challenged actions were pretexts,⁴ and that plaintiffs' group-conscious remedy is justified by the documented discrimination of a particular institutional decision maker.⁵

On the other hand, to suggest that we are somehow on the verge of transcending this paradigm is to say far too much. First, many claimants whose cases bear precisely these characteristics continue to struggle, and their efforts have been made all the more difficult by the harsh "color-blind" hand of the current Supreme Court's Fourteenth Amendment.⁶ Second, the changes that may be occasioned by the kinds of cases I will describe may not transform the paradigm so much as revise or recast it. This is particularly true if we draw on precedent in arguing for change, a move that requires us to suggest continuity, even as we create disjuncture. But, by examining several groups of claimants and glimpsing threads that connect many different areas of antidiscrimination law, I will argue that the dominant regime must be revised if it is adequately to respond to their injuries.

II. NEW CLAIMANTS

The first group of claimants are gay, lesbian, or bisexual. These claimants can be represented by Richard Buchanan and Rita Mathis, two unsuccessful litigants in an ongoing struggle. Buchanan and Mathis, residents of Cincinnati, challenged a popularly enacted amendment to the city's charter that prevented the city from adopting or enacting any ordinance that protects the civil rights of gays and lesbians.⁷ Buchanan and Mathis's equal protection claim was accepted by the dis-

3. See, e.g., *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

4. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

5. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

6. See, e.g., *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995); *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

7. *Equality Found. v. City of Cincinnati*, 860 F. Supp. 417, 421-26 (S.D. Ohio 1994), *aff'd in part, vacated in part*, 54 F.3d 261 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-239).

strict court,⁸ but reversed by the Sixth Circuit, which found, inter alia, that gays and lesbians could not be a class entitled to heightened scrutiny because the behavior that was their distinguishing characteristic could be rendered criminal by the states following *Bowers v. Hardwick*.⁹ The future of claimants like Buchanan and Mathis may be determined in part by *Evans v. Romer*,¹⁰ the Colorado antigay initiative case that will be heard this year by the Supreme Court. There are also other claimants within this group whose cases have other dimensions; for example, Toshav and Phillip Storrs are a gay couple from my hometown of Ithaca, New York, who have attracted nationwide controversy by applying for a marriage license.¹¹

The second group of claimants share the trait that they are all targets of sexual harassment. The claimant I will treat as emblematic is Teresa Harris, the ostensible victor in the 1993 Supreme Court case *Harris v. Forklift Systems, Inc.*¹² Harris was harassed by the head of the company, who berated her as a "dumb-ass woman," suggested that they negotiate her raise at the Holiday Inn, and asked her to fish coins out of his front pocket.¹³ Even after she confronted him about his con-

8. *Id.* at 449.

9. *Equality Found. v. City of Cincinnati*, 54 F.3d 261, 266-68 (6th Cir. 1995) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-239).

10. 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995).

11. When Phillip and Toshav Storrs (the latter of whom legally changed his surname to that of his partner) initially sought the license, they expected to be rejected outright. Instead, the city clerk initially halted the proceedings, citing the state's domestic relations law; but when the couple challenged her to find a provision in that law that limited its application to cross-sex couples, she was unable to do so, and referred the matter to the city attorney. See David W. Dunlap, *For Better or Worse, A Marital Milestone: Ithaca Officials Endorse a Gay Union*, N.Y. TIMES, July 27, 1995, at B1, B5. Subsequently both the mayor and the Democratic city council endorsed the idea of granting licenses to same-sex couples. *Id.* at B1. However, after pressure from some national gay rights advocacy groups, who believe that the case could set harmful precedent were it decided against the couple, the Storrs have at least temporarily abandoned their quest for a license.

12. 114 S. Ct. 367 (1993). I say "ostensible" because the magistrate's decision which subsequently applied the Supreme Court's new standard found that she was entitled to recovery for only a portion of the sexual harassment that she claimed. *Harris v. Forklift Sys., Inc.*, No. 2:89-0557, 1994 U.S. Dist. LEXIS 19928, at *1 (M.D. Tenn. Nov. 9, 1994). Although Harris was ultimately awarded \$151,435 for her injury, *id.*, the magistrate's opinion on remand is disturbing, as Professor Ruth Colker has observed, because it recognizes a claim with respect to the sexualized abuse received by Harris, but not with respect to the nonsexualized derogation (comments such as "she's just a dumb-ass woman," etc.). See Ruth Colker, *Sexualized Harassment Doctrine: Winners and Losers*, 7 YALE J.L. & FEMINISM (forthcoming 1996).

13. *Harris v. Forklift Sys., Inc.*, 60 Empl. Prac. Dec. (CCH) 74,245, 74,247 (M.D. Tenn. 1990).

duct, he asked her publicly if she had gotten an important account by "giving [the client] some bugger Saturday night."¹⁴ She subsequently quit her job and brought a Title VII action.¹⁵ The central question raised by the case was whether a claimant must demonstrate "serious psychological injury" in order to prevail in a sexual harassment action, a requirement the district court held that Harris had not met, in part, because she seemed self-possessed enough to confront her employer about his conduct.¹⁶ The Supreme Court held that no demonstration of psychological injury was required and proposed a flexible multifactorial test, stating that a woman did not need to "suffer a nervous breakdown" before she could allege harassment.¹⁷ If Teresa Harris's case reflects many important threads of sexual harassment law, other features must be underscored by other claimants. Lois Robinson, a welder at Jacksonville Shipyards, brought a sexual harassment charge based on the pervasive posting of pornography in her workplace, only to be met with a First Amendment defense.¹⁸ Anthony Goluszek, a shy and sheltered young man whose sensitivity to sexual talk was crudely exploited by his coworkers, brought a Title VII action that failed, because the court did not find his harassment to be reinforced by a social or workplace pattern of male disadvantage.¹⁹

The third group of claimants are poor, young, single mothers, mostly women of color, who suffer a different form of discrimination. One example can be found in the case of Darlene Johnson, a young, pregnant mother of four.²⁰ Johnson was reported to the Department of Social Services when she hit her two younger children with a belt for smoking cigarettes and putting a hanger wire in an electrical socket. The judge who heard the case granted Johnson's petition for probation, after declaring that he would have been justified in sending her to state

14. *Id.*

15. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 369 (1993).

16. *Harris*, 60 Empl. Prac. Dec. (CCH) at 74,249-50.

17. *Harris*, 114 S. Ct. at 371.

18. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991). Robinson won the First Amendment argument at the district court level, *id.* at 1534-37, and this case of first impression was appealed to the Eleventh Circuit Court of Appeals. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal docketed*, No. 91-3655 (11th Cir. July 12, 1991). Before that court could render an opinion, however, the case was dismissed by stipulation of the parties, after the Jacksonville Shipyards closed.

19. *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988).

20. This case is described in Michelle Oberman, *The Control of Pregnancy and the Criminalization of Femaleness*, 7 BERKELEY WOMEN'S L.J. 1, 5 (1992).

prison.²¹ Immediately after rendering his decision, however, the judge asked to speak with Johnson further. The judge noted that Johnson received welfare and had several children, and he proposed that she receive Norplant as a condition of probation—despite the fact that there had been no findings suggesting her unfitness to parent future children. Johnson, whose counsel was not present at this conversation, agreed to these conditions for probation. When Johnson's lawyer later obtained a hearing, the judge was unwilling to alter the conditions, despite evidence that these conditions were not in Johnson's best interests. Other claimants within this category might include women who are prosecuted for using drugs while pregnant,²² or women subject to limitations on welfare benefits despite the birth of additional children.²³

III. DEPARTURES FROM THE EXISTING EQUALITY PARADIGM

What might be described as "different" about these three groups of claimants and their cases? What issues or challenges do they present that are not adequately comprehended within the existing equality paradigm? In this section, I will focus on three factors. First, the harms suffered by these claimants have shifted from the kinds of injuries alleged by earlier equality claimants. Second, the claims of identity raised by these parties—the characteristics on the basis of which they suffer discrimination or claim relief—are more complex than many of the stigmatized characteristics that have been raised in the past and are more complex than legal doctrine seems prepared to accommodate. Third, these claimants must navigate a range of new defenses, many of which involve the moral condemnation of their conduct or their lives.

A. *New Harms*

The paradigmatic civil rights harm was a denial through state action of some opportunity, usually an opportunity in what we might recognize as the public sphere: to attend a particular school, to hold a particular job, to participate in a political party's convention, or to

21. *See id.*

22. *See, e.g.,* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

23. For a discussion of the "family cap" approach (which places a limit on welfare benefits notwithstanding the birth of additional children) in New Jersey, see *Changes in State Welfare Reform Programs: Hearings Before the Subcommittee on Social Security and Family Policy and Committee on Finance* (1992).

vote.²⁴ Some of the claimants I have described—for example, Buchanan and Mathis of Cincinnati—suffer a comparable deprivation of a publicly oriented opportunity. But for most of the other claimants I have described, the harms suffered are different.

In the case of sexual harassment, for example, the nature of the harm has changed. Sexual harassment does not always entail stark deprivation, even of an employment opportunity. The injury perpetrated by harassment sometimes rises to the level of constructive discharge,²⁵ but more often sexual harassment means that the target experiences impediments to doing her job.²⁶ In addition, this distinct environmental injury is often coupled with another kind of harm: the dignitary harm of being persistently sexualized²⁷ or denigrated because of group membership. Dignitary harm is not unprecedented as a civil rights injury—as anyone who remembers the “hearts and minds” language of *Brown* will recall.²⁸ But the emerging category of dignitary harm is no longer simply the measure of a deprivation of public opportunity (for example, the ability to attend an integrated school). The emerging category of dignitary harms may be treated as salient even when they arise from something as otherwise inconsequential as a word, gesture, picture, or touch. In addition, the emerging type of dignitary harm may be perpetrated by private individuals, rather than by state policy.²⁹ This represents a

24. Examples of cases within this paradigm include *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (access of black students to segregated public schools); *Smith v. Allwright*, 321 U.S. 649 (1944) (access of black voters to “white” primary); *Louisiana v. United States*, 380 U.S. 145 (1965) (enfranchisement of black voters); *Usery v. Tamiami Trail Tours*, 531 F.2d 224 (5th Cir. 1976) (access of women to formerly all-male workplace).

25. *Harris* itself was a suit for constructive discharge, because Teresa Harris quit her job after warning her employer that her position would be untenable unless he ceased his harassing activities. See *Harris v. Forklift Sys., Inc.*, 60 Empl. Prac. Dec. (CCH) 74,245 (M.D. Tenn. 1990); see also *Buchanan v. Sherrill*, 51 F.3d 227 (10th Cir. 1995); *Virgo v. Riviera Beach Assoc.*, 30 F.3d 1350 (11th Cir. 1994).

26. Justice Ginsburg refers explicitly to this kind of detriment in her concurrence in *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 372 (1993) (“It suffices to prove that . . . the harassment so altered working conditions as to ‘ma[k]e it more difficult to do the job.’”).

27. I use this term to mean primarily regarded or characterized by reference to sexual characteristics. Catharine MacKinnon, who pioneered the sexual harassment claim, regards sexualization of women in the workplace as pervasive. See CATHARINE MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* 1-25 (1979).

28. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

29. This type of dignitary harm has been particularly and fully elaborated on in the literature on racial hate speech, a phenomenon which both parallels and overlaps sexual harassment. For a lucid, persuasive discussion of the dignitary harms implicit in hate speech, see MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993). Works in this collection that convey these dignitary harms with partic-

departure from earlier claims of injury under the traditional civil rights paradigm.

The injuries of the single, young mothers of color depart even more sharply from the paradigmatic civil rights harm. First, the realm of the claimant's life in which those harms occur has shifted from the quasi-public world of the workplace to the ostensibly private realm of the family—a characteristic these women share with Toshav and Phillip Storrs, the gay couple seeking to be married.³⁰ Second, as in the case of Darlene Johnson, the nature of the harm is different as well. For example, the woman, who is required to submit to the implantation of Norplant or who is charged with neglect because of substance abuse while pregnant, may in fact be deprived of the opportunity to parent.³¹ But, even where the woman suffers no curtailment of her parenting or reproductive potential, she may still suffer the harm of intrusive, disparate surveillance of her familial and reproductive life.³² This surveillance may formally be triggered by an action the woman has taken—for example, Darlene Johnson's corporal punishment of her children—though the woman's action rarely justifies the governmental intervention, either in nature or extent.³³ But surveillance is also rendered more likely by the greater contact these mothers have with the world of social service providers and “mandatory reporters,”³⁴ and the

ular immediacy, often through the use of experiential narratives, include Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in MATSUDA ET AL., *supra* at 17, and Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in MATSUDA ET AL., *supra* at 53.

30. See *supra* note 11 and accompanying text.

31. This kind of injury is described in Roberts, *supra* note 22; Michelle Oberman, *Sex, Drugs, Pregnancy and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505 (1992). Michelle Oberman has also argued that this group of women is often caught in a cruel whipsaw, because while they are discouraged and often prevented from parenting, restrictions on abortion funding mean that they are discouraged and often prevented from terminating their pregnancies, even when they would otherwise choose to do so. See Oberman, *supra* note 20.

32. To take one example of disproportionate surveillance and intervention, Dorothy Roberts notes that although drug abuse during pregnancy occurs at comparable rates among white and nonwhite women, women of color (particularly black women) are reported for drug use by social service providers at close to ten times the rate of white women. See Roberts, *supra* note 22, at 1434.

33. See *infra* note 82 and accompanying text, where I argue that the government's intervention tends to respond more closely to fears produced by negative, judgmental stereotypes about poor women of color than to any specific action taken by a particular woman herself.

34. A recent report of the U.S. Commission on Civil Rights reveals that black women are five times more likely to live in poverty, five times more likely to be on welfare and three times more likely to be unemployed than are white women. UNITED STATES COMM'N ON CIVIL RIGHTS,

greater suspicion these providers have of the parenting skills of women demographically distinct from themselves.³⁵ Patterns of disproportionate governmental intervention, ironically, exacerbate these suspicions: they perpetuate an image of young, minority women as unfit or unreliable mothers.³⁶ This devaluative image adds to the injuries of this group of women a distinct dignitary harm.

B. *New, Complex Identities*

The identities of these three groups of claimants—those characteristics on the basis of which they suffer and claim discrimination—are complex in ways that the current legal system, and the political discourse underlying it, have difficulty accommodating. The preexisting paradigm, of course, permitted claims of discrimination based on group-based characteristics. The civil rights paradigm established legal protection for claimants within a number of categories, and even established hierarchies among claimants for purposes of legal intervention.³⁷ But these categories have been defined in rigid and limiting ways, which has made judicial response to the complexity of many claimants' identities difficult.

First, traits under the preexisting paradigm were singular: a plaintiff brought a claim of discrimination based on one of them. Claims of intersecting discrimination—such as that based on race and gender—have incited an unreliable, often prejudicial response.³⁸ Though

THE ECONOMIC STATUS OF BLACK WOMEN 1 (1990). All of the features of the lives of black women make them more likely to come into contact with social service providers and other mandatory reporters.

35. See Kathleen C. Faller & Marjorie Ziefert, *Causes of Child Abuse and Neglect*, in *SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN* 47 (Kathleen C. Faller ed., 1981) (observing that professionals are more likely to report child abuse by poor parents because they may be reluctant to believe in abuse within their own socioeconomic group).

36. Dorothy Roberts observes that this is a long-standing familiar image in relation to black women: black motherhood has been devalued, and black children disproportionately removed, since slavery. See Roberts, *supra* note 22, at 1436-44.

37. Compare *Korematsu v. United States*, 323 U.S. 214 (1944) (establishing strict scrutiny for racial claims) with *Craig v. Boren*, 429 U.S. 190 (1976) (establishing mid-level scrutiny for gender-based claims).

38. I discuss this erratic response in the area of employment discrimination in Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2493-2502 (1994). Other works that discuss the difficulties faced by plaintiffs claiming intersectional discrimination include Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS. 30 (1981).

some courts have recognized the distinctive character of such claims,³⁹ others have rejected them outright, warning that such claims represented a step toward unfathomable complexity in civil rights litigation or exceeded the scope of antidiscrimination statutes.⁴⁰ Second, identity within particular protected categories was understood to be unitary or uniform, so that variation within the categories was beyond the scope of the preexisting paradigmatic approach.⁴¹ As a result, courts have had difficulties responding to antagonisms among members of a single group⁴² or to discriminatory treatment from the outside that distinguished some group members from others.⁴³ This reluctance to acknowledge intragroup variation has stemmed partly from the paradigm's inability to accommodate intersectionality;⁴⁴ but it has also stemmed from the fact that categories are traditionally understood to protect immutable, biological characteristics.⁴⁵ A woman suffers discrimination, in this view, because of an employer's attitude toward people with two x-chromosomes.⁴⁶ When a particular claimant argues that she suffered discrimination because she manifested a socially female characteristic, or combined biological femaleness with characteristics that were regarded as socially male, judicial response has been erratic and unpredictable.⁴⁷

39. See, e.g., *Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).

40. See, e.g., *Judge v. Marsh*, 649 F. Supp. 770 (D.D.C. 1986) (holding that employment decisions directed against black women as such may violate Title VII, but limiting "sex-plus" doctrine to two characteristics and warning of "many-headed Hydra" that could be created by complex claims); *DeGraffenreid v. General Motors Assembly Div.*, 413 F. Supp. 142 (E.D. Mo. 1976) (denying intersectional claim).

41. For a more detailed discussion of this assumption, see *Abrams*, *supra* note 38, at 2520-21, 2532-35.

42. See, e.g., *Hansborough v. City of Elkhart Parks & Recreation Dep't*, 802 F. Supp. 199, 207 (N.D. Ind. 1992) (holding that plaintiff alleging intraracial discrimination bears a "relatively unique and difficult burden of proof," which this plaintiff failed to carry); see also *Walker v. IRS*, 713 F. Supp. 403 (N.D. Ga. 1989) (holding that action by light-skinned black woman against dark-skinned black woman can be maintained, but as action for "color" rather than "race" discrimination).

43. See, e.g., *DeGraffenreid v. General Motors Assembly Div.*, 413 F. Supp. 142 (E.D. Mo. 1976), *aff'd in part, rev'd in part*, 558 F.2d 480 (8th Cir. 1977) (rejecting gender discrimination claim by black women because treatment did not extend to white women as well).

44. For works that discuss, in detail, the courts' reluctance to acknowledge intersectional identity and discrimination, see *supra* note 38.

45. For a general discussion of this assumption in Title VII law, see *Abrams*, *supra* note 38, at 2520-21.

46. *Id.*

47. Biological women who manifest socially male characteristics have tended to fare somewhat better in the judicial system than biological men who manifest socially female characteris-

For much of the period between the sixties and eighties these constraints produced little apparent tension in the legal system. Some claimants were occupied with fleshing out the boundaries of the single-category claim; others were likely discouraged by prevailing doctrine from pressing the complexity of their identities on the courts.⁴⁸ The claimants described above reflect a new generation of discrimination victims, who have come to understand their identities as complex, contingent, or ambivalent, and who have begun to press these identities on a doctrinal regime ill-equipped to respond.

The women facing Norplant or surveillance and prosecution for child neglect are being targeted because they are female, unmarried, poor, young, and members of minority groups—frequently black. Each of these identities confers some independent disadvantage,⁴⁹ but the maximal surveillance, enforcement, and stigma—the sort that has char-

tics. Compare *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (holding that woman who was denied partnership after having been told to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” was discriminated against under Title VII) with *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) (holding that shy, sexually naive man whose sensitivities were exploited by coworkers did not make out a claim for sexual harassment under Title VII). This may be attributable in part to the biological bias of antidiscrimination law (i.e., it is hard for a court to see a biological man as having suffered gender discrimination even if the attitudes that fueled his bad treatment are similar to those that produce discrimination against biological women), and it may be attributable in part to the fact that claims by biological women who act like men are easier to frame under the dominant “equality theory” understandings that animate antidiscrimination law (i.e., a man who behaved in the same way would not be subject to discrimination). The status, in antidiscrimination law, of the masculine woman and the feminine man have recently been the subject of considerable attention among scholars of gender and sexual orientation. See, e.g., Abrams, *supra* note 38; Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine M. Franke, *The Central Mistake of Sex-Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PENN. L. REV. 1 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

48. There are occasional cases in which the failure of a claimant to make an intersectional complaint, or highlight her complex identity, seems perplexing. See, e.g., *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989), *overruled in part by Taxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993). In *Brooms*, the plaintiff bifurcated her sexual and racial harassment claims, despite the fact that there was ample evidence of harassment targeted specifically at black women. Though she ultimately prevailed on her sexual harassment claim, she lost her racial harassment claim and with it her opportunity for punitive damages. I found myself wondering why she did not attempt to stress the sexual inflection of the racial harassment (and vice versa); the lack of receptivity of the courts to such intersectional claims formed one possible explanation.

49. See, e.g., MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 106-18, 180-89 (1995) (discussing stigmatization of poor mothers and single mothers).

acterized the life of Darlene Johnson, for example—is produced by the intersection of negative stereotypes surrounding minority race, female gender, unmarried parental status, youth, and poverty.⁵⁰ When judges, social service providers, and other political actors are unfamiliar with the interaction of these stereotypes (and the legal system is resistant to intersectional claims), they may not understand the sources of their own enhanced surveillance. They may be unresponsive to arguments about unfair treatment, and they may be more susceptible to the suggestion that these women require surveillance for immoral or irresponsible conduct.

Other claimants discussed above are complex in different ways. Both Teresa Harris and Anthony Goluszek are individuals who mingle the biological traits associated with one sex with the social behaviors associated with another. The district courts in both cases declined to see this ambivalence, and held each claimant to a standard based exclusively on biological sex. Harris was a biological woman who reacted to sexual harassment more in the manner we might expect from a man: she joked along, she tried to be one of the guys; when she'd had enough, she gave the boss an ultimatum; and when he didn't keep up his end of the bargain, she quit.⁵¹ The record does not make clear whether Teresa Harris was singled out by her boss because she manifested biologically female characteristics combined with socially male characteristics; but the district court's conclusion that she did not suffer "serious psychological injury" stemmed in part from her assertive manner of handling her harassment.⁵² Goluszek, on the other hand, was a biological man who responded to harassment in a socially female manner: he blushed, he stammered, he tried to avoid sexual conversations, and his work performance (at least allegedly) suffered.⁵³ It appears from the record that he was targeted by his coworkers precisely because of this nonmasculine sensibility. The district court, however, saw only the aberrant harassment of a biological man and refused to see the derogation of a socially female response or the attempt to enforce a social role conventionally tailored to one's biological sex.⁵⁴

50. See generally Roberts, *supra* note 22, at 1424; Linda McClain, "Irresponsible" *Reproduction*, 47 HASTINGS L.J. (forthcoming Jan. 1996).

51. Harris v. Forklift Sys., Inc., 60 Empl. Prac. Dec. (CCH) 74,245, 74,247 (M.D. Tenn. 1990).

52. *Id.* at 74,248.

53. Goluszek v. Smith, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988).

54. Critiques of the court's decision on this ground include Abrams, *supra* note 38, at 2513-15; Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual*

Still other claimants challenge a different tendency toward reductive classification in the current paradigm: a tendency to dichotomize the agency of legal subjects. This phenomenon may be described in part as a tendency to dichotomize the agency of perpetrators and victims. Like black and white or male and female, the categories of perpetrator and victim are understood to be simple and unitary: the perpetrator enjoys full agency, and the victim either lacks as a categorical matter, or loses through the experience of discrimination, virtually all capacity for self-direction.⁵⁵ This contrast is encouraged in part by the legal system's emphasis on an intent standard of discrimination: the perpetrator is rarely a semiaware cog in an institutional wheel; he is the individual with the power to make the decision, who does so on the basis of prejudice.⁵⁶ The notion of a nonagentic victim is also instilled by the posture of nonintervention that lies at the heart of the liberal state. In order to overcome the presumption that the state need not intervene in order to resolve disputes among self-directing individuals, victims must show themselves to be almost abject, incapable of resolving matters on their own.⁵⁷ This image has been particularly compelling in areas such as rape and spousal abuse, where the ostensibly private nature of the interaction strengthens the assumptions of state nonintervention, and the stereotype of the abject female has independent force in bringing about this characterization.⁵⁸ The victim of sex discrimination is thus conceived as someone utterly lacking in agency, who calls on the state to reorder what might otherwise be understood as private interactions because she is without sufficient powers of self-defense and self-direction (frequently sexual self-direction) to do so herself. The victim who declines to define herself in this way often finds a legal system that is less responsive to her claims: it concludes that she is hardly a victim or may in fact be responsible for her plight.⁵⁹

and *Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 126-30 (1992).

55. I have explored this dichotomous characterization of agency in the context of laws and legal theory relating to violence against women in Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

56. For a discussion of the paradigmatic character of this intentionalist view of the perpetrator, see Abrams, *supra* note 38, at 2518-26.

57. For a discussion of how this object characterization of victims responds to the liberal assumptions of work in mainstream legal doctrine, see Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 YALE L.J. 1533, 1555-56 (1994) (book review).

58. I have discussed this difficulty in cases involving women's claims of sexualized injury in Abrams, *supra* note 55, at 343-44; Abrams, *supra* note 57, at 1555-56.

59. See Abrams, *supra* note 55, at 372-73.

This problem is complicated by a second tendency, present as often in popular political discourse as in legal doctrine: a tendency to dichotomize the agency of particular groups of women. Even in contexts where women make no deliberate attempts (as they might in litigation) to characterize the extent of their agency, white, middle class, straight women, and other women who superficially conform to gender specific social expectations, are often placed by political observers or commentators in the category of "no agency"—that is, they are assumed to have or described as having no agency when in fact they may manifest partial or constrained agency.⁶⁰ Poor women, women of color, and women who manifest nonconforming sexual desires or practices tend to be placed in the category of "full agency" or often, "full, culpable agency"—that is, they are described as having full agency, even when that agency is in fact quite constrained. This ascription of full agency leads others to attribute to these women some level of culpable responsibility for disadvantageous circumstances that may be largely beyond their control.⁶¹ These categories overlap with those of victim and nonvictim described above⁶² and present women with the same unacceptable alternatives (though in this second context, women lack even the opportunity of choosing between them): either actionable, yet stigmatizing, abjection or full, often culpable, agency, which warrants no relief and may lead to the ascription of blame or responsibility.

Both Teresa Harris and the poor mothers of color described above find themselves penalized by this legal and political tendency to dichotomize agency. Teresa Harris, despite her anger and humiliation, responded to her employer's conduct with self-assertion: she displayed more agency, in short, than many courts or observers feel comfortable

60. See *id.*; Linda C. McClain, Agency, Irresponsibility and Sexuality: Gender Ideology and Feminist Legal Theory 27-32 (June 6-8, 1994) (unpublished manuscript, on file with author).

61. See Abrams, *supra* note 55, at 374-75. This notion of culpable agency is explored at length in McClain, *supra* note 50.

62. An interesting premise revealed by exploring this overlap is that, in public discussions or the expectations of observers, victims of rape and sexual harassment (who are characteristically treated as lacking in agency) are generally assumed to be white. This assumption, of course, corresponds to the legal system's neglect of the sexual violation of black women described by many black feminist theorists. See, e.g., Crenshaw, *supra* note 38, at 139. It may also explain why black women (who, as I note above, tend to be characterized politically as culpable agents) have had greater difficulty in presenting themselves as victims of sexualized aggression in various legal contexts. The St. Johns' rape trial, where the jury refused to accept the black victim's claims that she had been overwhelmed by alcohol and the aggression of the perpetrators, and the Anita Hill-Clarence Thomas hearings, where the sexually conservative and morally upright Hill was nonetheless charged by some senators and observers with responsibility for her situation because of her ostensibly careerist failure to leave, are only two examples.

ascribing to women who are "legitimate" victims of sexual harassment. This led the district court to wonder if she had actually suffered a legally cognizable "hostile environment."⁶³ Poor, black, single mothers have, similarly, ignited hostility among legal and political decision makers by exhibiting limited forms of agency. Some have persisted in a desire to parent notwithstanding their constrained circumstances, and they have also done so, knowingly or of necessity, within family structures that depart from conventional definitions of family. Even this highly constrained agency has led some decision makers to ascribe to these mothers full and culpable control over their choices⁶⁴—either because they fall within groups to which decision makers tend to ascribe full, culpable agency or because they seem not to reflect the complete abjection decision makers may expect in a victim. This attribution of responsibility, as we shall see below, is often used to justify intrusive surveillance and intervention.

C. *New Defenses that Target the Conduct of Claimants*

The critique of single, black mothers' ostensibly culpable agency raises a final feature of these cases that is distinct from previous equality paradigms. The government, and other defendants in these cases, seek to defend their actions by indicting the conduct of claimants in these cases. Some of these defenses are political rhetoric, uttered outside the context of a lawsuit.⁶⁵ Yet even where defenses are offered

63. *Harris v. Forklift Sys., Inc.*, 60 Empl. Prac. Dec. (CCH) 74,245 (M.D. Tenn. 1990) (plaintiff's failure to demonstrate "serious psychological injury" means she has not demonstrated a pervasively hostile environment).

64. See, e.g., *Illegitimacy and Welfare: Hearings on H.R. 4 Before the Subcommittee on Human Resources*, 104th Cong., 1st Sess. 1 (Jan. 20, 1995) (written testimony of William Bennett). See generally McClain, *supra* note 50.

65. The claim that disadvantaged groups' claims for equal rights represent efforts to obtain "special rights" is one that is frequently made in the political, as well as the legal, realm. A particularly vivid example may be found in the Dole campaign's ongoing effort to justify returning a contribution from the Log Cabin Republicans, a conservative gay group. Attempting to demonstrate that the decision did not involve discrimination, but rather the rejection of a political agenda that was "fundamentally at odds with that of the candidate," see Richard L. Berke, *Gay Congressman From Dole's Party Brings Fire on Him*, N.Y. TIMES, Sept. 7, 1995, at A1, A24, Nelson Warfield, a Dole spokesman, stated that the Log Cabin group supported legal recognition of same-sex marriages, "a special-rights platform that Senator Dole simply does not support." *Id.* If there ever was a context in which a marginalized group simply sought to secure for itself a benefit routinely granted to more privileged groups, the struggle for legal recognition of same-sex marriage would seem to me to be such a context. Yet in an effort to discredit this agenda, the Dole campaign moved quickly to label it a "special rights" issue.

Urvashi Vaid has argued that this "special rights" argument, as it has been applied in recent

in the context of litigation, they go beyond the assertion of a *de jure/de facto* distinction, a legitimate nondiscriminatory reason, or other kinds of defenses that simply describe why defendants should prevail in a particular case. These new defenses have what might be called "stage-setting" functions: they supply observers with a way of understanding the context of the case that characterizes the parties and their claims. A number of these defenses broadly condemn the conduct of claimants—legitimizing existing prejudice⁶⁶—as they enhance the intelligibility or appeal of the defendant's position.

Some of these defenses strive to shape the view of claimants' secondary or litigation-oriented conduct: for example, the established claim that plaintiffs' demands for group-conscious remedies represent a quest for "special rights" or the more recent argument that efforts to regulate sexual harassment constitute a violation of defendants' free speech rights.⁶⁷ These characterizations shift the moral balance of the case by presenting the defendant as the party wronged—in a way that expression-loving or equal-rights-oriented American jurists are likely to grasp. They also alter the strategy of the case by shifting the argumentation to new—for example, First Amendment—terrain.

The most disturbing examples of new defenses are not those that indict the litigation conduct of the claimant in one way or another, but others that characterize claimants' primary conduct—that is, nonlitigation conduct—as immoral. Challenging the morality of the victim's conduct is also not entirely new: for example, in the areas of rape and sexual assault, the so-called "trial of the victim"—which amounts to the moral evaluation of her past and present sexual conduct—has been

referenda campaigns, has been the most effective tool against advocates for gay and lesbian rights. See URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 331 (1995).

66. In his article describing strategies for litigating the Colorado antigay amendment case, Matthew Coles notes how many of the justifications offered by the state simply "invoke the classification as [the] purpose" which is the same as saying "we're passing this initiative because we don't like these people." Matthew Coles, *Equal Protection and the Anti-Civil-Rights Initiatives: Protecting the Ability of Lesbians and Gay Men to Bargain in the Pluralist Bazaar*, 55 OHIO ST. L.J. 563, 568 (1994). He notes that such justifications are generally excluded by the constitutional rule against improper purposes. See *id.* at 566-72. However, if such views are characterized as moral judgments about right and wrong behavior (i.e., because of their moral deviance, no one should like these groups), rather than personal judgments (i.e., we just don't like these groups) they are more likely to survive scrutiny. And given that the moral judgment is offered as a basis for the personal antipathy, judicial decisions affirming or embodying that judgment may play at least an indirect role in legitimating the antipathy.

67. See, e.g., Kingsley E. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

going on for decades.⁶⁸ Yet in the new context, the challenge to claimants' morality is more systematic and concerns conduct even more strikingly removed from the litigation in question. Claimants like Richard Buchanan and Rita Mathis, whose case concerns the opportunity to lobby and vote on behalf of gay rights ordinances, are attacked for the immorality (or illegality) of their sexual conduct.⁶⁹ Claimants like Darlene Johnson, whose case concerned the use of corporal punishment, are indicted for having multiple children while on welfare.⁷⁰ The net effect of these indictments is not only to strengthen defendant's litigation or political posture, but to reinforce and legitimate the very prejudice that gave rise to the claimant's harms in the first place.

Of course, the legitimization of prejudice may or may not be the self-explicit motive of those who raise such defenses. There is a growing impulse toward moral judgment in American political life that has probably shaped this pattern; among the contributing factors would seem to be a malaise with unmitigated individualism leading to an emphasis on the restoration of shared morality and responsibility to others,⁷¹ and the rise of a censorious brand of religious fundamentalism.⁷² This tendency toward censorious moral judgment has been given license in law by the movement of equality claims into the familial realm, where such judgments are more common or at least seem less inappropriate. The seat of these judgments, as they apply to questions of family, is a narrow normative vision of family life.⁷³ The formative

68. Two articles that provide vivid accounts of this morally inflected trial of the victim are Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. OF WOMEN & L. 277 (1993) and Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

69. See, e.g., *Equality Found. v. City of Cincinnati*, 54 F.3d 261, 266-67 (6th Cir. 1995) (gays and lesbians cannot be regarded as suspect class because their distinguishing conduct violates state criminal law), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-239); *Evans v. Romer*, 882 P.2d 1335, 1346-47 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995) (surveying arguments that statute prohibiting pro-gay legislation sends message that gays and lesbians are immoral).

70. See Oberman, *supra* note 20, at 5.

71. See JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920* (1994); David C. Williams, *The Militia Movement and the Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. (forthcoming 1996).

72. The political potency of this movement can be seen in the influence of the Christian Coalition. Dan Balz & Ronald Brownstein, *God's Fixer: Christian Coalition Leader Ralph Reed Has a Strategy: Instead of Chasing Republican Politicians, He Wants the Party to Come to Him. It's Working*, WASH. POST., Jan. 28, 1996, Magazine, at 8. However, this reassertion of religious belief and influence has placed its mark upon the political left as well as the right. See David E. Anderson, *Political World 'Too Secular,' President Says*, WASH. POST., Sept. 4, 1993, at D6.

73. For elaborations of and critical perspectives on this dominant vision, see FINEMAN,

unit of family life is a cross-sex, potentially procreative, married pair. The bearing and rearing of children, the ostensible goal of such units, is to be commenced when the couple (with earnings provided primarily by the male "breadwinner") is able to support them. In the solipsistic style of many of the proponents of this vision, this family is also assumed to be white and at least to aspire to the middle class. Proponents of this view may not know what to expect of, and subsequently regard with greater suspicion, families who violate these race and class assumptions.

Gays and lesbians, of course, depart from these norms by making a same-sex, nonprocreative unit the center of family life. The judgment that this departure is "deviant" or immoral, which may reflect the mutual reinforcement of religious and political morality, is often used to discredit gays in political discourse—as the lengthy and acrimonious debates over the Colorado and Oregon referenda demonstrated.⁷⁴ Moreover, this form of moral judgment is given scope in law by privacy doctrine: since *Griswold v. Connecticut*,⁷⁵ this doctrine has legitimated the cross-sex, procreative pair, and since *Bowers v. Hardwick*,⁷⁶ it has declined to extend its protections to many kinds of gay and lesbian sex. *Bowers v. Hardwick*, whose restrictive view of privacy led to the upholding of the Georgia sodomy statute, has provided an additional reason to pass moral judgment on gay legal claimants: the behavior that ostensibly defines gay and lesbian claimants' identity has been criminalized in some states.⁷⁷ This combination of religious and political morality given sanction by the narrow scope of the Court's privacy

supra note 49, at 22-24, 71-200; GAY MEN, LESBIANS AND THE LAW 475-562 (William B. Rubenstein ed., 1993); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

74. It is striking that several of the state's justifications in *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995), reflect thinly disguised moral judgments about the evils of homosexuality. *See id.* at 1344, 1346 (stating that Amendment 2 protects parents' "'privacy' right to instruct their children that homosexuality is immoral"; Amendment 2 "promotes the compelling governmental interest of allowing the people themselves to establish public social and moral norms," including the "preserv[ation of] . . . heterosexual marriage" and the "condemn[ation of] gay men, lesbians, and bisexuals as immoral").

75. 381 U.S. 479, 485 (1965) (describing privacy protections as attaching to (cross-sex) marriage, as long-standing, fundamental relationship).

76. 478 U.S. 186 (1986) (denying privacy right to perform "homosexual sodomy").

77. *See, e.g.*, *Equality Found. v. City of Cincinnati*, 54 F.3d 261, 266-67 (6th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3122 (U.S. Aug. 10, 1995) (No. 95-239); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (*en banc*) (fact that sexual conduct of gays and lesbians may be criminalized militates against heightened scrutiny).

doctrine has had stark implications for the kinds of cases discussed above. It provides states with a basis for distinguishing between same-sex and cross-sex couples for purposes of securing state sanction for marriage.⁷⁸ Perhaps more importantly, it has been used by courts to limit the scope of the group's protection in politics: the Sixth Circuit in the recent *Cincinnati* case held that the fact that same-sex conduct could be a felony prevented gays and lesbians from claiming suspect classification status for purposes of equal protection doctrine.⁷⁹ Note how far defendants have come from saying, for example, that plaintiffs are not entitled to protection because they are relying on an unfathomably broad notion of societal discrimination; defendants now come perilously close to saying that plaintiffs are not entitled to protection because they are bad people.

Young, single, minority mothers are also condemned for their deviation from these implicit familial norms. Because the posture of many of these cases is distinct (mothers have suffered harm, but may not yet be suing to vindicate their rights,⁸⁰ or the legislature may still be contemplating the measures that would produce the harm in the first place), the approach to communicating this moral condemnation is different, but the message is equally clear. Lawmakers, political commen-

78. As Bill Eskridge notes in *A History of Same Sex Marriage*, his thoughtful and comprehensive analysis of same-sex marriages, the most frequent stated ground for excluding gays and lesbians from the institution of marriage is definitional: "marriage is necessarily different-sex and therefore cannot include same-sex couples." William N. Eskridge, Jr., *A History of Same Sex Marriage*, 79 VA. L. REV. 1419, 1427 (1993). See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974) (stating that "appellants . . . are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex"); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) ("marriage has always been considered as the union of a man and a woman"). However, some opinions seem to betray a negative moral judgment on the participants in same-sex unions. See, e.g., *In re Estate of Cooper*, 564 N.Y.S.2d 684, 687 (N.Y. Sur. Ct. 1990) (refusing to "elevate[] homosexual unions to the same level achieved by the marriage of two people of the opposite sex"); *Succession of Bacot*, 502 So. 2d 1118, 1127-30 (La. Ct. App. 1987) (holding that a man cannot be a "concubine" of another man).

79. See *Equality Found.*, 54 F.3d at 266 & n.2. This reasoning has also been applied in a series of cases upholding the exclusion of gays and lesbians from the military. See, e.g., *Steffan*, 41 F.3d at 684 n.3; *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

80. One factor which may have deterred or delayed such legal actions is the difficulty in formulating a legal claim that adequately captures these women's injuries. The most intuitively obvious claim, one for discriminatory enforcement of criminal or child protection laws, could founder on the difficulty of proving discriminatory motive (although demonstrating discriminatory impact would, given the statistics noted above, be easy enough). This may be one reason that scholars such as Dorothy Roberts had advocated the use of a privacy claim. See Roberts, *supra* note 22.

tators, and others have perpetuated a broad, inculpatory portrait of single, minority mothers that overstates their agency in directing their familial lives, understates the confluence of social influences in constraining their choices, and emphasizes their departures from the often unstated familial norm. These mothers have "chosen" to parent outside the marital unit, an act which is represented as immoral.⁸¹ They have also "chosen" to parent at a young age, without financial means, which is represented as irresponsible because it fails adequately to provide for one's children and entails a level of culpable dependence on government.⁸² These judgments, rendered familiar by policy debates, may be internalized by judges, like the one who sentenced Darlene Johnson, who conclude that the fertility of black women on welfare must be directly controlled. These judgments may also be internalized by social workers, doctors, and other "mandatory reporters" who sometimes begin with less stigmatizing motives but whose reflexive ethnocentrism leads them to scrutinize and report single black mothers far more than their more privileged counterparts. Moreover, the nascent public understandings created by these moral judgments mean that as these mothers begin to raise their political, or even legal claims, they must first wage a battle of self-defense on someone else's terrain.

IV. SHAPING A NEW PARADIGM

How can the law, and the political debates that inevitably shape it, better respond to these new developments in the struggle for equality? Advocates for the kinds of claimants described above will face several tasks, which correspond roughly to the distinctive features of their

81. For a useful synopsis and analysis of this argument stemming from "immorality," see McClain, *supra* note 50. See also *Illegitimacy and Welfare: Hearings on H.R. 4 Before the Subcommittee on Human Resources*, 104th Cong., 1st Sess. 1 (Jan. 20, 1995) (written welfare testimony of William Bennett); *MacNeil/Lehrer News Hour* (PBS television broadcast, Aug. 8, 1995) (remarks of Senator John Ashcraft that "illegitimacy is a moral wrong").

82. See McClain, *supra* note 50 (describing claim made by legislators and commentators that it is irresponsible and unaccountable to give birth to children if one is unable to support them); see also Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14 ("From society's perspective, to have a baby that you cannot care for yourself is profoundly irresponsible. . . .").

In some cases, the women accused of immoral and irresponsible familial behavior have also committed culpable acts such as drug use or child neglect, although, as scholars such as Dorothy Roberts and Michelle Oberman have pointed out, the legal action taken in such cases seems to correspond more closely to political/moral concerns about these women as parents than to the particular culpable acts committed. See Oberman, *supra* note 20, at 2; Roberts, *supra* note 22, at 1424.

cases. The first is to enhance public understanding of the kinds of harms these cases involve. Such an understanding is, in most cases, a necessary prerequisite to the responsive handling of such claims by the courts.⁸³

The dignitary harms involved in sex- (and race-) based harassment have received perhaps greater exposure than the other new harms discussed above, although this introduction has not always produced the judicial response desired. Some courts have seen the assertion of dignitary injuries as an invitation to limit all vulgar or tasteless speech in the workplace—an invitation they have been loath to accept⁸⁴—while others have become so fixed on the dignitary injury of sexualized derogation that they have declined to find Title VII violations in cases where such injury is not manifest.⁸⁵ In this area, continued elaboration of the dignitary harm should be combined with explanations of how it operates in conjunction with a larger discriminatory context.⁸⁶ Advocates should also make explicit the ways in which such injuries can produce the kinds of concrete employment disadvantages that Title VII was intended to target.⁸⁷

83. For courts who are unpersuaded by unfamiliar claims of injury (and unfamiliar with any context-based or other limitations associated with such harms), the slippery slope involved in their recognition may bulk very large, particularly when courts may, as an instinctive matter, find it easier to identify with the perpetrators in such cases than with their victims. This may have been one factor, for example, in courts' rejection of the first efforts to claim harm from, and justify administrative regulation of, university hate speech. See, e.g., *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

84. In *Gender Discrimination and the Transformation of Workplace Norms*, I argued that some courts have (inaccurately) ascribed to sexual harassment plaintiffs the view that Title VII is aimed at all offensive or vulgar language in the workplace that has any relation to sex—a view courts have seen it as their duty to limit or reject. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1197-1209 (1989).

85. Ruth Colker makes this interesting point regarding a varied group of recent cases. See Colker, *supra* note 12.

86. When I am doing sexual harassment education, I frequently find some male employees who believe that women must be unusually sensitive to be injured by the kinds of comments at issue in many sexual harassment cases. It sometimes helps to explain that we all interpret language in the workplace (or elsewhere) in light of our past experience, and that, for many women, such comments may have been coupled with discriminatory treatment or unwanted sexual advances in the past, or they may seem more demeaning because some women have not been socialized to feel at home or entitled to succeed in many workplaces. These are experiences most men have not had, and it sometimes helps them to see women's responses as less anomalous when they understand that sexualized (or other devaluative) comments or gestures can sound different against a different background. This contextualization is, in my view, the goal of the "reasonable woman" standard in sexual harassment litigation. See Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, 1995 DISSENT 48.

87. The Brief for Amicus Curiae American Psychological Association in Support of Neither

With respect to the familial harms of disproportionate surveillance, intervention, and stigmatization at issue in the other cases discussed, the task of public education is at a more preliminary stage. Most people who are straight, white, and middle class experience little or no unsolicited governmental intervention into their family lives. The government gives its official blessings, in the form of a license to marry, and it may provide little-noticed subsidies through the tax system or impose barriers such as waiting periods or informed consent requirements should such a couple seek an abortion. But the government is generally not a familiar player or an intrusive presence in their lives.⁸⁸ To help this portion of the public (which exerts a disproportionately powerful influence on legal institutions) understand the stigma that can arise when the state refuses to sanction marriage, or the frustration and anxiety that may be produced when the state intervenes extensively in decisions about the bearing or rearing of children, would seem to be a critical first task. For those who see marriage or child rearing as an almost inalienable right, exposure to the experience and circumstances⁸⁹ of those whose way is heavily impeded by the state may help to bring about a new perception of these cases.

Party, in *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993) (No. 92-1168), does a good, concrete job of describing how a woman who is feeling injured in this way may be less able to function in the ways she needs to perform or advance in the workplace, or may be a less attractive target for mentoring or other assistance from peers or superiors.

88. One exception to this apparently benign relationship is the situation where the woman in a cross-sex couple has solicited the state's intervention—for example, in the case of spousal abuse or marital rape—and the state is reluctant to provide it. *See, e.g.*, *Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988) (suit against municipality for police failure to respond to complaints of domestic abuse). Feminist advocates seeking governmental assistance in addressing such problems have had to challenge the long-standing premise of a public/private distinction in American law. *See generally* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). Case law reveals that this distinction will need to be monitored by equal rights advocates for too much permeability, as well as for too little.

89. For example, I recently took part in a conversation about the suspicion among Catholics that there is, and long has been, a group of married priests who simply keep their marriages "underground." One participant was, quite properly, appalled by the costs such a practice must impose on the "shadow" wife, who cannot reveal herself to her husband's colleagues or acknowledge her union in public. He seemed quite unaware, however, that our political-legal system (of which the ban on same-sex marriages is a salient part) imposes many of those same costs on gay and lesbian couples. Helping to make the connection for people between the familiar context, in which infringements are readily perceived, and the unfamiliar context, in which their costs are scarcely noticed, is a critical part of public education. Similarly, middle-class couples who might be frustrated by institutional restrictions on their own ability to procreate (the failure of some insurance companies to pay for infertility treatments, for example), may not perceive the anxiety or frustration of a poor mother whose desire to procreate may be thwarted by welfare restrictions or by her concerns about governmental detection of her past drug use. That the desire to parent

The next task is to develop a new legal consensus about the role that moral judgments should play in equality claims. As Chai Feldblum has observed with respect to gay and lesbian claimants, there is more than one way this question can be resolved.⁹⁰ I think that this is also true with respect to the other groups I have discussed.

One answer may be to revisit those doctrines which have traditionally been used to separate moral judgment of personal choices from legal protection of group-based or individual rights. The most obvious candidate here is privacy doctrine. Since *Bowers v. Hardwick*⁹¹ made the fatal mistake of incorporating, rather than setting apart, censorious judgments about sexual preference, this doctrine has been of little assistance to gays and lesbians.⁹² It may, however, be of greater assistance to young, single mothers of color. Dorothy Roberts has argued that a privacy doctrine that integrates the perspectives of women of color would protect not only the right to terminate a pregnancy but the right to carry that pregnancy to term, notwithstanding the variety of constraints that may face the mother, as well as affirmative obligations

may not be diminished by such barriers may not be fully appreciated by those with greater privilege. Of course, the simple step of considering the desire or the pain of the "other," or of those in unfamiliar circumstances, is precisely what arguments implying adverse moral judgment on such "others" attempt to foreclose. They are, in effect, presented as moral deviants, whose desires are not entitled to consideration or are not comparable to "our" own.

90. See Chai R. Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996).

91. 478 U.S. 186 (1986).

92. Mary Anne Case and Janet Halley, among others, have both suggested ways in which advocates for gay and lesbian rights might revisit the privacy issue in *Hardwick*, with the hope of different results. Case suggests that some advantage might be gained by making the gay/lesbian couple, as opposed to the individual gay/lesbian litigant, the focus in litigation over privacy and other gay rights. See Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1654 (1993) ("[I]f one were to chart a progression from *Griswold* through *Eisenstadt*, with the first step being the married couple, followed by the unmarried heterosexual individual, what is the next logical term in the series? . . . Perhaps with the benefit of hindsight . . . we may now claim that the next term in the series is the gay couple.") (citations omitted). Janet Halley proposes the use of political-legal coalitions based on act rather than identity, which in one place she terms an "alliance of sodomites," to encourage the court to reconsider its position and its ill-defended merger of act and identity. See Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1770-72 (1993). Both authors point out, however, that such approaches may be double-edged swords: focusing on the much stigmatized gay couple might expose gays and lesbians to greater censure. See Case, *supra* at 1666-76. Encouraging alliances of sodomites might simply lead authorities to insist more strenuously on a distinction between heterosexual and homosexual sodomy. See Halley, *supra* at 1771. Both authors conclude that such strategies should be treated as potential resources rather than ideal solutions.

on the part of the state to help facilitate either choice.⁹³ This conception of privacy might be used to answer advocates or judges who seek to make a woman's childbearing practices an issue in neglect proceedings, drug abuse prosecutions, or policy debates.

Yet many, including myself, remain ambivalent about a strong separation of moral claims from equality claims. Such a strategy risks depriving those who struggle on these emerging fronts of the moral impetus that assisted earlier claimants to civil rights. Thus, a second strategy is to respond with a moral claim for the indicted characteristics, which may serve to answer condemnation at the same time it mandates legal protection. David Richards, for example, has characterized gay and lesbian sexual orientation as a form of dissenting conscientious conviction and has argued that the Free Exercise Clause prevents burdens from being placed on the exercise of this conviction without compelling secular justification.⁹⁴ Martha Minow's more provisional suggestion that advocates seek to protect nontraditional family forms through a right to the "free exercise of families" reflects a similar strategy.⁹⁵ This second strategy would permit those claimants described above to avail themselves of the same immanent critique that assisted civil rights advocates: that a nation committed to the protection of certain rights (in that context, the right to equality; here, the right to follow one's conscience) should secure these rights to all groups, rather than just a privileged subset.

In conjunction with either strategy, it will be useful to challenge these inculpatory judgments as legitimate moral judgments, even before they enter the domain of the law. Most of these judgments reflect an inconsistent pathologizing of the unfamiliar or rest upon starkly discriminatory stereotypes. The same arguments that indict black, single mothers for reproducing in the context of welfare dependence, for example, completely neglect the nonbenign forms of dependence that underlie more traditional childbearing: the dependence of nonworking women on men or the dependence of married, heterosexual couples on

93. See Roberts, *supra* note 22, at 1464-81. But see Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45 (Jay L. Garfield & Patricia Hennessey eds., 1984) (arguing that privacy doctrine is inherently incapable of supporting women's right to substantive assistance from the state in vindicating their reproductive choices).

94. See David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 *OHIO ST. L.J.* 491 (1994).

95. Martha Minow, *The Free Exercise of Families*, 1991 *ILL. L. REV.* 925.

tax and other subsidies provided by the government to conventionally defined nuclear families.⁹⁶ Stigmatizing stereotypes abound in this rhetoric of condemnation: charges of irresponsibility place greater opprobrium on the women who raise children in constrained circumstances than on the men who decline to parent them at all;⁹⁷ charges of profligacy and unaccountability rise reflexively to the lips of critics when the targets are African-American; and the reduction of homosexual orientation to homosexual conduct enacts the familiar, stereotypic sexualization of gays and lesbians.⁹⁸ A concerted political effort to expose these judgments as group-based animus masquerading as morality may help to place critics on the defensive, as well as making legal actors and uncommitted political observers more informed consumers of censorious rhetoric.

Even beyond the challenge of censorious moral judgments, claimants must still confront a legal system which is ill-suited to respond to the complexity of their claims of discrimination. Here, several steps might be taken to make complex images of gender discrimination or women's agency more widely available to decision makers and, correspondingly, to reduce judicial fear of the slippery slope⁹⁹ introduced by such complexity. First, there are several legal claims, most under Title VII, that show at least the potential for improving on the singular, unitary, biological view of protected categories that characterizes current antidiscrimination law. Sexual harassment law, as we have seen, has thus far displayed a mixed record for addressing intersectional and other complex forms of gender discrimination. Yet, if properly used, it has a unique potential for illuminating these patterns, because the attitudes of and stereotypes relied upon by perpetrators are so transparently displayed in their language. Epithets such as "buffalo butt" or "Chinese pussy"¹⁰⁰ reveal the confluence of race and sex discrimination

96. Martha Fineman, Discussion of "Welfare and Hidden Dependencies" at the 1995 Annual Meeting of the Law & Society Association (June 2, 1995).

97. See McClain, *supra* note 50.

98. Works noting this tendency to sexualize gays, lesbians and their relationships include VAID, *supra* note 65, at 329; Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes and Legal Protection for Lesbians and Gay Men*, 46 MIAMI L. REV. 511 (1992).

99. See *Judge v. Marsh*, 649 F. Supp. 770, 779-80 & n.11 (D.D.C. 1986).

100. These are actual epithets cited as evidence in recent sexual harassment cases. "Buffalo butt" comes from *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), a sexual and racial harassment action brought by an African-American woman. "Chinese pussy" comes from the case of *Jew v. University of Iowa*, 749 F. Supp. 946 (S.D. Iowa 1990), a sexual harassment case brought by a Chinese-American woman. See Martha Chamallas, *Jean Jew's Case: Resisting Sex-*

in the minds of the perpetrator. They may profitably be used by advocates to explain why neither claim, alone or in simple aggregation, does justice to the claimant's treatment, or why a race claim (for example, where only one such claim is available) does not become less racial by being inflected with sex-based animus, and vice versa.

Similarly, both sexual harassment claims and sex discrimination claims based on stereotype often combine animus directed toward the biological trait of femaleness and animus directed toward socially female characteristics. They may also, as we have seen above, reflect animus toward unconventional combinations of biological sex and social gender. By making explicit the way these combinations operate—and have operated in cases where courts have been willing to find sex discrimination¹⁰¹—advocates can make clear that what we call sex or gender discrimination is often a complex combination of bias against female sex, bias against social characteristics gendered female, and insistence that the social and the biological be combined only in narrow, conventional ways.¹⁰² Acknowledging precisely what attitudes undermined Ann Hopkins may be a first step toward permitting recovery by biologically male, socially female claimants like Anthony Goluszek, who continue to languish under the current doctrinal order.

Contemporary sex discrimination actions can also serve as a vehicle for contesting another kind of reductive categorization: the tendency to deny the agency of victimized groups. The Supreme Court's recent rejection of the "serious psychological injury" standard in sexual harassment law¹⁰³ reflects the recognition that one can suffer actionable discrimination without being debilitated or losing one's capacity for resistance or self-direction. Recent changes in the law of battered women's advocacy, which emphasize the struggle for power and control in the battering relationship or qualify early extreme portraits of learned helplessness,¹⁰⁴ suggest that even the most brutal forms of coercion tend to constrain rather than negate the agency of their targets.

ual Harassment in the Academy, 6 YALE J.L. & FEMINISM 71, 74 (1994).

101. One might make explicit, for example, the fact that Ann Hopkins, in *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1986), was denied partnership for combining female biological sex with social characteristics gendered male.

102. See Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987) (providing a thorough explication of these different strains in sex discrimination); Case, *supra* note 47 (providing an innovative and comprehensive effort to address confusions of sex, gender and sexual orientation in antidiscrimination law).

103. See *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993).

104. Feminist legal scholars, including those who were previously women's self-defense law-

With respect to these complex characteristics, one invaluable long-term strategy may be to populate public discourse with detailed, complex portraits of the lives of oppressed groups. This has been one contribution of the recent flood of first-person narratives by women, people of color, and gays and lesbians;¹⁰⁵ yet the strategy need not derive exclusively from that medium. By demonstrating how a Latina woman encounters the confluent strains of discrimination in her life; how emotional and moral commitment, as well as erotic attraction, function in the life of a gay or lesbian couple; or how a single, black mother's efforts to rear her child reflect both acquiescence in systematic constraint and struggles toward independent self-definition, these images may assist in the struggle against censorious moral judgments by challenging the erasure of humanity that permits reductive characterization. These images will also offer a full account of the complex social reality to which law—through whatever revisions or shifts in paradigm—will ultimately be called upon to respond.

yers, have played an important role in highlighting the tension between the need to defend battered women who kill (often through the use of defenses such as "learned helplessness") and the need for battered women, and women as a group, to project an image reflecting some capacity for agency. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 38 (1991); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986). As a result they have contributed materially to the formulation of richer and more complex accounts of battering relationships.

105. The legal literature reflecting or advocating the use of experiential narratives is large and growing. For representative examples, see MATSUDA ET AL., *supra* note 29; PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 1 (1989); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994). There is also a related literature evaluating the use of narrative both positively and negatively. Compare Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993) and Marc A. Fajer, *Authority, Credibility and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L. J. 1845 (1994) with Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).