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Authors

Brown, Judith Olans
Williams, Lucy A.
Baumann, Phyllis Tropper

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THE MYTHOGENESIS OF GENDER: JUDICIAL IMAGES OF WOMEN IN PAID AND UNPAID LABOR

Judith Olans Brown*

Lucy A. Williams**

Phyllis Tropper Baumann***

INTRODUCTION

Mythic thinking constructs and permeates our culture, lodging in our collective unconscious, shaping and ultimately validating the way we look at the world.¹ The word "myth" itself has many connotations.² Myths can create reality and increase

* Professor of Law, Northeastern University School of Law; A.B., Mount Holyoke College, 1962; L.L.B., Boston College Law School, 1965.

** Professor of Law, Northeastern University School of Law; A.B., Baylor University, 1969; J.D., University of Chicago Law School, 1974.

*** Lecturer, Northeastern University School of Law; A.B., Brandeis University, 1967; J.D., Boston University Law School, 1970.

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1. According to Jung, the "collective unconscious" is a repository of universal mythic themes. FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 190-91 (Charles Lam Markmann trans., 1967). See ELIZABETH JANEWAY, *MAN'S WORLD, WOMAN'S PLACE: A STUDY IN SOCIAL MYTHOLOGY* 33 (1971) (arguing that myths are the product of profound emotional drives common to many people and therefore reflect emotional reality); *id.* at 295 (proposing that this emotional reality shapes the way we look at the world and leads us to create a myth to validate the common feeling).

2. "Mythos" in classical Greek denoted any story or plot, be it true or invented. MEYER H. ABRAMS, *A GLOSSARY OF LITERARY TERMS* 111 (5th ed. 1988). The study of theories of mythology has been the subject of much twentieth century scholarship, beginning with the work of the structural anthropologist Claude Levi-Strauss and the linguist Ferdinand de Saussure. There are at least three distinct types of contemporary myth scholarship: psychoanalytic (examining what it is within the mind that elevates symbols and stories into myth); cultural or anthropological (examining the myths of disparate cultures and the cultural forces which shape and create myths); and literary criticism (examining the individual components of litera-

meaning, operating not as reflection but inspiration. Myths can also be reductive, abolishing complexities and creating a "blissful clarity."³ Myths can be symbolic or distortive, positive or negative, descriptive or normative. Operating in our minds often without our being aware of them,⁴ myths can make even the most historically contingent ideas seem universal, natural, and inevitable.⁵ Thus, myths serve ideology and can perpetuate orthodoxy, legitimating a particular point of view⁶ and often relieving us of the burden of critical thinking.⁷

This is a paper about the power of certain, often reductive, mythologies (with both descriptive and normative aspects) in the development of legal doctrine relating to women receiving welfare and women in paid labor, and how in these contexts mythic thinking has contributed to gender oppression.

Law does not exist apart from the larger culture; it is not a closed system.⁸ Law does not — indeed cannot — operate in a

ture and narrative forms to trace the interaction of myth and language). Tracing the often bewildering array of applications of the word "myth" far exceeds the scope of this paper. We read liberally among all three fields and found much overflow and mutuality of intellectual indebtedness. We agree with Elizabeth Janeway that "the way to study myth is through a determinedly mixed approach." JANEWAY, *supra* note 1, at 34.

3. ROLAND BARTHES, *MYTHOLOGIES* 143 (Annette Lavers trans., Noonday ed. 24th prtg. 1990) (1957).

4. CLAUDE LEVI-STRAUSS, *THE RAW AND THE COOKED* 10 (John Weightman & Doreen Weightman trans., 1969) (1964).

5. Barthes taught that one function of mythology was to "naturalize" socially constructed "facts," *i.e.*, to transform "history into nature." BARTHES, *supra* note 3, at 129. As Professor Eagleton observes, this makes ideology seem as "innocent and unchangeable as nature itself. Ideology seeks to convert culture into nature." TERRY EAGLETON, *LITERARY THEORY* 135 (1983). In this sense, "ideology . . . is a kind of contemporary mythology, a realm which has purged itself of ambiguity" *Id.*

6. Barthes was primarily interested in the ideological use of myth. See JANEWAY, *supra* note 1, at 13; ANNETTE LAVERS, ROLAND BARTHES, *STRUCTURALISM AND AFTER* 106 (1982); MICHAEL MORIARTY, ROLAND BARTHES 21 (1991). Barthes referred to myths as a "perpetual alibi." BARTHES, *supra* at 123.

7. Marcel Detienne, *Rethinking Mythology*, in *BETWEEN BELIEF AND TRANSGRESSION: STRUCTURALIST ESSAYS IN RELIGION, HISTORY AND MYTH* 45 (Michael Izard & Pierre Smith eds., John Leavitt trans., 1987) (referring to the "strange and disconcerting discourse of myths"). Myths and religion are closely related. See EAGLETON, *supra* note 5, at 93 (describing literature and myth as a displaced version of religion and as an "essential palliative for the failure of religious ideology"); JANEWAY, *supra* note 1, at 59-60; see also Lucinda Peach, *From Spiritual Descriptions to Legal Prescriptions*, 10 *J. L. & RELIGION* 73, 74 (1994) (describing the relationship between religious symbols and legal views of women).

8. "[T]he legal system invests, habits, and flows out of the same society that produces and sustains popular culture." Lawrence Friedman, *Law, Lawyers and Popular Culture*, 98 *YALE L.J.* 1579, 1589 (1989). Cf. Richard A. Posner, *The Depic-*

vacuum. The images in the case law are refracted in other cultural texts,⁹ and those texts, in turn, inform the decisions of the legal regime.

Indeed, the mythological nature of our core beliefs about the legal system illustrates how historical contingency is naturalized.¹⁰ One of our most cherished myths is that judges, insulated from the political process and sequestered from the hubbub of daily living, are free to develop the objective intellectual abstractions (legal doctrine) which govern the conduct of society.¹¹

tion of the Law in the Bonfire of the Vanities, 98 YALE L.J. 1653, 1660 (1989). Posner states, "So we should not expect popular fiction to influence perceptions of the law, and through them perhaps law itself, but we may be able to learn something about the popular understanding of law from popular fiction about law." Posner also admitted, "I am a resolute nonreader of popular fiction, nonviewer of television, and nonmoviegoer." *Id.*

9. The importance of imagery for public understanding (or misunderstanding) of events has long been recognized. For a review of the critical theories on the importance of image in the "media society," see Suzanna Danuta Walters, *Material Girls: Feminism and Cultural Studies*, 12 CURRENT PERSP. SOC. THEORY 59 (1992). For an analysis of cultural developments during the antebellum period, see ANN DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (1978). Of course, both words and images shape popular ideology. See BARTHES, *supra* note 3, at 109; see also JAN NEDERVEEN PIETERSE, *WHITE ON BLACK: IMAGES OF AFRICA AND BLACKS IN WESTERN POPULAR CULTURE* 53 (1992).

10. Barthes taught that "[s]ome mythical objects are left dormant for a time; they are then no more than vague mythical schemata whose political load seems almost neutral." BARTHES, *supra* note 3, at 144.

11. See, e.g., Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1885 (1988). Two University of North Carolina law professors conducted a study which concluded that a majority of Americans believe in judicial objectivity and that political neutrality was the basis of judicial legitimacy:

More broadly the findings of this study suggest that the model of objective interpretation of the Constitution is very much alive in the minds of Americans . . . the Court remains a highly respected legal institution among the general public. Further, the public generally believes that the Court is a legitimate institution that uses fair decision making procedures.

Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 748 (1994) (discussing the effects of literature on law, and law on literature). See also Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 912 (1995) (discussing the tension between the ideal character of the judicial office and the world of electoral politics); Kenji Yoshino, Note, *What's Past is Prologue: Precedent in Literature and Law*, 104 YALE L.J. 471, 478 (1994). Of course, competing mythologies of judicial compromise can also have persuasive power.

Twentieth century social science scholarship has exposed the wistful naiveté of this model.¹² Contemporary legal scholarship teaches that legal doctrine is not created by judges making a series of neutral judgments.¹³ Yet mythic thinking elevates this seductively comfortable ideal into an "objective truth." These myths then serve as a rhetorical template by which we assure ourselves of the continued legitimacy of the legal regime.¹⁴

It is important to understand that we are not suggesting that myths *per se* are bad. Everything courts and legislatures do rests on mythologies. Rather, our thesis is that certain reductive assumptions about women upon which courts and legislatures rely, and which advocates unknowingly often reinforce, have frustrated the development of a transformative legal discourse. This

12. For some references familiar to the legal reader, see ROBERT McCLOSKEY, *THE AMERICAN SUPREME COURT* 40-42 (1960) (characterizing Justice Marshall's opinion in *Marbury v. Madison* as a "masterwork of indirection," successfully avoiding a political crisis); *id.* at 164-78 (describing the Supreme Court's reaction to FDR's court-packing bill, particularly the "switch in time that saved nine" of Justice Roberts); Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980) (positing the importance of *Brown* to domestic and international politics); see also MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992) (surveying how politics shapes law).

13. The critical legal studies movement attempts "to explain both that legal principles and doctrines are open-textured and capable of yielding contradictory results, and that legal decisions express an internal dynamic of legal culture contingent on historical preference for selected assumptions and values." Martha Minow, *Law Turning Outward*, 73 TELOS 79, 83 (1986); see also Gary Minda, *The Jurisprudential Movements of the 1980's*, 50 OHIO ST. L.J. 599 *passim* (1989) (relating and reconciling Law and Economics, Critical Legal Studies and Feminist Legal Thought).

As the legal realist Oliver Wendell Holmes observed:

The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.

OLIVER WENDELL HOLMES, *THE COMMON LAW* 8 (1963 ed.). Felix Cohen asserted that:

[t]he traditional language of argument and opinion neither explains nor justifies court decisions. When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions . . . then the author, as well as the reader, is apt to forget the social forces which mold the law and the social ideas by which law is to be judged.

Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935); see also *infra* note 43.

14. PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 11 (Maureen Cain & Carol Smart eds., 1992) (arguing that we subject ourselves to the law through our belief in a myth of the law's authority).

mythopoeic process is distortive,¹⁵ perpetuating nostalgic¹⁶ myths about all women, with significant race and class variations. As a result, the contextualized complexity of many women's experiences has not been interpreted in the legal culture. Thus, in our view, continuing gender oppression is due in large part to the absence of dynamic, vital, inclusive, multidimensional, and evolving mythologies about women.¹⁷

Mythic generalizations¹⁸ often reduce women to one of two archetypes: madonna or whore.¹⁹ The madonna is the ultimate

15. BARTHES, *supra* note 3, at 121.

16. Judith Olans Brown & Phyllis Tropper Baumann, *Nostalgia as Constitutional Doctrine: Legalizing Norman Rockwell's America*, 15 VT. L. REV. 49, 58 (1990).

17. JOAN COCKS, *THE OPPOSITIONAL IMAGINATION: FEMINISM, CRITIQUE AND POLITICAL THEORY* 127 (1989) (referring to the "misogyny of cultural artifacts").

18. Of course, no single mythology stands alone. Even as we point to the reduction of some myths, we recognize the connectedness, reinforcement, and competition among multiple myths in any setting. Thus, the madonna/whore myths are themselves not dichotomies.

19. These archetypes undergird much of Western religious heritage. See, e.g., GERDA LERNER, *THE CREATION OF PATRIARCHY* 200-01 (1986) ("And in the story of the Fall, woman and more specifically female sexuality became the symbol of human weakness and the source of evil."). Professor Peach noted that Eve and the Virgin Mary are the "two dominant symbols of the feminine in Christian tradition." Peach, *supra* note 7, at 74. Although these two symbols are opposite in many respects, they are both defined in relation to their sexuality and maternity. Eve is "corrupt, sinful, degraded, sexual, desirous, sensual, stupid, ignorant, greedy," *id.* at 75; Mary is pure, celibate, chaste, asexual, passive, receptive and submissive, *id.* at 76. For a Catholic perspective and a questioning of the Marian ideal, see MARINA WARNER, *ALONE OF ALL HER SEX: THE MYTH AND THE CULT OF THE VIRGIN MARY* (1976). After quoting Barthes' observation that "Myth . . . transforms history into nature," Warner continued: "This is the crux of the matter: for the moral concepts the Virgin expresses are presented as quite natural." *Id.* at 335 (quoting BARTHES, *supra* note 3, at 129). Mary is "an icon of feminine perfection, built on the equivalence between goodness, motherhood, purity, gentleness and submission." *Id.* See also ELAINE PAGELS, *THE Gnostic GOSPELS* 66-67 (1982) (documenting sexism and noting that women's sexuality was unclean and the greatest obstacle to a male Christian's devotion to God, the Father). For a good discussion of the myth of the virgin birth — the twin ideal of virginity (purity) and motherhood, see EDMUND LEACH, *Virgin Birth, in GENESIS AS MYTH AND OTHER ESSAYS* 106 (1969) (noting that the biological impossibility is the key to the myth).

The madonna/whore mythologies also inform scholarship about contemporary gender roles. For a fascinating study of the "good girl/bad girl dichotomy," see Barbara Bradby, *Like a Virgin-Mother? Materialism and Maternalism in the Songs of Madonna*, 6 CULTURAL STUD. 73 (1992); see also EAGLETON, *supra* note 5, at 190-91 (arguing that women are "both 'inside' and 'outside' male society, both a romantically idealized member of it and an outcast from it"). For a powerful fictional account, see MARGARET ATWOOD, *THE HANDMAID'S TALE* 79 (1985) ("There are only women who are fruitful and women who are barren, that's the law."). For a slightly different perspective, see OLD MAIDS TO RADICAL SPINSTERS: UNMARRIED WOMEN IN THE TWENTIETH CENTURY NOVEL (Laura L. Doan ed., 1991). For a collection of essays on the theoretical and psychological differences between the

maternal nurturer and virtuous role model, neutered and asexual. Women who leave the sanctity of the home for paid labor may "abandon" their virtue; hence, they should not be "surprised" when they become objectified in the sexual jungle of the work place.²⁰

Mainstream white culture has developed separate but parallel mythologies for African American women:²¹ Mammy is the neutered caregiver to whites, who presumably has no family to care for herself, a family which needs no care, or who can juggle paid/slave labor and family responsibilities with no conflict; Jezebel is the sexually charged slut (again with no imagery of caregiving responsibilities).²² In recent times, as the popular assumption

sexes, see Deborah L. Rhode, *Definitions of Difference*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 197 (Deborah L. Rhode ed., 1990).

20. This mythology teaches that women who "forsake" their children for paid labor are bad mothers, regardless of whether their paid labor is necessary to feed their children. A competing mythology for poor women, particularly single mothers, teaches that poor women are supposed to be in paid labor, but are not supposed to have children. Hence the double bind: they are bad mothers *both* because they had children without being part of a two-parent family and because they are in paid labor. See MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY 106 (1995) ("The concept of deviant motherhood that emerges in poverty discourses most clearly and unambiguously reflects the role of patriarchal ideology in the process of constructing Mother"); Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of the Law*, 53 OHIO ST. L.J., 1210-19 (1992) (distinguishing the late nineteenth and early twentieth century ideology of motherhood for white middle and upper class women for whom motherhood was a "sacred social trust," and the negative stereotypes of recent immigrants and women of color which operate to devalue motherhood on racial, ethnic and class lines).

21. Of course, there are also mythologies for Latinas and Asian women. See Tracy Lai, *Asian American Women: Not For Sale*, in RACE, CLASS AND GENDER, 1963-1971 (Margaret L. Andersen & Patricia Hill Collins eds., 1992) (noting the stereotyping of Asian peoples and cultures as inferior and exotic); Deborah Woo, *The Gap Between Striving and Achieving*, in MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 185 (Asian Women United of California ed., 1989) (exploring cultural emphasis on education and success); Felix M. Padilla, *Salsa Music as a Cultural Expression of Latino Consciousness and Unity*, HISPANIC J. BEH. SCI. 28 (1989) (chronicling how music has become mythologized and marked as a defining cultural characteristic); Cherríe Moraga, *La Güerra*, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 27 (Cherríe Moraga & Gloria Anzaldúa eds., 1983).

22. See PIETERSE, *supra* note 9, at 155, 178 (describing "Aunt Jemima" as a desexualized, nonthreatening figure reminiscent of "old times" and the mystique of the "Black Venus"); see also CATHERINE CLINTON, THE OTHER CIVIL WAR: AMERICAN WOMEN IN THE NINETEENTH CENTURY 33-34 (1984) (surveying the history of women in the nineteenth century). For an analysis of the complex and interrelated impact of gender, race, and class, see VICTORIA E. BYNUM, UNRULY WOMEN: THE POLITICS OF SOCIAL AND SEXUAL CONTROL IN THE OLD SOUTH 5 (1992):

that society has cured itself of its racism²³ has made the Mammy role less “acceptable,” the popular media has replaced this dichotomy with another one. On the one hand, in the media (particularly television sitcoms, advertising, and media personalities) African American women have achieved the American dream: they are professional women in heterosexual, middle-class, two-parent families, fully assimilated into the white mainstream culture.²⁴ On the other hand, the news media routinely portrays the vast majority of African American women as drug users, prosti-

Whether slave women behaved like Mammies or Jezebels depended on the role imposed on them. Certainly the role of Mammy was safer. Sexless and loyal, according to white images, Mammy inspired the trust of whites and thus usually received better treatment [T]he role of Jezebel represented the sexually charged, seductive counter-image of the ‘bad’ black woman. In some cases, however, this role brought material rewards from white men

Id. at 5. Discussing the bifurcated sexuality of black and white women (the sexual inconvenience of making all women pure), Bynum notes “[t]he creation of Jezebel provided the rationale for allowing sexual relations between white men and black women” and allowed the sexual degradation of black women by white men. *Id.* at 4. Bynum also points to the connection between these gender assignments and economics:

[C]onfining white women’s sexual and reproductive activities within the institution of marriage and black women’s within slavery reinforced the plantation patriarchy. White wives perpetuated the lines of kinship that underlay the wealth and authority of white men, while slave women produced wealth for white men through their productive and reproductive labors.

Id. at 10; see also ELIZABETH FOX-GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH* 290-92 (1988) (describing male and female images such as Buck, Sambo, Jezebel, and Mammy as dominant white views of gender roles among slaves and white anxiety about their relationships with slaves). Fox-Genovese writes, “Jezebel lived free of the social constraints that surrounded the sexuality of white women.” She legitimated the lust of white men by “suggesting that black women asked for the treatment they received.” *Id.* at 292.

23. The mythology that institutional racism is a thing of the past informs the Rehnquist Court’s discrimination jurisprudence. See, e.g., the motivation-driven definition of discrimination in both constitutional claims, *Washington v. Davis*, 426 U.S. 229 (1976), and cases arising under civil rights statutes, *Saint Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993) (Title VII of the Civil Rights Act of 1964); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and the Court’s rejection of affirmative action programs, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

24. Michele Wallace juxtaposed Oprah Winfrey’s daytime talk show persona and her portrayal of a “fat, old and poor” character in *The Women of Brewster Place*, to highlight the message that the woman’s choice of involvement with certain men makes them successful (Winfrey) or a member of the “underclass.” Michele Wallace, *Negative Images: Towards a Black Feminist Cultural Criticism*, in *THE CULTURAL STUDIES READER* 122-24 (Simon During ed., 1993).

tutes, and welfare cheats.²⁵ African American women who do not fit into one of these two procrustean paradigms are by and large excluded from media attention. In other words, since the mainstream media (and the legal system) lacks creative mythologies which interpret the experiences of most African American women, it is left with only reductive and distortive myths.²⁶

These myths portray individuals in terms of roles. As a result, we understand who people are only by what we think they ought to be.²⁷ Women who step out of one role are automatically assigned to another. Each mythic role contains its opposite; leaving one role engulfs you in its negative or shadow.²⁸

For example, consider the normative myth that connects virtue to the neutered white or newly middle-class African American nurturer who raises her children in a two-parent family. When a woman no longer fits that role (because of single parenthood or sometimes because of her entry into paid labor), she is assigned to its opposite, whore, and becomes a "bad mother," unworthy of protection.

The race and class assumptions underlying our gender mythologies are particularly stark and problematic when we juxtapose judicial opinions regarding mothers who perform paid labor

25. Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 *FORDHAM URB. L.J.* 1159, 1163-68 (1995).

26. Wallace, *supra* note 24, at 122-23, 126. These myths are based on the 1950s romantic ideal of the white two-parent middle-class family, with a female caregiver/childcarer/helpmate and a male breadwinner. Writing about that period, Max Lerner noted that woman's "central function . . . remains that of creating a life style for herself and for the home in which she is life creator and life sustainer." MAX LERNER, *AMERICA AS A CIVILIZATION* 611 (1957); *see also* SARA M. EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* 234 (1989) (noting the strong reassertion of traditional views of female domesticity in the postwar era). For the classic critique of this model, *see* BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

27. JANEWAY, *supra* note 1, at 70.

28. *Id.* at 118. Witches are the ultimate "negative" role. Evans writes, The association between witchcraft and women was pervasive, and most accused witches were seen to threaten the established order in some way. Some were women who inherited money directly . . . thus upsetting the orderly transmission of property through the male line. Others were older women whose aggressive and contentious behavior (itself not so unusual) was interpreted by their neighbors as an unwillingness to accept their proper place. Still others were newcomers who had not yet found a familiar niche in the order of things. Women were often convenient scapegoats for vague anxieties about economic uncertainty and underlying fears of female power and unruliness.

EVANS, *supra* note 26, at 33. *See generally* CAROL F. KARLSEN, *THE DEVIL IN THE SHAPE OF A WOMAN: WITCHCRAFT IN COLONIAL NEW ENGLAND* (1987) (detailing the identification of witchcraft specifically with women).

and mothers who receive welfare benefits.²⁹ Initially, the quid pro quo for the taxpayer was that the widowed or unmarried mother receiving welfare must fit madonna mythologies of the “good mother”: among other things, she must be chaste.³⁰ Increasingly, however, a particular image of welfare mothers as African American and, more recently, Latina, has lodged in our collective perception. As that distortive myth has become naturalized, the madonna image (never securely established even for white poor women) disappeared from the mythology: a poor woman without a man (virtually all welfare mothers)³¹ is not valued as a nurturer. In order to be valued, the welfare mother (like the women of color who traditionally were assigned work roles in slave or paid labor)³² must leave the welfare rolls; she must move into paid labor³³ or find another means to support her child.

Myths construct and distill experiences into naturalized “truth.” As such, part of the power of mythologies is that they resonate differently with different listeners. Thus, mythologies can be both complex and reductive at the same time. To those in power who use them to explain the unexplainable, myths may both express and mediate contradictions. To the “other,”³⁴

29. These two groups are far from mutually exclusive. See *infra* text accompanying note 131.

30. WINFRED BELL, AID TO DEPENDENT CHILDREN 9-13 (1965).

31. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 2D SESS., OVERVIEW OF ENTITLEMENT PROGRAMS, 1994 GREEN BOOK 401 (1994) [hereinafter 1994 GREEN BOOK] (documenting that 87.6% of children on AFDC are living with a single parent).

32. See *infra* text accompanying notes 85-92, 104-112.

33. See LINDA GORDON, PITIED, BUT NOT ENTITLED 185 (1994) (stating that honorable poverty derives from disrupted wage earning).

34. “Other” is a term used by social scientists and critical theorists to describe those who have been demonized and excluded from the power structure. See EAGLETON, *supra* note 5, at 190 (“woman is both ‘inside’ and ‘outside’ male society, both a romantically, idealized member of it and a victimized outcast”). Feminist theory critiques the idea that the “other” is less worthy. See SIMONE DE BEAUVOIR, THE SECOND SEX 211 (H.M. Parshley ed. & trans., 1952) (theorizing that the myth of woman as the infinite “other” also entails its opposite); KATE MILLET, SEXUAL POLITICS 53 (1969) (discussing the relationship between economic dependency and a “marginal life”); see also Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 742 (1992) (stating that focus on the “otherness” of the poor highlights race and gender differences). Julia Kristeva explores the negative consequences of patriarchal monotheism for women “who find themselves reduced to the role of the silent other of the symbolic order.” Julia Kristeva, *About Chinese Women*, in THE KRISTEVA READER 138-59 (Toril Moi ed. & Seán Hand trans., 1986); see also LUCE IRIGARAY, SPECULUM OF THE OTHER WOMAN 135 (Gillian C. Gill trans., 1985) (“[S]ilent allegiance of the one guarantees the auto-sufficiency, the auto-nomy of the other as long as no questioning of this

whose individuality may be denied by the assertion of mythic universality, myths can be evasive and inadequate.

In this Article, we examine how myths have constructed the status of women in the legal regime, concentrating particularly on issues involving work, family, and sexuality,³⁵ and suggest the importance of creating new mythologies for women. We trace the law's dependence on cultural myths, developing the inevitability of mythology in the legal as well as the popular culture, and discussing the intellectual and institutional dangers of much current mythic thinking.

We begin in Part I with *Muller v. Oregon*³⁶ in order to illustrate the gendered nature of worker mythology in the early twentieth century. Next, we turn to a historical context, briefly reviewing women's roles in slave and paid labor markets as well as the evolution of their participation in social welfare systems. We explore the gender, race, and class themes in the multiple mythologies of motherhood invoked in the case law. In Part II, we examine the law's obsession with women's sexuality, again contrasting the mythic "ideals" of romance and motherhood with mythologies of the sexual allure and availability of women in paid labor and women receiving welfare. We conclude with some thoughts about the necessity and difficulty of creating new mythologies, and the role which progressive lawyers must play in developing a new mythogenesis of gender.

mutism as a symptom — of historical repression — is required.") Fitzpatrick notes that "[myth] . . . is formed in the comprehensive denial of the 'other' — in assertions of universal knowledge, imperious judgment and encompassing being." FITZPATRICK, *supra* note 14, at x; see also RIANE EISLER, *THE CHALICE AND THE BLADE* 93 (1987) (explicating the subrogation of women due to biblical eradication of the Goddess, whose worship was considered an "abomination"). Speaking of the fundamental distinction between the self and other, Edward Said noted that the "other" is the "negative illumination" of the "self," or its "underground self." COCKS, *supra* note 17, at 185 (quoting EDWARD SAID, *ORIENTALISM* 3 (1978)). Professor Cocks added that with respect to gender "the difference between Self and Other is articulated not as Occident/Orient but as masculine/feminine. Its classic exposé is not Said's *Orientalism* but Simone de Beauvoir's *The Second Sex*." *Id.* Cocks suggests Said benefited from de Beauvoir and Foucault in developing the idea of a dominant group. *Id.* at 187 n.39.

35. We acknowledge that this focus on so-called "women's issues" is necessarily limited. In future articles we hope to explore the gendered mythology in other areas of the legal system.

36. 208 U.S. 412 (1908).

I. MYTHOLOGIES OF MOTHERHOOD

A. *The Use of Maternal Mythology by Advocates and Judges: The Example of Protective Labor Legislation*

The Supreme Court's early twentieth century opinions on protective labor legislation exemplify the transformation of myth into legal doctrine.³⁷ Both *Lochner v. New York*,³⁸ which rejects protective labor legislation for men, and *Muller v. Oregon*,³⁹ which upholds it for (some) women, rest on myths in the guise of "factual" premises.⁴⁰ *Lochner* and *Muller* demonstrate how myths validate the philosophical biases of judges and facilitate gender-differentiated outcomes.⁴¹

In *Lochner*, the Supreme Court held that New York's statute limiting bakers' hours to ten hours per day was "an illegal interference with the rights of individuals to make contracts."⁴² To justify its holding, the Court had to assume certain "facts" about the operation of paid labor markets: a worker is "free," individually able to contract with an employer for the sale of his labor and to bargain and negotiate over the terms and conditions of employment.

Traditional legal scholarship criticizes *Lochner* as the imposition of a particular non-neutral⁴³ economic theory on legal doc-

37. Of course, institutions and individuals use myths for a variety of underlying agendas, the explication of which is beyond the scope of this article.

38. 198 U.S. 45 (1905).

39. 208 U.S. at 423.

40. "Facts," of course, are not neutral, embodying socially constructed values. EAGLETON, *supra* note 5, at 17. For purposes of this article, we use the words "find" or "facts" within this understanding. Barthes suggested that the ambiguity of mythical speech is due in part to its appearance as "fact." BARTHES, *supra* note 3, at 124. In that sense, myths often substitute for "facts":

Myth does not deny things, on the contrary, its function is to talk about them; simply, it purifies them, it makes them innocent, it gives them a national and eternal justification, it gives them a clarity which is not that of an explanation but that of a statement of fact.

Id. at 143.

41. Limitations in the coverage of protective labor legislation for women, however, often perpetuated racial classifications. For example, agricultural and domestic workers (the bulk of whom were women of color) were not included. *See infra* note 58.

42. 198 U.S. at 59; *see also* David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 559-64 (1991) (discussing the increased role fact finding and interpretation should play in Supreme Court jurisprudence).

43. Professor Sunstein refers to the "principle of neutrality as based on the status quo." CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 17 (1993). For a discussion of various conceptions of judicial neutrality, *see also* Kent Greenawalt, *The*

trine.⁴⁴ But, of course, economic theories are themselves grounded in myth, creating and accepting assumptions about human behavior in the workplace. Thus, the lower court opinions in *Lochner*, upholding the statute, assumed different "facts" — "facts" about the connections among working conditions, the health of the community, and the health of the workers.⁴⁵

Enduring Significance of Neutral Principles, 78 COLUM. L. REV. 982 (1978) (discussing a more flexible formulation of the requirement of "neutral" principles); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (imposing strict constraints on judges); cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 589-93 (3d ed. 1986) (defending liberty of contract as a constitutional principle). For a general critique of the economic approach to law, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 114-85 (1987).

44. The classic exposition of this view is Justice Holmes' famous *Lochner* dissent:

This case is decided upon an economic theory which a large part of the country does not entertain The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.

198 U.S. at 75 (Holmes, J., dissenting). For an example of the application of Spence-rian ideas to women, see the work of former Harvard Overseer and Medical School professor Dr. Edward Clarke. Clarke described women's natural limits as proof of Herbert Spencer's theory that higher civilizations represented increasing specialization, exemplified by the divergence of male and female roles. See ROSALIND ROSENBERG, *BEYOND SEPARATE SPHERES, THE INTELLECTUAL ROOTS OF MODERN FEMINISM* xv, 1-27 (1982) (discussing Clarke's impact on educational opportunities for women). But see GLENNA MATTHEWS, *JUST A HOUSEWIFE: THE RISE AND FALL OF DOMESTICITY IN AMERICA* 123 (1987) (noting the absurdity of the idea that Darwin and Spencer created the view that women were biologically inferior to men and suggesting that their theories ratified "pre-existing prejudices").

45. The Appellate Division of the New York Supreme Court did not refer to specific "findings" but wrote:

It is very important for the health of the community that bakers should supply people with wholesome bread and pure food When we consider the intense heat of the rooms where baking is done, and the flour that floats in the air and is breathed by those who work in bakeries, there can be but little doubt that prolonged labor, day and night, subject to these conditions, might produce a diseased condition of the human system, so that the employés (*sic*) would not be capable of doing their work well, and supplying the public with wholesome food.

People v. Lochner, 76 N.Y.S. 396, 402 (1902), *aff'd*, 69 N.E.373 (N.Y. Ct. App. 1904), *aff'd*, 198 U.S. 45 (1905).

The New York Court of Appeals relied on the broad scope of the state's police power and the statute's purpose to regulate working conditions for the public health. The majority opinion refers to "published medical opinions and vital statistics," but does not analyze them. 69 N.E. 373, 380 (N.Y. Ct. App. 1904), *aff'd*, 198 U.S. 45 (1905).

After an extensive consideration of statistics and other authorities, Judge Vann, in a concurring opinion, concluded that, "[t]he evidence, while not uniform, leads to

The United States Supreme Court ignored the "findings" of the lower courts, substituting its own "factual" assumptions about the nature of labor relations:

The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with⁴⁶

This myth became the predicate for the Supreme Court's "finding" that, while there was "data" indicating that the trade of a baker is not as healthy as some other trades, "to the common understanding the trade of a baker has never been regarded as an unhealthy one."⁴⁷ That "common understanding" reinforced the outcome.⁴⁸

Lochner is a classic illustration of the use of myths, the incorporation of beliefs about the "inevitability" of things, as the basis for legal rules.⁴⁹ Although the labor movement had sup-

the conclusion that the occupation of a baker or confectioner is unhealthy, and tends to result in diseases of the respiratory organs." *Id.* at 384.

46. *Lochner*, 198 U.S. at 59.

47. *Id.*

48. Myths are common understandings; they illustrate the "miraculous evaporation" of history. BARTHES, *supra* note 3, at 150. Thus myths are based on "patterns of the mind." LEVI-STRAUSS, *supra* note 4, at 12. They are "trans-historical, collapsing history to sameness or a set of repetitive variations on the same themes." EAGLETON, *supra* note 5, at 92. Professor Eagleton suggests that myths are not so much a way of understanding reality but rather a kind of "collective utopian dreaming." *Id.* at 93 (speaking of literature, which he defines as myths, archetypes, and genres).

Indeed, arguments based on natural law are really arguments based on myths; each resonates with an appeal to universal rightness. Natural law theories define law in terms of authoritative moral principles which are typically seen as absolute, rational, and readily apparent. Like mythic theories, natural law justifies the normative content of a law. *See also* LLOYD WEINREB, *NATURAL LAW AND JUSTICE passim* (1987).

49. For the inevitability of myths, see BARTHES, *supra* note 3, at 129; *cf.* FED. R. EVID. 201(b):

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

ported maximum hours legislation,⁵⁰ the Supreme Court characterized the New York statute as a harmful interference with labor's "freedom," relying on one mythological framework (a prelegal sphere of individual autonomy) rather than competing mythologies about the relationship between capital and labor.⁵¹

Confronted with *Lochner's* fervent embrace of the mythic freedom of contract,⁵² how could the *Muller* Court have upheld protective legislation for women workers? In his famous brief on behalf of the National Consumers' League,⁵³ Louis Brandeis invoked powerful competing myths of motherhood, suggesting that an entirely separate set of "facts" applied to female workers and persuading the Court to bifurcate the workplace by gender and ultimately to sustain protective legislation for women.

Muller's holding that legislation limiting hours for women was constitutional rests on "facts" (myths) about women workers that differentiated them from male workers, thereby avoiding the conundrum that, if men had a constitutional right to labor in an unregulated economy, women should enjoy the same "right."⁵⁴

According to the Advisory Committee's note, judicial notice is appropriate for "particular facts outside the area of reasonable controversy," making the introduction of evidence unnecessary. The "oldest and plainest ground" for judicial notice is for "facts" that are so commonly known that it is unnecessary to require proof, and so certainly known as to make them indisputable. EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 922 (3d ed. 1984).

50. Various unions, including the American Federation of Labor and the National Consumers League, participated in the "protective" labor law effort. For a brief discussion, see *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 33-40 (Barbara Allen Babcock et al. eds., 1978).

51. Myths substitute "a will to believe that what they desire exists — or should exist." JANEWAY, *supra* note 1, at 27. Janeway also noted that mythic thinking is "wishful" and used the phrase "mythic longing." *Id.* at 30.

52. The briefs of the parties make only passing reference to the freedom of contract argument. The argument, however, appears in Judge O'Brien's dissent from the New York Court of Appeals decision:

When it is manifest . . . that the law has no relation whatever to the subject of health, and that its real object and purpose was to regulate the hours of labor between master and servant in a business which is private, and not dangerous to morals, or to health, freedom to contract with each other, defining their mutual obligations, cannot be prohibited without violating the fundamental law.

69 N.E. at 387. The employer's brief focused instead on equal protection and the notion that baking is not unhealthy. See Brief for Plaintiff in Error at 21-22, Brief for Defendants in Error at 12, 19-21, *Lochner v. New York*, 198 U.S. 45 (1905) (No. 292).

53. Brief Amicus Curiae for the National Consumers' League, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107).

54. A comparison of *Lochner* and *Muller* with state court decisions on protective labor legislation demonstrates the peculiar and elusive "factual" phenomena

Thus, instead of the self-reliant male bargaining unit of *Lochner*, Brandeis's *Muller* brief⁵⁵ invoked myths of the dependent female worker in need of protection.⁵⁶ Unlike the male baker, she was

underlying the various opinions upholding or rejecting this sort of legislation. *Muller* relies upon three state court decisions upholding similar legislation. *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383 (1876); *Wenham v. State*, 91 N.W. 421 (Neb. 1902); *State v. Buchanan*, 70 P. 52 (Wash. 1902). Only one state court struck down protective labor legislation for women:

[I]nasmuch as sex is no bar, under the constitution and law, to the endowment of woman with the fundamental and inalienable rights of liberty and property, which include the right to make her own contracts, the mere fact of sex will not justify the legislature in putting forth the police power of the state for the purpose of limiting her exercise of those rights, unless the courts are able to see that there is some fair, just, and reasonable connection between such limitation and the public health, safety, or welfare.

The question here is not whether a particular employment is a proper one for the use of female labor, but the question is whether, in an employment which is conceded to be lawful in itself, and suitable for women to engage in, she shall be deprived of the right to determine for herself how many hours she can and may work during each day. There is no reasonable ground — at least none which has been made manifest to us in the arguments of counsel — for fixing upon eight hours in one day as the limit within which women can work without injury to her physique, and beyond which, if she work, injury will necessarily follow.

Ritchie v. People, 40 N.E. 454, 458-59 (Ill. 1895).

55. "The famous 'Brandeis brief . . . was not only written for Brandeis by women . . . it was conceived by women, and Brandeis was persuaded to do it by women.'" GORDON, *supra* note 33, at 83-84; see Clement E. Vosete, *The National Consumers' League and the Brandeis Brief*, 3 MIDWEST J. POL. SCI. 267 (1957) (chronicling women's involvement in this and other legal battles).

56. From the mid-1860s on, the popular press had published exposés about the miserable working conditions faced by many (primarily white) women in paid labor markets. See LYNN Y. WEINER, *FROM WORKING GIRL TO WORKING MOTHER: THE FEMALE LABOR FORCE IN THE UNITED STATES, 1820-1980*, at 36-41 (1985). Both conservatives and progressives denounced their impact on women. Conservative supporters of protective legislation focused on the threat to the ideal of innocence and pure womanhood. Henry Finck wrote that "all employments which make women bold, fierce, muscular [and] brawny in mind will be more rigidly tabooed as unwomanly." Henry T. Finck, *Employments Unsuitable for Women*, INDEPENDENT, Apr. 11, 1901, reprinted in *SELECTED ARTICLES ON THE EMPLOYMENT OF WOMEN* 77 (Edna Bullock ed., 1911). Compare ex-slave Sojourner Truth's pride in her strength and musculature, *infra* note 85. Progressive supporters focused on economic necessity and emphasized that poor working conditions threatened the health as well as the morality of women:

[P]hysical well being of woman is essential if we are to have a strong and vigorous race, and when through overstrain and exhaustion woman's vitality is lowered, her fitness for motherhood may be destroyed, and her children will pay the penalty with weakened or vitiated physical vigor. Therefore, as a potential mother the state has the right to protect her.

not a free and equal negotiant in the labor market but rather someone who entered that market at a disadvantage. Her health was more likely to be endangered by long hours or poor working conditions because of the physical differences between men and women.⁵⁷ Any threat to her health ultimately threatened society because it imperiled her ability to bear and raise healthy children.⁵⁸

WEINER, *supra*, at 69-70 (quoting CONNECTICUT SPECIAL COMM. TO INVESTIGATE CONDITIONS OF WORKING WOMEN AND MINORS REPORT (1913)); *see also* MARY ABIGAIL DODGE, *A NEW ATMOSPHERE* (1865) (detailing the threat that women working outside the home posed to the family structure); ANNIE MARION MACLEAN, *WOMEN WORKERS AND SOCIETY* 37 (1916) ("universal conditions of employment imperiled the physical health of the young women who would one day be mothers."). The connection between progressive politics and social gospel was strengthened in 1908, when 33 Protestant denominations founded the Federal Council of the Churches of America. Among the declarations espoused by the Council was the need to "safeguard the physical and moral health of the community" with protective regulation of women's work conditions. WALTER RAUSCHENBUSCH, *CHRISTIANIZING THE SOCIAL ORDER* 14-15 (1912). WEINER, *supra*, at 42. But even the concern of progressives was limited to those (primarily white) women who were employed in offices and factories, not those women of color who worked as domestic laborers or farm workers.

57. *See infra* note 61. The effect of work on both women and the public was evident to the state courts which upheld protective legislation for women:

It is a matter of universal knowledge with all reasonably intelligent people of the present age that continuous standing on the feet by women for a great many consecutive hours is deleterious to their health. It must logically follow that that which would deleteriously affect any great number of women who are the mothers of succeeding generations must necessarily affect the public welfare and the public morals While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government.

State v. Buchanan, 70 P. 52, 54 (Wash. 1902).

58. The brief for the state of Oregon argued that a woman, unlike a man, is: unfitted . . . for most kinds of manual labor . . . and knowing the duty she owes to the home and the family and that she is the mother of the citizens of a coming generation, can we say that a law restricting the number of hours in which she may labor, in certain classes of hard work, is not a law involving the safety, the morals, nor the welfare of the public?

Brief for the State of Oregon at 19, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107). The image of the healthy mother was that of the predominantly white factory worker. Domestic and agricultural workers were excluded from protective legislation, even though these were the two "most arduous" occupations for women. ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES* 188 (1982). Most of the women who worked in those jobs were African American or poor whites. Indeed, it was not until 1970 that African American women were not primarily employed as domestics and/or farm laborers. Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 *AM. U. J.*

Brandeis's brief in *Muller* is renowned for its use of (unchallenged) social science "data"⁵⁹ to support the conclusion that the health of female workers depended upon restricting the hours women work in paid labor.⁶⁰ But the brief assumed the conclusion it sought to prove — women, unlike men, needed protection from the dangers of the workplace. It also assumed a rather attenuated relationship between working hours and conditions and alleged physical effects.⁶¹ Yet the "data" indicates that adverse

GENDER & L. 1, 20 (1993). In *Lochner*, the race and class of the bakers was irrelevant to the quality of the bread they baked. In *Muller*, however, where the issue was the quality of the future population, it was impossible to avoid the race and class of the working mothers-to-be. Kessler-Harris suggested that a "growing eugenics movement and concern about 'race-suicide' provided additional ammunition" for those advocating protective legislation (which they saw as a "special privilege for the home and motherhood"). KESSLER-HARRIS, *supra*, at 185. The argument was that "[n]o selfish employer could be allowed to undermine the strength of the race by threatening the health of future mothers or tempting the morality of future homemakers." *Id.*; see also THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 379-80, 394 (1992).

The eugenics movement in this connection was primarily directed at the new immigrants from southern and eastern Europe. See Maxine S. Seller, *Beyond the Stereotype: A New Look at the Immigrant Woman*, in DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 197 (Ronald Takaki ed., 1987). For a fascinating discussion of nativism, see generally KATHLEEN M. BLEE, WOMEN OF THE KLAN: RACISM AND GENDER IN THE 1920s (1991).

Note that domestic and agricultural workers were also excluded from the paid labor benefit programs of social security and unemployment insurance. Social Security Act of 1935, Pub. L. No. 74-271, ch. 531, § 811(b)(1), (2) (codified as amended at 26 U.S.C. § 3306(c)(1)(2) (West 1989)) (unemployment insurance). For a discussion of the exclusion of these categories of workers from old age assistance, see JILL QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY 115-16 (1988).

59. See Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 304 (1989). Levit referred to this as the "unscientific use of empirical evidence," pointing out that the use of scientific or social science evidence does not necessarily mean that a court has used the scientific method or that its deliberations have been scientifically sound. For the idea that myths are a form of enlightenment, see JURGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES 107 (Frederick G. Lawrence trans., 1987); MAX HORKHEIMER & THEODORE W. ADORNO, THE DIALECTIC OF ENLIGHTENMENT 3, 25 (John Cumming trans., 1972).

60. Of course, there were others who accepted competing mythologies about women workers and thus understood the "facts" in other ways. See *infra* text accompanying notes 128-30.

61. Brief for Defendant in Error at 20-21, *Muller v. Oregon*, 208 U.S. 412 (No. 107) (quoting DR. THEODORE WEYL, HYGIENE OF OCCUPATIONS 7 (1894)). The following is a typical entry in the collection of "data" assembled in the brief:

The investigations of Schuler and Burkhardt embracing 18,000 members of Swiss insurance against sickness (about 25 percent of the Swiss factory workers and fifteen industries), show that factory work, even in a short period, produces very unfavorable effects upon the development of the body of young men. It is even more conspicuous in the

physical effects do not differ significantly between men and women.⁶² Indeed, unhealthy working conditions for *both* male and female workers of many occupations, including those largely filled by people of color, could justify regulations limiting hours.⁶³

Thus, the ostensible concern with the health of some women workers was largely a concern with their reproductive role. The Court noted that the expert opinions included in Brandeis's brief were:

significant of a widespread belief that women's physical structure and the function she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.⁶⁴

Women's unique physical characteristics, their childbearing and maternal functions, and the need to prevent "laxity of moral fibre" which follows "physical debility" required restricting their hours of paid labor.⁶⁵

The use of "data" in the Brandeis brief triggered multiple reinforcing mythologies which naturalized the Court's own culturally and historically contingent assumptions about women and

case of women. Thus of 1000 men in the manufacture of embroidery, 302 were sick to 332 women. In bleaching and dyeing, 279 men, 316 women; also in cotton spinning and weaving, the morbidity of women was much greater than men.

Similarly the number of working days lost through illness was more among women than among men, being 6.47 among women to 6.25 among men.

62. JUDITH A. BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION* 25 (1978) (criticizing the lack of methodological sophistication of the reports relied on in the defendant's brief).

63. Nancy Levit suggests that the simplest proof of the need for regulation would be to link health consequences to all workers, not just women. Levit, *supra* note 59, at 304.

64. *Muller*, 208 U.S. at 420-21. This is another example of the relationship between mythic thinking and judicial notice. See *supra* note 49.

65. Brief for Plaintiff in Error at 24, *Muller v. Oregon*, 208 U.S. 412 (1908)(No. 107).

paid labor.⁶⁶ Indeed, healthy mothers were so essential to “vigorous offspring”⁶⁷ that *society* had an interest in ensuring that women made the correct decisions about their jobs. It was appropriate for the Oregon legislature to safeguard working women from the “greed as well as passion” of men and from their own “indifference, error, recklessness or cupidity.”⁶⁸ In other words, women were not only physically weaker, they were mentally less acute and/or morally suspect when they made choices about employment. Mythologies of women as reproducers and nonagents validated the state’s assumption of the role of protector in the workplace which husbands and fathers had in the home. Looked at this way, a persuasive subtext of Brandeis’s advocacy was that women’s most important work was mothering, not paid labor.⁶⁹ Simplistically stated, maternal myths trumped myths of freedom of contract.

66. Of course, those myths imposed white middle class romantic maternal roles on women who might not be able to afford them. Alice Kessler-Harris suggests that by 1900 “all semblance of the class solidarity that had informed the search for protective legislation in the mid-nineteenth century had disappeared.” KESSLER-HARRIS, *supra* note 58, at 185.

67. “[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.” *Muller*, 208 U.S. at 421-22.

68. *Id.*

69. See Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1224 (1986) (discussing sex-specific fetal protection policies). This notion was reinforced by many in the women’s suffrage movement who argued that woman’s distinct and different attributes made her entirely unfit for the competitive world. Kessler-Harris notes the “ideological danger in asserting women’s weakness,” pointing out that while the suffrage movement had originally stressed women’s similarity to men, by the 1880s many feminists, such as Lucy Stone and Annie MacLean, had begun to argue that a woman’s “special sphere” and “her special sensibilities nurtured in the home” should be represented in the political process. KESSLER-HARRIS, *supra* note 58, at 185. A woman’s primary duty was to preserve the health of her children and the sanctity and cleanliness of her home. As society became more urban, more industrial (dirtier), cleanliness depended on code enforcement, meat and milk inspection, garbage collection, and other government services. *Id.* Women thus sought to convince other women to enter into the suffrage movement through the argument that a clean, safe, and moral home depended on access to the government to protect that home. In articulating this position in a pamphlet published by the National American Woman Suffrage Association, Susan W. Fitzgerald wrote: “women are by nature and training, housekeepers. Let them have a hand in the city’s housekeeping, even if they introduce an occasional housecleaning.” Susan Walker Fitzgerald, *Women in the Home*, reprinted in ONE HALF THE PEOPLE: THE FIGHT FOR WOMAN SUFFRAGE, 114-15 (Anne Firor Scott & Andrew M. Scott eds., 1982). Moreover, since women were primarily spiritual beings, their participation “would elevate the moral level of government.” WILLIAM CHAFE, *THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLES, 1920-1970*, at 13 (1972). While this argument may have had a non-

Of course, maximum hour laws for women can be seen as an opening wedge for maximum hour laws for all workers.⁷⁰ But *Muller* implicated gender-driven mythologies about the primacy of (at least some)⁷¹ women's maternal and "feminine" functions and their vulnerability in and distaste for competition and challenge.⁷² By restricting women's employability, protective legislation elevated the myth of domesticity to constitutional magnitude.⁷³ Ultimately, that mythology, which reflects a profoundly paternalistic distrust of women's ability to make the appropriate choices for themselves,⁷⁴ sanctioned the state's authority to define and constrain gender roles.⁷⁵ But the mythopoeic advocacy that persuaded the Court to reach the *Muller* result so reified women's maternal role that it also justified legislation that excluded women from paid labor.⁷⁶ The *Muller*

threatening superficial appeal on the suffrage issue, it had significant consequences for women in paid labor, because it rested on the premise of women's unfitness for the "competitive economic struggle" of the workplace. KESSLER-HARRIS, *supra* note 58, at 185. For a discussion of the tensions between African American and white women in the suffrage movement, see GERDA LERNER, *THE MAJORITY FINDS ITS PAST: PLACING WOMEN IN HISTORY* 97 (1979).

70. SKOCPOL, *supra* note 58.

71. This notion of general feminine ineptitude for the competitive world simply ignored large segments of the population: women of color and/or poor women who needed to work to survive. See *supra* note 58.

72. See ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* 203 (1988) ("[P]rotective legislation in the late nineteenth century was firmly grounded in the idea of woman as mother. Woman was viewed as compassionate nurturant, and unfit for the competition of the market.").

73. Cf. *Bradwell v. State*, 83 U.S. (16 Wall) 130 (1872), discussed *infra* note 126.

74. See *infra* text accompanying notes 170-203 for a more modern expression of this distrust of women's choices.

75. Professor MacKinnon writes that "[t]he state is male in the feminist sense The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender — through its legitimating norms, forms, relation to society, and substantive policies." CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 161-62 (1989).

76. Beginning at the turn of the century and continuing into the 1970s, state protective legislation prevented women from working where alcohol was sold, see *infra* text accompanying notes 170-76, as well as working at a puzzling variety of jobs — as messengers, letter carriers, court reporters, elevator operators, or taxi drivers — that might interfere with or spoil their female qualities. KESSLER-HARRIS, *supra* note 58, at 185-86, 232. For a fascinating description of gendered garment industry work patterns in the *Muller* era, see SUSAN A. GLENN, *DAUGHTERS OF THE SHTEITL: LIFE AND LABOR IN THE IMMIGRANT GENERATION* 113-17 (1990). Today, the idea that child-bearing capacity warrants protection survives in fetal protection policies that restrict the employability of women. Moreover, in the aftermath of *Muller*, women were increasingly segregated into "women's work." In predominantly female occupations, protective labor legislation resulted in improved working conditions without reduction in pay, since employers generally did not replace women

myths were used to protect women at their own expense, to limit women's choices, and to discourage their full participation in the work force.⁷⁷ The resulting discourse "encased [middle-class women] in the image of the nurturant (and non-laboring) mother, [while] working-class women found that their visible inability to replicate that model worked equally hard against them."⁷⁸

B. *Contextualizing the Mythology: A Brief Historical Overview*⁷⁹

In order to contextualize the significant variations in the ongoing *Muller* mythology based on race and class, it is important to review some of the historical "facts" regarding women in paid labor and receiving governmental benefits.

Until the Industrial Revolution,⁸⁰ most Americans, both men and women, worked on farms and in family businesses.⁸¹ Even when relatively few Americans worked for wages, tasks

with "cheaper" male workers. Rhode, *supra* note 19, at 206. But where male workers were available, female unemployment increased. For example, restrictions on night work and overtime as well as maximum hour laws resulted in job losses for women. However, many single mothers in the early 1900s were forced to accept night work due to the lack of child care facilities. See *infra* text accompanying note 113.

77. Activist women argued women's unique qualities and functions as the basis for labor reform, suffrage, and an expanded public forum for women. SKOCPOL, *supra* note 58, at 319-37, 370-71, 373-423. Deborah Rhode notes that protective legislation "impeded equal opportunities for women in the workplace and equal obligations for men in domestic life." Rhode, *supra* note 19, at 205.

78. Jeanne Boydston, *Home and Work: Housework, Wages and the Ideology of Labor*, in *THE EARLY REPUBLIC* 158 (1990).

79. Even the presentation of "historical facts," of course, by assuming cultural and historical contingencies, constructs mythology and is constructed by mythology. It is not our purpose to retell the multiple histories of women in and out of paid labor, a task which has been done by many others. See, e.g., EVANS, *supra* note 26; JOAN HOFF, *LAW, GENDER AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* (1991); JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW* (1985); CHRISTINE STANSELL, *CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860* (1987); BARBARA MAYER WERTHEIMER, *WE WERE THERE: THE STORY OF WORKING WOMEN IN AMERICA* (1977). This section merely offers some context in which to discuss the development of certain mythologies.

80. Most historians use the Industrial Revolution as a key date changing women's economic life. See, e.g., CHAFE, *supra* note 69, at 17; NANCY F. COTT, *THE BONDS OF WOMANHOOD* 21 (1977); DOUGLAS, *supra* note 9, at 48-56. But Laurel Thatcher Ulrich points out that this view is far too simple. LAUREL THATCHER ULRICH, *GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND, 1650-1750*, at 15 (1991).

81. See WERTHEIMER, *supra* note 79, at 7-56.

were largely defined by gender:⁸² women were to bear and rear the children and to produce the necessities such as clothing, food, soap, and candles. Rich and middle-class white women supervised the slaves and servants who did those jobs.⁸³ Even within the gender allocation, there were distinctions based on race and class.⁸⁴ Slaves, freed slaves, and poor white women were expected to perform both "paid" work and household labor.

For slaves, physical strength, not gender, was usually the determining factor.⁸⁵ Thus, women slaves were expected to and did perform hard manual labor as field hands. However, some tasks were still gender based: women slaves were sometimes brought in from field work early on Saturdays in order to do laundry.⁸⁶ In addition, a gendered division of labor was often evident within the internal life of the slave community,⁸⁷ with home and child

82. Margaret Mead's illustration is particularly cogent: there have been villages where men fish and women weave and other villages where women fish and men weave. In both cultures, however, there is a definite relationship between a woman's gender and the tasks which society feels she is capable of performing. MARGARET MEAD, *MALE AND FEMALE: A STUDY OF THE SEXES IN A CHANGING WORLD* 169-70, 174 (1949). Neither the home nor the person in charge of domestic tasks was highly valued. See MATTHEWS, *supra* note 44, at 3-4. The allocation of power was hierarchical, and the husband had the weight of authority in the household. *Id.*

83. JONES, *supra* note 79, at 23-25 (describing relationship between mistresses and household slaves).

84. See Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2485 (1994) (challenging the domesticity image as an overly broad reflection of the experience of all women).

85. JONES, *supra* note 79, at 15-18. A particularly famous statement is that of ex-slave Sojourner Truth showing the muscles she had developed from years of agricultural labor: "Look at me! Look at my arm! . . . I have plowed, and planted and gathered into barns, and no man could head me — and ain't I a woman?" OLIVE GILBERT, *NARRATIVE OF SOJOURNER TRUTH: A BONDSWOMAN OF OLDEN TIME* 134 (1878).

86. JONES, *supra* note 79, at 38.

87. Levi-Strauss taught that different cultures with seemingly different mythologies really share the same mythology. LEVI-STRAUSS, *supra* note 4, at 1-14. For a critique of the Eurocentricity of this approach, see Wallace, *supra* note 24, at 119-22.

care viewed as “women’s work.”⁸⁸ This pattern continued after emancipation.⁸⁹

During Reconstruction, while most middle-class white women “remained cloistered at home,” African American freedwomen who were housewives were considered lazy (by many whites) if they did not do field work.⁹⁰ In 1870 in the Cotton Belt of the South, 40% of African American married women listed jobs, mostly as field workers, while 98.4% of white wives stated that they were “keeping house.”⁹¹ That same year, a study of seven southern cities found that three times as many African American women as white listed an occupation; 66% of single African American women as opposed to 25% of single white women and 31% of African American married women as opposed to 4% of married white women reported jobs. African American women tended to stay in paid labor throughout their lives.⁹² The class distinction was also critical: poor white women in the rural South tended to be sharecroppers’ wives who performed household tasks and field work.⁹³

88. JONES, *supra* note 79, at 38, 42. For a specific account of a child’s view of his mother’s work as centering around cooking, cleaning, childrearing, and sewing, see James Cury, *Narrative* (1837-1862), reprinted in *SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS AND AUTOBIOGRAPHIES* 133 (John W. Blassingame ed., 1977). Sara Evans noted the “complementary and roughly egalitarian roles” within slave families. The women were primarily responsible for the preparation of food, supervision of children, and manufacture of clothing; the men supplemented the food supply by hunting and made furniture and tools. EVANS, *supra* note 26, at 109.

89. JONES, *supra* note 79, at 63, 105; see also SIR GEORGE CAMPBELL, *WHITE AND BLACK: THE OUTCOME OF A VISIT TO THE UNITED STATES* 297 (Negro Univ. Press 1969) (1879) (noting that newly emancipated women slaves “copied” white women by staying at home and working there).

90. JONES, *supra* note 79, at 59; see also JOHN W. DE FOREST, *A UNION OFFICER IN THE RECONSTRUCTION* 94 (James H. Croushore & David M. Potter eds., 1948) (“[freedwomen] who once earned their own living now have aspirations to be like white ladies and, instead of using the hoe, pass the days in dawdling over their trivial housework, or gossiping among their neighbors.”). Many African American men desired women to be homemakers “in accordance with the accepted norms of the dominant society.” LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 245 (1978). Note also women’s self-definition as mothers rather than paid laborers. JONES, *supra* note 79, at 134; DOUGLAS, *supra* note 9, at 48-49.

91. JONES, *supra* note 79, at 63.

92. *Id.* at 74, 163. Many freed slaves in the Reconstruction period preferred sharecropping to wage work in that it allowed both men and women to retain control over their energy and allowed women to divide their time between household tasks and field work. *Id.* at 46. See EVANS, *supra* note 26, at 121 (documenting the income earning labor of women needed for survival of African American families).

93. JONES, *supra* note 79, at 106-07.

For many women, the Industrial Revolution moved the center of production from the home to the factory.⁹⁴ The technological revolution dramatically decreased the hours required for domestic tasks,⁹⁵ and the availability of birth control and the corresponding decline in the birthrate freed many women from having to spend all of their time on child-centered activities.⁹⁶ At the same time, increased educational opportunities also facilitated many women's entry into paid labor.⁹⁷

Once again, however, it is important to recognize the race and class distinctions. While antebellum immigrants had come primarily from Ireland, Germany, and Scandinavia, in the 1880s there was a large in-migration of people from eastern and southern Europe. Many of these newcomers, accustomed to working in a family economy, were bewildered by the industrialized American cities.⁹⁸ Taking in boarders and/or working at home on piece work offered a viable solution for married (white) women

94. For a feminist perspective on labor history, see *WORK ENGENDERED: TOWARD A NEW HISTORY OF AMERICAN LABOR* (Ava Baron ed., 1991).

95. BARBARA R. BERGMAN, *THE ECONOMIC EMERGENCE OF WOMEN* 34-36 (1986). For a compelling description of the impact of rural electrification on the lives of women in the Texas Hill Country, see ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* 502-15 (1982).

96. BERGMAN, *supra* note 95, at 40-49.

97. For the expansion of women's educational opportunities, see ROSENBERG, *supra* note 44, *passim*; Deborah L. Rhode, *Association and Assimilation*, 81 Nw. U. L. Rev. 106, 128-32 (1986).

Wars also accelerated women's paid labor opportunities. The phenomenon known as the "Rosie the Riveter" syndrome, *i.e.*, women performing men's work in men's absence during wartime, occurred as early as the Civil War and has been the case in every war since then. For an excellent description of the World War II era, see DORIS KEARNS GOODWIN, *NO ORDINARY TIME* 364-65, 368-70, 413-18 (1994). But note that:

From official United States government posters to short stories in popular women's magazines, recruitment propaganda was aimed exclusively at white women of both the middle and working classes. When black women were mentioned in connection with the national manpower crisis at all, they were exhorted to enter 'war service,' by taking jobs that white women most readily abandoned — laundry, cafeteria, and domestic work.

JONES, *supra* note 79, at 236-37. For the wartime experience of African American women, see *id.* at 234-40; EVANS, *supra* note 26, at 219-29 (noting the differential experience of Black women and lesbians).

But just as wartime increased women's opportunities, often the gains made during the war were lost during peace. See GOODWIN, *supra* at 622-24 (discussing the postwar loss of women's jobs and the "elevation of domestic virtues into an ideology"). Moreover, economic depressions intensified gender discrimination in paid labor. NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 209-11 (1987).

98. EVANS, *supra* note 26, at 131.

with children.⁹⁹ Unmarried white immigrant women largely entered domestic service and worked in the factories.¹⁰⁰ Female office work was limited to primarily “white native-born young women.”¹⁰¹ Most of the white women in the “burgeoning” movement into paid labor were poor.¹⁰²

During the period between Reconstruction and the migration to the North,¹⁰³ African American women were mainly part of rural sharecropper families,¹⁰⁴ both picking cotton and performing household chores.¹⁰⁵ However, many single women, whether single mothers, widows, or unmarried daughters of sharecropper families, moved to the urban South.¹⁰⁶ Twenty-five to thirty percent of urban African American families lacked a husband or father at some time between 1880 and 1915.¹⁰⁷ Women of color were largely excluded from the factory floor.¹⁰⁸

99. *Id.* at 132.

100. *Id.* at 133.

101. *Id.* at 134.

102. *Id.* at 130. Nancy Cott noted that at least half the female labor force was employed in “taxing, menial jobs that offered long hours, unpleasant and often unhealthful conditions, very low pay, and rare opportunities for advancement.” COTT, *supra* note 97, at 130. These were the manufacturing operatives (almost a quarter of all women employed) and the even larger number in domestic and personal service. *Id.* Women’s factory wages were, on average, “little more than half the male wage and service occupations were paid even lower wages.” *Id.* This was so because women, concentrated in unskilled jobs, “were viewed by male employers and by most employees as ‘secondary’ laborers . . . it stood to reason that no one would subject herself to drudgery for a pittance unless the pittance made the difference between bare support and none.” *Id.*

103. *See infra* note 108.

104. In 1900, 90% of all African Americans lived in the South, and 80% of those lived in rural areas. JONES, *supra* note 79, at 80.

105. *Id.* at 87-89. Nate Shaw, in his autobiography, remembered his mother in the cotton fields with her sons: “my mother had to Boss-instruct, she had to be a teacher to them boys, weren’t nobody else there to teach em but her. She taught them how to plow, chop, work that crop every way — she raised em up to it.” THEODORE ROSENGARTEN, *ALL GOD’S DANGERS: THE LIFE OF NATE SHAW* 9 (1974).

106. JONES, *supra* note 79, at 108-09, 113. While the percentage of African Americans who moved to urban areas was only 2-3% each year between 1880-1915, that figure represented over a million people. *Id.* at 112.

107. *Id.* at 113. In the 1880s, 26% of workers in Philadelphia were women, 34% in Fall River, MA and 35% in Atlanta. *See* EVANS, *supra* note 26, at 130.

108. Jones noted that “[d]espite the significant shift in white working women’s options, the paid labor of black women exhibited striking continuity across space — urban areas in the North and South — and time — from the nineteenth to the early twentieth century.” JONES, *supra* note 79, at 161.

Jones has also documented how, during the period from 1880 to 1915, African American women were excluded from the cotton mills, but were allowed to be hired in the least desirable jobs of tobacco steamers and oyster shuckers. *Id.* at 135, 137,

Although women of color were often the primary or sole support of their families,¹⁰⁹ the vast majority of jobs available for women of color were in agriculture or domestic work.¹¹⁰ The length of the work day for domestics meant that their own children frequently had to fend for themselves.¹¹¹ It is significant that a higher percentage of African American married women worked

139, 141. When two million African Americans migrated to the North between 1900 and 1930, they found that factories preferred to hire new white immigrants over African Americans. *Id.* at 153, 166. They were almost completely excluded from clerical and sales work. *Id.* at 178. As a result, northern African American women continued to be largely domestics. *Id.* at 164, 167; *see also* EVANS, *supra* note 26, at 134.

109. After Reconstruction, nonsharecropping African American men were able to obtain only the lowest-paid, unskilled, and irregular work. JONES, *supra* note 79, at 124, 135. Jones cited an Atlanta University study conducted in 1897 which showed that out of 1,100 urban African American families, only 24% relied exclusively on a male household head's earnings. *Id.* at 124 (citing Thomas J. Woofter, *The Negroes of Athens, Georgia*, Phelps-Stokes Fellowship Studies, No. 1, Bulletin of the University of Georgia, Dec. 1913, at 41-42). In 1880, seven African American sections of New Orleans, Louisiana, had male unemployment rates between 4-55%. *Id.* at 124. After the first northern migration (1900-1930), men were concentrated in domestic work (*e.g.*, janitorial) or the most unwanted factory jobs and a high percentage of women were the primary source of family income. *Id.* at 135-61.

110. *Id.* at 74, 113-27. Like the poor white female immigrants in textile mills of the North, freedwomen in the South were considered "exempt from the middle-class ideal of full-time domesticity," by both northern and southern whites. *Id.* at 45. For sharecroppers in the rural cotton belt in 1880, only 4.1% of African American women regularly worked as a domestic for a white family, only 9% in 1890. However, many more (27% of African American female agricultural workers in 1910) did irregular domestic work during slack agricultural seasons. *Id.* at 90. In the urban areas in that same period, 50-70% of all adult African American women were employed. *Id.* at 113.

111. *Id.* at 128 (noting that there is "little evidence" that unemployed African American husbands took on child care and household duties). As a result, from the turn of the century, African American women trying to juggle available paid labor and their own families were blamed for social ills such as juvenile delinquency, infant mortality, and retardation. *Id.* at 184.

Even those most supportive of the African American woman's plight saw a connection between employment of African American workers and the problems of their children. Mary White Ovington, one of the founders of the NAACP, writes in her "investigation" of "the Negro in New York City" that:

[T]he most important cause of infant mortality is improper infant feeding For a properly fed baby is a breast fed baby, or else one whose food has been prepared with great care, and mothers forced by necessity to go out to work, cannot themselves give their babies this proper food. It is among the infants of mothers at work that mortality is high.

MARY WHITE OVINGTON, *HALF A MAN: THE STATE OF THE NEGRO IN NEW YORK* vii, xvii, 55-56 (Schocken Books 1969) (1911).

in paid labor than both white married women and "immigrant wives of the same socioeconomic class."¹¹²

Single mothers of all races faced particular difficulties. They could either restrict their hours of availability, thus earning even less,¹¹³ or leave their children alone, or place them in institutions or foster care, the only organized child care option.¹¹⁴ However, given the absence of social welfare programs, paid labor was the major way women without other sufficient family support could provide for their families.

The predecessors of social welfare programs, particularly Aid to Families with Dependent Children ("AFDC" or "welfare"), were the "Mother's Pensions" or "Widow's Pensions" Acts enacted in numerous states in the early twentieth century to provide cash assistance for single mothers and their children.¹¹⁵ As Linda Gordon has so carefully documented, aid to unemployed men during this period was designed to perpetuate the model of a male breadwinner with an at-home wife. Aid to single mothers was provided, in part, to enable them to fulfill the "woman's role" of homemaker,¹¹⁶ to validate the ideal of "motherhood,"¹¹⁷ and to allow them to not place their children in institutions.

112. JONES, *supra* note 79, at 162. African American middle-class women often held paid jobs. *Id.* at 143. Jones documented that in the period from 1880-1915, these women frequently worked as seamstresses and school teachers. *Id.*; see Elizabeth Pleck, *A Mother's Wages: Income and Earning Among Married Italian and Black Women, 1896-1911*, in *A HERITAGE OF HER OWN: TOWARD A NEW SOCIAL HISTORY OF AMERICAN WOMEN* 367-392 (Nancy F. Cott and Elizabeth H. Pleck eds., 1979).

113. Linda Gordon has noted that in one study of nine large cities, 48% of single mothers "took low-wage night jobs, most often cleaning office buildings, in order to have time for their children during the day, with the result that they got little sleep and were in poor health." GORDON, *supra* note 33, at 22. Others took in hand sewing at "the lowest wages available." *Id.*

114. *Id.* at 22-23; 2 CHILDREN & YOUTH IN AMERICA: A DOCUMENTARY HISTORY 248-90 (Robert H. Dalton ed., 1971) (describing generally the circumstances in which children were placed and the conditions in which they lived).

115. BELL, *supra* note 30, at 3; JOEL F. HANDLER & YEHESKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY* 21 (1991).

116. GORDON, *supra* note 33, at 7, 38.

117. *Id.* at 38. Jones cited a 1936 study (one year after AFDC was enacted as part of the Social Security Act), which showed that infant mortality declined in African American neighborhoods which had the highest number of AFDC recipients, in part because:

[t]here is also the factor that the mother, if employed prior to the family's going on relief, worked several months during pregnancy and returned to work within a minimum time after the birth of the child whereas the mother on relief remains at home and is thus able to take

To avoid the stigma of immorality attached to unmarried mothers or deserted wives, the program's proponents highlighted the image of the worthy white widow.¹¹⁸ Early programs were highly discretionary, allowing localities to exclude "immoral" women and women of color.¹¹⁹ Many of the programs began in big cities with a focus on "Americanizing" the recent (white) immigrants.¹²⁰

Even for a woman who was eligible for benefits, the amount was so low that she (and often her children) had to do paid labor or attach herself to a male breadwinner. Thus, poor women were again faced with irreconcilable paradoxes: they were expected not to earn, yet they were expected to earn;¹²¹ they were expected to be chaste, yet needed to find a man; they were expected to care for their children, yet they were forced to leave their children to perform paid labor (although there was no child care).¹²²

Hence, at least for the prosperous and growing middle class, the "cult" or "ideology" of domesticity¹²³ taught that a woman's role was to preserve the home as a haven for her children and a

greater precautions in regard to her own health during pregnancy, and devote more care to her child after its birth.

JONES, *supra* note 79, at 224-25 (citing E. Franklin Frazier, *Some Effects of the Depression on the Negro in Northern Cities*, SCIENCE AND SOCIETY, Fall 1938, at 495).

118. GORDON, *supra* note 33, at 27. The National Congress of Mothers, in lobbying for mother's aid, initially framed the program as providing support for mothers of "the race." *Id.* at 62-63.

119. *Id.* at 48 n.41 (noting that in 1931, only 3% of recipients of mother's pensions were African American); BELL, *supra* note 30, at 29-35.

120. GORDON, *supra* note 33, at 46. Even widows were often scrutinized for their housekeeping, cleanliness, and moral habits. *Id.* at 28, 45-46; BELL, *supra* note 30, at 29.

121. GORDON, *supra* note 33, at 30-31, 50.

122. *Id.* at 52.

123. The literature on this topic is voluminous. See MATTHEWS, *supra* note 44, *passim* (providing an excellent overview); see also Barbara Corrado Pope, *The Influence of Rousseau's Ideology of Domesticity*, in CONNECTING SPHERES, WOMEN IN THE WESTERN WORLD, 1500 TO THE PRESENT 136-45 (Marilyn J. Boxer & Jean H. Quataert eds., 1987). Sara Evans noted that before the Civil War, the romanticization of home and family was greater in the South than in the North. EVANS, *supra* note 26, at 68-70. Evans also analyzes the domesticity phenomenon by race, class, and geography. *Id.* at 94-118. Susan Faludi noted several periods in American history when domestic virtues were celebrated as part of a backlash against women. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 48 (1992); see also GORDON, *supra* note 33, at 87 (documenting how African Americans and Hispanics were either not noticed or were not considered "reformable and integratable"); JANE H. PEASE & WILLIAM H. PEASE, LADIES, WOMEN AND WENCHES: CHOICE AND CONSTRAINT IN ANTEBELLUM CHARLESTON AND BOSTON 10-13 (1990); *id.* at 34-40, 46-54 (discussing those excluded by race, poverty, or slave

sanctuary to which her husband could escape after the stresses of a day in the impersonal, competitive world of the workplace.¹²⁴ The cultural vision heralded "womanhood" as the repository of the higher moral values and ethical concerns lost in the laissez-faire business world.¹²⁵ Affirming the denial of Myra Bradwell's application for admission to the Illinois Bar because of her sex, Justice Bradley celebrated the domestic myth:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.¹²⁶

Given this mythology, the argument that society should protect the reproductive health of (mostly white) women who worked in paid labor was not ideologically repugnant to the relatively wealthy and propertied white justices of the *Muller* Court in 1908. But once again it is important to stress competing mythologies: white upwardly mobile women's health and breeding ability was so important that society should encourage them to remain at home or enact laws to protect them if they were

status from the cult of domesticity); *id.* at 140-59 (describing those "wenches" excluded by their lack of moral purity).

The Bureau of Labor Statistics reported in 1994 that in 1993, of the 42.2 million women (married or unmarried) who stayed out of paid labor, approximately 21.3 million did so because they were "keeping house." Only 390,000 men stayed out of paid labor for that reason. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 41 EMPLOYMENT AND EARNINGS No. 1, at 224, T.35 (1994).

124. Indeed, the notion of "domestic science" was developed in large part to entice intelligent women bored by the prospect of homemaking to remain in the home. EVANS, *supra* note 26, at 162-64; MATTHEWS, *supra* note 44, at 145-71.

125. Julie Kristeva has traced the power of this myth in literature and linguistics. See Carolyn Burke, *Rethinking the Maternal*, in *THE FUTURE OF DIFFERENCE* 107-13 (Hester Eisenstein & Alice Jurdine eds., 1980).

126. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872). Other courts agreed. See, e.g., *Matter of Goodell*, 39 Wis. 232, 235 (1875):

The Law of Nature destines and qualifies the female sex for the bearing and nurturing of the children of our race And all life long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of law, are departures from the order of nature; and when voluntary, treason against it.

Interestingly, Theodore Roosevelt disagreed. In his undergraduate thesis at Harvard University, he described the law as "a profession requiring less prolonged mental effort than some others, and especially fitted for 'the weaker sex.'" HENRY F. PRINGLE, *THEODORE ROOSEVELT: A BIOGRAPHY* 57 (1931) (quoting EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT*, 149 n.68 (1979)). Notice the connection between the "factual" (mythological) underpinning of women's unfitness as "natural" in *Bradwell* and *Goodell* with the nature of the market in *Lochner*.

"forced" to enter paid labor.¹²⁷ Poor white women and African American women did not deserve that solicitude. Although the president of the American Bar Association, Joseph Choate, declined to defend the Oregon statute in *Muller* because he "could see no reason why a great husky Irish woman should not work in a laundry more than ten hours a day if her employer wished her to do so,"¹²⁸ the Supreme Court opinion does not reflect that class bias.¹²⁹ In the slave context, Choate's comment echoes the remark of a Mississippi planter: "Labor is conducive to health; a healthy woman will rear most children."¹³⁰

Thus, some women were suited primarily for child bearing while others were designed for paid labor in addition to bearing and raising children. Choate's refusal to advocate protective legislation and the planter's *Lochnerian* vision of field work exemplify competing class and racial mythologies about whether employment outside the home was inherently harmful to women and their children.

C. *Welfare and Paid Labor: A Mythic Dichotomy*

The race and class dimensions of the domesticity myths are particularly obvious in cases from the 1960s and 1970s interpreting paid labor obligations of women receiving Aid to Families with Dependent Children. At the outset, it is important to understand that mythologies which distinguish between women receiving AFDC and women in paid labor are themselves reductive and distortive; the two groups are not mutually exclusive. Many AFDC recipients regularly move in and out of low wage paid labor.¹³¹ Yet the mythologies have not expanded to interpret the

127. This incorporates the cultural assumption that there is some objective standard of, rather than a relative nature to, economic need below which women would "have" to work. Williams, *supra* note 34, at 739.

128. DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 40 (1989).

129. *Cf. Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142 (1837) (upholding the authority of the state of New York to enact laws forbidding the immigration of poor people under the state's authority to "provide precautionary measures against the moral pestilence of paupers").

130. JONES, *supra* note 79, at 19 (quoting FREDERICK L. OLMSTEAD, *A JOURNEY IN THE BACK COUNTRY IN THE WINTER OF 1853-1854*, at 58-59 (1860)). Protective legislation did not include occupations such as agriculture and domestic service, which were predominantly filled by African American women. *See supra* notes 58 & 71.

131. MARK GREENBERG, *BEYOND STEREOTYPES: WHAT STATE AFDC STUDIES ON LENGTH OF STAY TELL US ABOUT WELFARE AS A "WAY OF LIFE"* 23-31 (1993); Gary Burtless, *Employment Prospects of Welfare Recipients*, in *THE WORK ALTER-*

complexities and diversity of low-income women's experiences; mythology has naturalized as "fact" that AFDC recipients are "lazy" African Americans who are not in paid labor.¹³²

The legal discourse in several cases interpreting the 1967 Social Security Act Amendments, which for the first time enacted mandatory paid labor eligibility requirements for welfare recipients,¹³³ relied on this mythological framework with its underlying racial assumptions.¹³⁴ Unlike the *Muller* mythologies, these cases are predicated upon a judicial embrace of myths that poor single mothers will and should perform paid labor, at any wage. Indeed, in one case, the state of Maryland argued that keeping AFDC benefits low enhanced enforcement of the 1967 mandatory work provisions.¹³⁵

The plaintiffs in *Jefferson v. Hackney*¹³⁶ challenged Texas's decision to reduce the AFDC benefit level by fifty percent while

NATIVE 71, 77 (Demetra Smith Nightingale & Robert H. Haveman eds., 1995); Kathryn J. Edin & Christopher Jencks, *Welfare*, in *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 204, 206-07 (Christopher Jencks ed., 1992).

132. See *supra* text accompanying notes 29-33. The majority of AFDC recipients are not African American. 1994 GREEN BOOK, *supra* note 31, at 402 (explaining that the percentage of African American recipients decreased from 45.2% in 1969 to 37.2% in 1992).

133. Social Security Amendments of 1967, Pub. L. No. 90-248, Title II, 81 Stat. 821, 877-921 (1967) (codified at scattered sections of 42 U.S.C.) (1988 & Supp. V 1993).

134. Williams, *supra* note 25, at 1177-85 (documenting the racial imagery in the legislative debates on the Amendments and noting that this mandatory paid labor requirement was enacted following a rise in African American women on AFDC rolls, and the debate invoked the media coverage of urban riots). In this racial context, note the comment of Senator Russell Long during the debate, reflecting the particular historically located myth of African American women:

One thing that somewhat disturbs me is this idea that all these mothers who are drawing welfare money to stay at home have to be provided with a top paid job, that they have to be trained so they can be the top secretary in your office. You know somebody has to do just the ordinary everyday work. Now, if they don't do it, we have to do it. Either I do the housework or Mrs. Long does the housework, or we get somebody to come in and help us, but someone has to do it, and it does seem to me that if we can qualify these people to accept any employment doing something constructive, that is better than simply having them sitting at home drawing welfare money

Social Security Amendments of 1967: Hearings on H.R. 12080 Before the Senate Finance Comm., 90th Cong., 1st Sess. 1127 (1967) (statement of Sen. Long).

135. Brief for Appellants at 32-33, *Dandridge v. Williams*, 397 U.S. 471 (1970) (No. 131). Note the ongoing vitality of the assumption that lowering benefits will increase the incentive to do paid work in the recent California benefit cut challenged in *Beno v. Shalala*, 30 F.3d 1057, 1061 (9th Cir. 1994).

136. 304 F. Supp. 1332 (N.D. Tex. 1969), *vacated and remanded*, 397 U.S. 821 (1970), unreported district court opinion, *aff'd*, 406 U.S. 535 (1972).

not reducing benefits in programs for the elderly, blind, and disabled. The District Court noted that “[m]others of young children frequently do work and receive no outside assistance. The Legislature might have considered that many mothers could work and would do so with some assistance to enable them to keep their children in the home, *particularly at this time when workers are sorely needed.*”¹³⁷

The Supreme Court’s assumption in *Jefferson v. Hackney* that AFDC mothers should be in paid labor is particularly noteworthy given the plaintiffs’ initial claim that the reduction in AFDC benefits was racially based.¹³⁸ Justice Marshall, in dissent, was troubled by the Court’s failure to see the connection between the plaintiffs’ racial claim and the state’s race-dependent reasoning that it funded the AFDC program at a lower rate because it was a politically unpopular program whose recipients were stigmatized.¹³⁹ Plaintiffs argued that state policies depended on image, and less favorable policies emerged when “the image of the recipient changes [from the white literate elder] to that of an uneducated, unmarried Negro mother and her offspring.”¹⁴⁰ More specifically, Marshall questioned the state’s justification of differential treatment for AFDC families on the basis that AFDC *children* could be employed, AFDC families could get help from relatives more easily than recipients of other programs, and AFDC recipients have a greater likelihood of fu-

137. *Id.* at 1338 (emphasis added). The notion of “sorely needed” work is reminiscent of the assignment of women of color into domestic work “needed” by white housewives, JONES, *supra* note 79, at 128, and the *Muller* Court’s protection of the husky Irish washerwoman whose manual labor was “needed” by society. See *supra* text accompanying note 128. Also note Ross’s insight that the *Jefferson* court was assuming that jobs were available for the AFDC poor in Texas. Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1527 (1991).

138. In 1969, only 13% of Texas AFDC recipients were designated as White-Anglo, as opposed to 60.2% of Old Age Assistance, 53.1% of Aid to the Partially and Totally Disabled, and 44.3% of Aid to the Blind recipients. *Jefferson*, 406 U.S. at 549 n.17.

139. *Id.* at 575 (Marshall, J., dissenting). Plaintiffs argued that AFDC families were politically unpopular not only because of race, but also because they “often consist of illegitimate children, and parents who have not conformed to society’s mores.” Brief for Appellants at 29-30, *Jefferson v. Hackney*, 406 U.S. 535 (1972) (No. 70-5064); see also *id.* at 13-14. The African and Mexican American families are described as “usually larger than White AFDC families,” *id.* at 40, and as “broken families,” *id.* at 56.

140. Brief for Appellants at 131 n.20, *Jefferson*, (citing GILBERT Y. STEINER, SOCIAL INSECURITY: THE POLITICS OF WELFARE 3 (1966)). The public’s view of these recipients as “unworthy” then drives the legislature’s welfare policy. *Id.* at 33-34, 50.

ture employment.¹⁴¹ Professor Sylvia Law has pointed out that the racial disparity between AFDC and the other programs was justified "because AFDC families are 'more adaptable' and have 'greater hope of improving their situation.' AFDC mothers can get a job or find a man, and the State need not structure grants in a way which 'discouraged' them from doing so."¹⁴² In other words, the Court could not imagine mythologies other than myths that African American or Latina mothers and children can and should be in paid labor at any wage, that they can find work if they only look, and that they will not do so unless the state substantially cuts their benefits.¹⁴³

Racially bifurcated mythologies are also evident in the judicial assumptions in *Anderson v. Burson*,¹⁴⁴ which challenged Georgia's practice of closing AFDC cases in certain counties with seasonal employment whenever the county board designated the period as one of full employment, regardless of the individual mother's employment status.¹⁴⁵ The challenged regulation also provided that the state would not supplement earnings from full-time employment with a partial AFDC grant, regardless of how low the earnings were.¹⁴⁶ In other words, Georgia denied benefits to African American AFDC mothers

141. *Jefferson*, 406 U.S. at 579-80 (Marshall, J., dissenting). As Justice Marshall notes, since most of these sources of money would reduce the AFDC benefit at whatever level it is, these are not reasons which should justify an across-the-board AFDC decrease. *Id.*

142. Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1269 (1983).

143. Brief for Appellees at 17, *Jefferson* (No. 70-5064) (arguing that because many AFDC children and parents can work, there is less need for aid). The district court noted that the parties had stipulated that one-half of the caretakers were too uneducated or handicapped to hold even the lowest paying jobs. *Jefferson*, 304 F. Supp. 1332, 1338 n.4 (N.D. Tex. 1969). Dissenting, Justices Douglas and Marshall also assumed the ultimate goal was to get AFDC recipients into paid labor, thus failing to grapple with the complex issues of the dual roles of mothers. *Jefferson*, 406 U.S. at 554, 574. Law has noted that this assumption undermined concern for the adequacy of the grant, which was the issue in this case. Law, *supra* note 142, at 1270.

144. 300 F. Supp. 401 (N.D. Ga. 1968).

145. See 113 CONG. REC. 24,780, 36,788 (1967) (remarks of Sen. Kennedy on the "employable mother" policy in debate of the 1967 Social Security Act Amendments); 113 CONG. REC. 36,797 (statement of Lawrence Speiser, American Civil Liberties Union, read by Sen. Metcalf).

146. *Anderson*, 300 F. Supp. at 403; see also Williams, *supra* note 25, at 1177-85 (describing the employed African American mother receiving AFDC as being denied the opportunity to be a full-time mother to her own children because she is forced to accept a job, often caring for children of the wealthy, often white women).

during harvest season in rural counties, forcing them to work in the fields for substandard wages.¹⁴⁷

While the three-judge court struck down the full-time/non-supplementation provision, it upheld a requirement that AFDC mothers must accept paid employment.¹⁴⁸ The state agreed that no mother would have her AFDC terminated unless she received a job offer or a referral to a job, at which time the burden was on the mother to show "good cause" for refusing the job.¹⁴⁹ This decision highlights the competing mythologies that the undeserving (women of color not married to men tied to paid labor) must do paid labor, while the deserving (largely white Social Security widows)¹⁵⁰ need not. If society, as a policy matter, wanted to

147. The use of AFDC to reinforce the low wage work of women of color in fields and as domestics has been well documented. See, for example, the testimony before the Mississippi Advisory Board of the Civil Rights Commission which exposed this practice, as well as the use of AFDC to retaliate against those who participated in civil rights activities:

In the year 1965, I was receiving a welfare check. On the first of June, I came to Jackson on a demonstration. I got locked in jail and stayed locked in jail for eleven days, and when I returned home, the welfare lady . . . asked me where had I been. She came to my home, and where was I? I told her I was in Jackson at that time. And she asked me wasn't I in a demonstration? I told her, 'Yes, I was.' She said, 'Didn't you know that you didn't have any business to leave home, to leave your children?' She said, 'Where did you leave your children?' I said, 'I left my children. They were at home and they was in good care.' She said, 'You didn't have any business to go off and leave your children.' And she said, 'You should have been here chopping cotton for \$3.00 a day instead of going off on a demonstration.' Then she said, 'If you will agree to chop cotton for \$3.00 a day,' she said, 'you will get your check back in August.' This was in June. At this time, I belonged to a Freedom Labor Union in Indianola, Mississippi. This union was on strike. I refused to go back into the fields. I told her that this was a Freedom Labor Union, and this union was on strike and I refused to return to go back to the fields. She told me that if I refused to go back to the fields and chop cotton for \$3.00 a day, then she would cut my check off, and she did cut it off. I didn't go back. She cut my check off.

113 CONG. REC. 36,807 (1967) (quoting testimony of Mrs. Ora D. Wilson, Miss. State Advisory Comm., U.S. Comm'n on Civil Rights, Welfare in Mississippi 30-31); see also BELL, *supra* note 30, at 63-67 (noting that these provisions were utilized not only in the South, but also in states such as New York and Michigan); MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 62 (1993).

148. After the case was filed, the state amended the regulation to delete the provision that boards set certain periods of full employment, but instead provided that the *mother* always had the burden to show that employment was not available. *Anderson*, 300 F. Supp. 403.

149. *Id.* at 404.

150. See *supra* text accompanying note 118.

treat all women who were single parents similarly, it could allow them both to volunteer to work. But the mythology that the mother receiving AFDC is lazy and undeserving reinforces the notion that we can not trust her to make the right choice — in this case, to do paid labor — so she must be required to do so.¹⁵¹

The issue of mandatory paid labor requirements for AFDC recipients reached the United States Supreme Court in *New York State Department of Social Services v. Dublino*.¹⁵² That case challenged state work rules¹⁵³ established in addition to the federal work requirements of the 1967 Social Security Act Amendments. The District Court, although invalidating the state rules, invoked myths of welfare mothers as unmotivated and unwilling to work.¹⁵⁴ The state and county reinforced that mythology in their briefs to the Supreme Court, presenting the image of an overburdened system needing some vehicle to get lazy and unap-

151. Joel F. Handler, *Constructing the Political Spectacle: The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 *BROOK. L. REV.* 899, 944-46 (1990). Compare *supra* text accompanying notes 64-68 (the "choice" confronting the women workers in *Muller*) with *supra* text accompanying notes 177-203 (the choices confronting women who work in the modern toxic workplace).

152. 413 U.S. 405 (1973).

153. 348 F. Supp. 290, 294 n.6 (W.D.N.Y. 1972), *rev'd* 413 U.S. 405 (1973). The requirements included many not imposed by the federal law, including that welfare recipients had to personally pick up their checks from the employment offices. *Id.* The district court acknowledged that this inflicted a particular hardship on those who lived far from the required office in that the major transportation expense had to be paid for out of their welfare check, but noted that the New York legislature had failed to pass a bill which would have allowed a "hardship exemption." *Id.* at 298. Recipients who could not find or pay for transportation faced loss of their checks. *Id.* at 297. In addition, "no attempt was made to determine the skills or training possessed by individuals who would be classified as employable," and unemployment rates in New York were at a record high. *Id.* at 298. These state requirements were enacted "in response to a March, 1971 special message from Governor Rockefeller directing the New York Legislature to consider means of transferring the able-bodied from the welfare rolls to payrolls." *Id.* at 294 n.6. In his speech, highlighted in the state's brief, Governor Rockefeller painted welfare mothers as failing to "develop a pride in their community" or "share in the responsibility for their families and our society" and definitively stated that "[w]ork is essential to a healthy individual." Brief for Appellants New York State Departments of Social Services and Labor and Their Commissioners at 9, *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405 (1973) (Nos. 72-792, 72-802) [hereinafter Brief for Appellants, *Dublino*].

154. *Dublino*, 348 F. Supp. at 300 (citing *Bueno v. Juras*, 349 F. Supp. 91 (D. Or. 1972) ("We recognize the pressure, political and moral, upon the [welfare department] to use both the carrot and the stick to try to place welfare recipients in gainful employment.")). The court also stated that "[r]equiring employable persons on public assistance to engage in employment . . . is entirely proper." *Id.* at 297 (emphasis added).

preciative welfare recipients (bad mothers) off the rolls.¹⁵⁵ Indeed, with few exceptions,¹⁵⁶ both the plaintiffs¹⁵⁷ and defendants' lawyers failed to acknowledge the plaintiffs as mothers or women at all. Although the original plaintiffs were almost all women,¹⁵⁸ the defendants constantly referred to the plaintiffs either in gender-neutral terms such as "recipients," "re-

155. The effect of the judgment below is to authorize thousands of AFDC recipients in the State of New York who are clearly employable persons, with adequate child care plans, to refused [sic] available employment, and, indeed, apparently even to quit existing employment, to *sit idle* without any good cause and collect public assistance. Such a result is so contrary to the interests of the taxpayers of this country

Statement as to Jurisdiction on behalf of Appellants Onondaga County Dep't of Social Services and its Comm'r, John L. Sascaris at 9, *Dublino* (Nos. 72-792, 72-802) (emphasis added); see *supra* text accompanying notes 29-32 (discussing lack of madonna image in mythology of welfare mothers); see also Reply Brief for Appellants New York State Departments of Social Services & Labor & their Commissioners at 21, *Dublino* (Nos. 72-792, 72-802) (emphasis added) [hereinafter Reply Brief for Appellants, *Dublino*]:

The obvious limitations in scope evident in the statutory language, when viewed in the light of the repeatedly expressed intent of Congress to *curb the expansion of the welfare rolls at least in part by employment*, would seem to lead inexorably to the conclusion that the Congress did not intend the WIN program to be exclusive of State work provisions.

Id.

The state's brief cited regularly to the limited funding for the federal WIN program and to the limited number of recipients which it could serve as a result. *Id.* at 19-20, 22. The program "penaliz[ed] recipients for refusal to accept employment." *Id.* at 21, 23.

156. Brief for Appellants, *Dublino*, *supra* note 153, at 12-13; Reply Brief for Appellants, *Dublino*, *supra* note 155, at 5 (citing regulations allowing exceptions where mother's presence in the home was determined to be essential).

157. With the exception of the "factual" allegations, *infra* note 161, and the priority categories for certification in appellee's brief, the plaintiffs' lawyers did not highlight the gender or race issues in their presentation to the Supreme Court, instead referring to the plaintiffs in "neutral" terms. Brief for Appellees, *Dublino* (Nos. 72-792, 72-802) at 8 [hereinafter Brief for Appellees, *Dublino*]. However, the brief for the National Welfare Rights Organization as amicus curiae regularly referred to AFDC mothers, used female pronouns, and discussed the importance of such mothers being in the home to care for their children. Brief for Amici Curiae of the Nat'l Welfare Rights Org., Citywide Coordinating Comm. of Welfare Orgns and the Upstate Welfare Rights Org. at 7-8, 18-22, 29, 35, 48, 52, 53, 55, *Dublino* (Nos. 72-792, 72-802). In arguing that the federal work program preempted the state program, NWRO stated: "Congress carefully devised a program to maximize the employment potential of such mothers which would not impede their ability to function as parents, and which would at the same time offer the best hope for their entrance into meaningful employment on a permanent basis." *Id.* at 29.

158. Stipulation of Facts at 156-87, *Dublino* (Nos. 72-792, 72-802) [hereinafter Stipulation, *Dublino*].

ferrals,” or “persons,” or with the pronoun “he.”¹⁵⁹ The state Welfare Commissioner presented testimony which viewed work from a “man’s” perspective as the most meaningful activity in life:

But work is not an obligation that makes less of a man, but rather it makes more of a man. When a man loses a job, he loses more than money. Work is more than a provision of income — although too many people interpret the work requirement as a cold and callous insistence that everyone must ‘work or starve.’ Tub work is more than doing a job, putting in time and collecting pay. Work is a source of interest, of friendship, and of activity that gives meaning and fulfillment to life.¹⁶⁰

Although the plaintiffs presented “evidence” demonstrating the unfairness and absurdity of the rules as applied to certain particularly burdened recipients,¹⁶¹ these stories did not trigger

159. Brief for the State of California As Amicus Curiae on Behalf of Appellants, *Dublino*, *supra* note 153, at 3-4, *Dublino* (Nos. 72-792, 72-802); Brief for Appellants, *Dublino*, *supra* note 153, at 3, 4, 12, 13, 20, 21. The exceptions include minor references in the state’s brief to a social services department determination of whether the mother’s presence at home was essential. *Id.* at 12-13.

160. Brief for Appellants, *Dublino*, *supra* note 153, at 36 (quoting from Remarks of Commissioner Wyman, at Midwinter Meeting of the New York Public Welfare Assoc. in Rochester, New York, Jan. 20, 1972). One must wonder where raising a child ranks in this listing of meaningful activity. Unlike the earlier image of mother as homemaker and caretaker and the policy based on needing to provide for her presence in the home to care for children, the state now presented a very different image: “Moreover, it is patent that the capacity to work is related to the problem of the need of an individual for public assistance, and, therefore, that a work requirement *per se* would not be inconsistent with the purposes of the Act.” Reply Brief for Appellants, *Dublino*, *supra* note 155, at 9. For the one-dimensional nature of the male myth, see also *infra* text accompanying notes 183-187.

161. Plaintiff’s brief cited to four plaintiffs who would be required to travel great distances at their own expense to pick up their checks, two women who were told to pick up their checks at the employment office even though there was no public transportation available, and one woman who was a college student studying education of the mentally retarded, who was sent to a job as a “‘go-go-girl’ at a night club.” Brief for Appellees, *Dublino*, *supra* note 157, at 13-14; Stipulation, *Dublino*, *supra* note 158, at 179. Stipulations in the case confirmed, *e.g.*, that one woman had to travel forty-four miles round trip on public transportation which “took the better part of a full day,” one woman who had no driver’s license had to travel twenty-eight miles in an area with no public transportation and in which a taxi fare would cost her fourteen dollars out of her welfare check, one woman would have to travel forty-four miles when she does not have a driver’s license, own a car, and no public transportation is available, one woman would have to travel sixty miles round trip by paying her neighbor to drive her to a town from which she can get a bus, a trip which takes a whole day. *Id.* at 158, 165, 170-71. The Plaintiff’s brief cited to eight paragraphs in the Stipulations of Facts for the proposition that “[r]ecipients of AFDC with numerous children and no child care arrangements were classified employable and required to comply with the Work Rules,” but did not discuss the sex

competing mythologies or reconceptualize the mythologies which informed the Supreme Court decision. Unproductive and less deserving welfare mothers do not contribute to the "societal well-being."¹⁶² A reinforcing myth was the ennobling nature of paid labor, a mythology usually associated with males who do not have to juggle a "second shift"¹⁶³ of family responsibility.

Dissenting from the majority's upholding of the work rules, Justice Marshall highlighted the naturalized "facts" underlying the opinion:

Myths abound in this area. It is widely yet erroneously believed, for example, that recipients of public assistance have little desire to become self-supporting. [citation deleted] Because the recipients of public assistance generally lack substantial political influence, state legislators may find it expedient to accede to pressures generated by misconceptions. In order to lessen the possibility that erroneous beliefs will lead state legislators to single out politically unpopular recipients of assistance for harsh treatment, Congress must clearly authorize States to impose conditions of eligibility different from the federal standards When across-the-board adjustments like those are made, legislators cannot single out especially unpopular groups for discriminatory treatment.¹⁶⁴

or experiences of these recipients. Brief for Appellees, *Dublino*, *supra* note 157, at 13. One woman with three children ages two years, one year, and three months was willing to work part-time in the evenings, but had no transportation or child care. The parties stipulated that the state workers told her, "That's not our problem." Stipulation, *Dublino*, *supra* note 158, at 186.

162. The majority opinion stated:

It [invalidating the rules] could impair the capacity of the state government to deal effectively with the critical problem of mounting welfare costs and the increasing financial dependency of many of its citizens. New York has a legitimate interest in encouraging those of its citizens who can work to do so, and thus contribute to the societal well-being in addition to their personal and family support. To the extent that the Work Rules embody New York's attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping many state and local governments, this Court should not lightly interfere. The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution.

Dublino, 413 U.S. at 413.

163. ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

164. 413 U.S. at 431-32.

Thus, the race and class biases that excluded poor women from the idealized maternal image also excluded them from whatever protection that mythology offered.

D. *Muller Redux: The Modern Protective Workplace*

In a series of opinions in the 1970s, the Supreme Court rejected the model of extreme deference to *Muller's* facially gendered view of the world¹⁶⁵ and began to examine some gender dependent classifications more carefully.¹⁶⁶ At least from the level of constitutional abstraction, formal equality theory seemed to have made the Court more self-conscious about accepting the *Muller* mythologies.¹⁶⁷ Yet the resiliency of those myths has not diminished, although the assumptions are reframed in often ironic ways.

Recall that one purpose of domesticity myths was to convince (white middle class) women that their place was in the home and not on the job site.¹⁶⁸ It is therefore not surprising that protective labor legislation both helped and hurt women.¹⁶⁹ *Goesaert v. Cleary*,¹⁷⁰ decided at mid-century, illustrates the Court's continuing reliance on *Muller* myths. Upholding the constitutionality of a Michigan statute forbidding women to be bartenders unless they were the wives or daughters of the male

165. Protective legislation in the *Muller* sense is, of course, no longer good law. Section 708 of Title VII of the 1964 Civil Rights Act preempts state laws inconsistent with its antidiscrimination mandate, such as statutes like the one in *Muller* which had facial gender categories. 42 U.S.C. § 2000e-7 (1964). State equal rights amendments achieve the same result. See, e.g., CAL. CONST. art. I, § 8 (amended 1974); MASS. CONST. AMEND. art. 106; PA. CONST. art. I, § 28 (amended 1971). For a more comprehensive listing, see BNA, INC., THE CIVIL RIGHTS ACT OF 1964 (1964).

166. See cases collected in Judith Olans Brown et al., *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFF. L. REV. 573, 576 n.16 (1987). Although a majority of the Court has never held gender to be as suspect a classification as race, gender classifications receive intermediate scrutiny and will be upheld only if they "serve important governmental objectives" and if the regulatory scheme is "substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976); cf. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (holding that classifications based on sex are inherently suspect and should receive strict judicial scrutiny).

167. For a fuller explanation of the problems in gender discrimination theory and a summary of the debate regarding equality theory, see Brown, *supra* note 166, at 590-625 (suggesting the debate is about the wrong question).

168. Poor women and African American women were not even in the image. HANDLER & HASENFELD, *supra* note 115, at 22-24. They were the maids in the "ideal homes." See *supra* text accompanying note 110.

169. See *supra* note 76.

170. 335 U.S. 464 (1948).

bar owners, the Supreme Court assumed the danger to women and women's lack of power in a barroom setting. Yet the Court never imagined other, perhaps even more effective, ways to protect women that would have provided them with more creative economic options.

The Court's unwillingness to look behind the gendered assumptions of the Michigan legislature¹⁷¹ was really an unwillingness to reconceptualize the myth upon which the assumptions were based. In other words, using particular mythologies allowed the Court to avoid making any judicial inquiry into culturally and historically contingent assumptions that husbands would be more protective of their wives than uncles would be of their nieces or hired bouncers would be of their coworkers.¹⁷² Judicial deference to the legislature thus reified the *Muller* mythologies and, in effect, cut off access to the courts as a means to challenge many socially constructed gender roles.

The *Muller* mythologies "fog"¹⁷³ the complexities of women's lives in another way: they minimize the conflict between

171. "Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This court is certainly not in a position to gainsay such belief by the Michigan legislature." *Id.* at 466.

172. Ironically, Justice Frankfurter included some historic and sociological "facts" in the majority opinion which belied the myth:

We are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald in Shakespeare, but centuries before him she played a role in the social life of England . . . Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women.

Id. at 465-66. Notice that women had run taverns in colonial times; indeed, baking and brewing were "normally women's work." Gloria L. Main, *Gender, Work and Wages in Colonial New England*, 4 WM. & MARY Q. 39, 57, 58 n.65 (1994). Rhode, *supra* note 19, at 202. Professor Rhode also noted that the legislative history made it clear that the purpose of the Michigan statute was primarily to protect male bartenders from competition. *Id.*

The notion that husbands would be better "protectors" of wives than uncles or hired bouncers is problematic for two reasons. The first is the idea that if a woman is in danger, the only safety she has is in the presence of a male protector. There are alternative measures a woman could take to protect herself, e.g., self-defense class as part of her training, allowing barmaids to have weapons on the job, etc. Second, punishing women because the environment in bars is unsafe fails to address the heart of the issue. Instead of prohibiting women from putting themselves in jeopardy, the Court might have required bar owners to curtail the activities of their clientele.

173. CLAUDE LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 184 (Monique Layton trans., 1976) suggests that myths "fog" complex phenomena. For an explanation of this concept, see EDMUND LEACH, *LEVI-STRAUSS* 62 (1974).

paid work and family responsibilities.¹⁷⁴ We have seen how in the welfare context, the courts have often assumed the appropriateness and ennobling nature of paid labor without considering women's family responsibilities.¹⁷⁵ This false dichotomy between public and private spheres¹⁷⁶ reduces women's lives to mythically exclusive roles.

The cases about women who work in the toxic workplace¹⁷⁷ provide a modern example of the continued vitality of *Muller's* mythologies. The leading case, *UAW v. Johnson Controls, Inc.*,¹⁷⁸ involved a battery manufacturing process which included the use of lead. Recognizing the health risks that the process entailed and attempting to protect itself from the risk of tort exposure (while professing a concern for the health of future generations), the company developed a series of fetal protection policies which first warned and then excluded women from lead exposure

174. Women, including women in paid labor, still do the majority of housework and have the primary responsibility for child care. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *WHERE'S PAPA? FATHER'S ROLE IN CHILD CARE* 5 (1993); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *WOMEN IN THE AMERICAN ECONOMY SERIES*, No. 146, at 23, (1986); see generally HOCHSCHILD & MACHUNG, *supra* note 163. Susan Faludi cited a national poll reporting women's opinion that their husbands share childcare shrunk from 40% in 1984 to 31% in 1987. FALUDI, *supra* note 123, at XIV. Deborah Rhode noted that women are responsible for about 70% of housework and that working wives spend twice as much time on household tasks as working men. RHODE, *supra* note 128, at 174; see also Heidi I. Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*, in *FEMINISM AND PHILISOPHY* 104, 111-14 (Nancy Toana & Rosemarie Tong eds., 1995) (citing time spent on housework as an example of how patriarchy operates in the home); *id.* at 115-17 (noting that the amount of time spent on housework by wives is not particularly sensitive to class, race, or ethnic differences).

175. See *supra* text accompanying notes 160-63.

176. There is much feminist literature on the topic of separate spheres. See, e.g., ANN DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (Anchor ed. 1988); Linda N. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 *J. AMER. HIST.* 9 (1988); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983). Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 151-57 (David Kairys ed., rev. ed. 1990). Dorothy Roberts noted that the separate spheres "dissolved" with slavery. Roberts, *supra* note 58, at 17. The public/private distinction is a false dichotomy because it suggests an either/or, all-or-nothing way of looking at the world, which ignores the overlapping roles most women must play within the family and the workplace. See Joan C. Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797 (1989).

177. In addition to *Johnson Controls* discussed in this section, see *Hayes v. Shelby Mem. Hosp.*, 726 F.2d 1543 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982).

178. 499 U.S. 187 (1991).

work.¹⁷⁹ The Supreme Court found that the policy was facially discriminatory and thus violated Title VII.¹⁸⁰

At first glance, *Johnson Controls* seems to be relying on the antithesis of the *Muller* mythologies.¹⁸¹ *Muller* viewed women as primarily reproducers, nonagents, incapable of freedom of contract, in need of protection; the women plaintiffs in *Johnson Controls* had the "right" to choose between reproductive risk and economic security. Thus, *Johnson Controls* seems to rest on competing mythologies of woman as something other than a mother, a person capable of making her own choices, one who can contract as "freely" as men, and one who does not need special gender-defined protection from the state.

Yet the most striking feature of the *Johnson Controls* opinion is that the toxic workplace is framed as a gender issue and not an issue of tort law, labor law, or administrative law.¹⁸² The challenge is not to the unhealthy or dangerous conditions of the workplace, but to the suitability of women's presence there: should workplaces which may interfere with women's role as breeders be closed to women? Asking the question in this way invites a response based on reductive myth.

Although there was "evidence" in the record about the "debilitating effect of lead exposure on the male reproductive system,"¹⁸³ the company had limited its exclusion policy to "wo-

179. Like the *Muller* brief, the Johnson Controls Company supported its policy with "scientific data," primarily on expert testimony. Brief for Respondent at 1-7, *Johnson Controls* (No. 89-1215). Justice Blackmun remained unpersuaded by the "data." His majority opinion notes only that the company overreacted in changing its warning to an exclusion when only eight employees over a four-year period became pregnant while having blood levels which exceeded OSHA's critical level. *Johnson Controls*, 499 U.S. at 207-08 (citing 29 C.F.R. § 1910.1025(n)(ii) (1990)).

180. The Court suggested that the policy might be justified if the employer could show that the costs of an alternative would "be so prohibitive as to threaten the survival of the employer's business." *Johnson Controls*, 499 U.S. at 210-11.

181. See *supra* note 69.

182. For an analysis of tort and regulatory response to chemical exposure, see John Endicott, *Interaction Between Regulatory Law and Tort Law in Controlling Toxic Chemical Exposure*, 47 SMU L. REV. 501 (1994).

183. *Johnson Controls*, 499 U.S. at 198. There is ongoing debate about the risk of lead exposure to sperm. See Chris Winder, *Reproductive and Chromosomal Effects of Occupational Exposure to Lead in the Male*, 3 REPROD. TOXICOLOGY REV. 221 (1989). Nevertheless, some studies link sperm exposure to lead and birth defects. See Gary Minda, *Title VII at the Crossroads of Employment Discrimination Law and Postmodern Feminist Theory*, 11 ST. LOUIS U. PUB. L. REV. 89 (1992). OSHA studies indicate "that lead-exposed males suffer serious harm to their spermatogenesis, including malformed sperm . . . , decreased motility of sperm . . . , and decreased number of sperm." *Id.*

men who are pregnant or who are capable of bearing children."¹⁸⁴ Fertile men, but not fertile women, were given a choice as to whether they wished to risk their reproductive health for a particular job.¹⁸⁵ Indeed, men were not allowed to be "protected" by the company policy; one of the individual petitioners in the class action was a man who had been denied a leave of absence for the purpose of lowering his lead level because he intended to become a father.¹⁸⁶ The company's gendered policy invoked a mythology that male workers, in their roles as both fathers and paid workers, were primarily economic providers. There is no room in this myth for men's procreative function; hence, workplace injury to men's reproductive capacity is not relevant to their private sphere lives.

The Court's framing of relief in "gender-neutral" terms (that women had the "freedom" to choose whether they wanted to be reproducers or economic providers) could be viewed as relying on a new gender mythology. But such a construction misses the point. The message of *Johnson Controls* is that a woman can "choose" to be a good mother by quitting her job, thus avoiding the danger of sterilization from lead exposure, or she can neuter herself and be an economic provider. She cannot be both.

Thus, like *Muller*, the Court in *Johnson Controls* celebrates the mythology of "responsible" (not in paid labor) motherhood¹⁸⁷ and, like the *Goesart* Court, uses that mythology to avoid exposing the cultural conflict between family and paid labor. Competing mythologies could envision mandating the em-

184. *Johnson Controls*, 499 U.S. at 192. "[W]omen . . . capable of bearing children" were "[a]ll women except those whose inability to bear children is medically documented." *Id.* The Seventh Circuit concluded the policy was facially sex neutral because it compared employees who could bear children with those who could not. *Id.*; cf. *Geduldig v. Aiello*, 417 U.S. 484, 194-96, 199 n.20 (1974) (holding that discrimination on the basis of pregnancy is not gender based but rather distinguishing between pregnant and non-pregnant people). The Pregnancy Discrimination Act ("PDA") of 1968 overruled *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) by amending Title VII to include discrimination based on pregnancy. The PDA, however, had no impact on *Geduldig*, a case decided under the Fourteenth Amendment. Thus, as a matter of constitutional doctrine, there is still no connection between pregnancy and gender. Indeed, Justice Scalia recently cited *Geduldig* in *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), for the proposition that there is no connection between abortion and gender ("the disfavoring of abortion . . . is not ipso facto sex discrimination."). *Id.* at 760-62.

185. *Johnson Controls*, 499 U.S. at 190.

186. *Id.* at 192.

187. Again, note the racial and class complexities of these mythologies, *supra* notes 123-30, 160-63 and accompanying text.

ployer to clean up the toxic workplace or, at least, to take measures to protect all workers.¹⁸⁸ But the power of the breeder myth obviated the need for any substantial judicial inquiry into the availability and cost of alternative ways to protect maternal (and paternal) health¹⁸⁹ which would not cut off women's economic opportunities.¹⁹⁰

188. Providing protective clothing is an obvious example. Professor Kirp suggested some of these alternatives: lowering the levels of airborne lead in the plant, narrowing the age range of the women affected by the policy which applied to all women from seventeen to seventy. See David L. Kirp, *Fetal Hazards, Gender Justice and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101, 109 (1992). Moreover, the Supreme Court noted that the policy was overinclusive because the company's concerns about how many women would become pregnant and how many would give birth to abnormal children were inflated. *Johnson Controls*, 499 U.S. at 207.

189. Ironically, the Supreme Court talked about cost at great length in *Johnson Controls*, but its discussion was focused on the cost of tort liability to the company. The majority noted that this was not a case where those costs might be "so prohibitive as to threaten the survival" of the business, dismissing the potential tort exposure as "remote at best." 499 U.S. at 210-11. Justice Scalia, concurring, essentially said the company had not shown a substantial risk of tort liability. *Id.* at 223-24. Concurring, Justice White began with a discussion of tort liability, citing litigation about prenatal injuries. He thought the company had a legitimate interest in protecting itself against this liability. *Id.* at 212-14, 217-19. Dissenting below, Judge Posner had suggested that "liability for a potential injury to a fetus is a social cost that Title VII does not allow a company to ignore." *UAW v. Johnson Controls, Inc.* 886 F.2d 871, 902 (1989) (en banc) (Posner, J., dissenting). In response, the majority noted only, "It is correct to say that Title VII does act to prevent the employer from having a conscience. The statute, however, does prevent sex-specific fetal-protection policies. These two aspects of Title VII do not conflict." 499 U.S. at 208. This misses the critical cost issues, which involve complex and difficult economic and policy questions about society's responsibility not only for maternal health but for the health of all workers.

190. Although the Seventh Circuit noted that women transferred from lead-exposure jobs to other jobs did not suffer a loss of pay or benefits, they were now working in lower status, indeed often menial jobs. The transfer lowered women's job satisfaction and prestige. As one woman described the reaction of her male colleagues: "Well, you girls burned your bras and look what you got. You're pushing brooms and washing respirators. Just like housework." Eileen McNamara, *Factory and Fertility: Suit Raises Issues of Bias, Fetal Rights*, BOSTON GLOBE, Oct. 17, 1989, at 1.

Women are employed in many toxic workplaces which do not have fetal protection policies because of the large numbers of women in that workforce. See Kirp, *supra* note 188, at 115 ("Expressions of corporate concern for the plight of fetuses . . . have been highly selective. Businesses that depend heavily on women workers have been much less scrupulous about the dangers they impose on the unborn."); see also Becker, *supra* note 69, at 1238-39 (stating that "[t]he concern for women's health and that of fetuses remains limited to those fields that are male dominated.").

The opinion in *Johnson Controls* is driven by mythologies which force women to make impossible choices:¹⁹¹ choices between maternal health and economic insecurity, between being sterilized and keeping jobs, between reproductive roles¹⁹² and economic roles. This is not to say that women might not indeed be in the best position to make their own decisions about their own safety and the health of their future children. It is, however, to suggest that these “choices” are illusory. Compressing the complex problems of the toxic workplace into the single issue of women’s reproductive health invites reductive mythic analysis and severely gendered outcomes. Thus, despite the Court’s rhetorical flourishes about gender equality, the opinion in *Johnson Controls* is little more than a more modern restatement of the *Muller* mythology.¹⁹³

The cruelty of the “choices” became nationally apparent in the hearings on Judge Robert Bork’s nomination to the Supreme Court. Judge Bork was questioned about his decision upholding a fetal protection policy of the American Cyanamid Company.¹⁹⁴ Although the case itself was extremely technical, involving the appropriate judicial deference to the regulations of an administrative agency,¹⁹⁵ the public perceived the issue as the propriety

191. Justice Blackmun stated that the responsibility for the unborn child properly belongs with its parents. This reinforces the mythology that women “choose” to be less dedicated workers. See *infra* text accompanying note 201. Justice Scalia saw the choice issue the same way: to him the issue was not whether “all pregnant women placed their children at risk . . . just as it does not matter if no men do so.” 499 U.S. at 223. Instead, the key point was that “Congress has unequivocally said, that Title VII gives parents the power to make occupational decisions affecting their families.” *Id.* (citing 886 F.2d 871, 915) (Easterbrook J., dissenting).

192. Compare the abortion cases which suggest that society does not trust a woman to make the appropriate decision on her own. See *Brown & Baumann, supra* note 16, at 59 (discussing cases).

193. Professor Schneyer read the Court’s opinion as suggesting that to the *Johnson Controls* company, “[W]omen are never anything but a problem to be solved. Either they are to be excluded, or they are to be worried about. Never are they simply workers like other workers.” Kenneth L. Schneyer, *Talking About Judges Talking About Women: Constitutive Rhetoric in the Johnson Controls Case*, 31 *AM. BUS. L.J.* 117, 183 (1993) (paraphrasing the *Johnson Controls* language).

194. *Oil, Chemical, & Atomic Workers Int’l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984). The program excluded all women of childbearing “capacity” (all women aged sixteen to fifty) from the company’s inorganic pigments department unless they could present medical evidence that they had been sterilized.

195. Indeed, Judge Bork himself had difficulty explaining the case during his testimony. 1 *Hearings on the Nomination of Robert H. Bork to be Associate Justice to the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 467 (1987) [hereinafter *Bork Hearings*]. The legal issue in the

of American Cyanamid's policy of offering women employees of childbearing age the "option" of being surgically sterilized or being fired.¹⁹⁶ Defending his decision, Bork emphasized that the choice had been voluntarily¹⁹⁷ made by the women: ". . . I suppose the five women who *chose* to stay on that job with higher pay and *chose* sterilization — I suppose that they were glad to have the *choice*."¹⁹⁸

Judge Bork invoked the myth that the rules of the legal regime did not allow him to secondguess the wisdom of the agency which upheld the company's fetal protection policy.¹⁹⁹ We have seen how the mythic model of judicial deference has cloaked gender nostalgia; this time, however, the deference exposed its callousness. In his unwillingness to investigate alternatives to the company's draconian policy,²⁰⁰ Judge Bork appeared to denigrate maternal mythologies in favor of "gender neutral" mythol-

case was whether American Cyanamid's policy of informing fertile women that they could retain their jobs if they underwent sterilization was a "hazard" within the meaning of the Occupational Safety and Health Act of 1970 (OSHA). *American Cyanamid*, 741 F.2d at 445. That statute requires protection of employees from certain risks, including exposure to high lead levels; hence, employees facing that risk had either to be transferred or discharged. 29 U.S.C. § 654 (1970). Judge Bork, writing for a unanimous panel, sustained the findings of both an administrative law judge and the Occupational Safety and Health Review Commission that the word "hazard" in the statute was limited to processes and materials and did not cover the option offered by American Cyanamid. *American Cyanamid*, 741 F.2d at 447.

196. L.A. Powe, *From Bork to Souter*, 27 WILLAMETTE L. REV. 781, 789-90 (1991).

197. Like the pregnancy cases, the "voluntariness" of the choice was used to justify the discrimination. See Brown, *supra* note 166, at 592; Dan Danielsen, *Identity Strategies: Representing Pregnancy and Homosexuality*, in AFTER IDENTITY: A READER IN LAW AND CULTURE 42 (Dan Danielsen & Karen Engle eds., 1995).

198. JOSEPH R. BIDEN, JR., SENATE COMM. ON THE JUDICIARY, NOMINATION OF ROBERT H. BORK TO BE ASSOC. JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. NO. 7, 100th Cong., 1st Sess. 309 (1987) (quoting Judge Bork in his testimony before the Judiciary Committee) (emphasis added).

199. As we understand the law, we are not free to make a legislative judgment. We may not, on the one hand, decide that the company is innocent because it chose to let the women decide for themselves which course was less harmful to them. Nor may we decide that the company is guilty because it offered an option of sterilization that the women might ultimately regret choosing. These are moral issues of no small complexity, but they are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy.

American Cyanamid, 741 F.2d at 445.

200. Dan Danielsen suggested some alternatives such as tailoring the policy to individual women's family plans and the use of birth control. Danielsen, *supra* note 197, at 43.

ogies of freedom of contract.²⁰¹ Indeed, Judge Bork's seeming unconcern for the pain of a woman who had chosen sterilization²⁰² was probably instrumental in the Senate's rejection of his nomination.²⁰³

II. MYTHOLOGIES OF SEXUALITY

We turn now to mythologies of the whore, the perceived oppositional archetype of the madonna. Sexuality myths are pervasive and definitional.²⁰⁴ Many myths surrounding female sexuality teach that, unlike a man, a woman's first identity is sexual;²⁰⁵ her identity as a worker (paid or unpaid) is often secondary to and inseparable from her sexuality.²⁰⁶

Again, different distortive and often reductive mythologies, perpetuated by some sectors of both white men and white women,²⁰⁷ construct the sexuality and seductiveness of women of

201. See, e.g., Judge Posner's opinion in *American Nurses' Association v. State of Illinois*, 783 F.2d 716 (7th Cir. 1986) (noting that women deliberately invest less in their careers in order to allow time for their family responsibilities). For a different perspective, see Judith Olans Brown et al., *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 HARV. C.R.-C.L. L. REV. 127, 135, 137 (1986); and Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1213 (1988).

202. Betty Riggs, one of the women who was sterilized, sent a telegram to the committee expressing her "disbelief that 'Judge Bork thinks we were glad to have the choice of getting sterilized or getting fired.'" BIDEN, *supra* note 198, at 309-10.

203. Powe, *supra* note 196, at 790 (noting that after the testimony about American Cyanamid, 77% of those polled indicated they were "less inclined" to support Bork). See also ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOCKED AMERICA* (1989).

204. See JANEWAY, *supra* note 1, at 260-77 *passim*; Cynthia A. Davis, *Archetype and Structure: On Feminist Myth Criticism*, in *COURAGE AND TOOLS: THE FLORENCE HOWE AWARD FOR FEMINIST SCHOLARSHIP 1974-1989*, at 110 (Joanne Glasgow & Angela Ingram eds., 1990) (positing that female archetype locks women into constricting roles and identifies women with Eros); Pamela S. Haag, *In Search of "The Real Thing": Ideologies of Love, Modern Romance, and Women's Sexual Subjectivity in the United States*, in *AMERICAN SEXUAL POLITICS* 161 (John C. Fout & Maura Shaw Tantillo eds., 1993) (explaining the myth that women's sexuality is unruly and out of control, while male sexual behavior is rational and self-controlled, but simultaneously noting class differences).

205. See PEASE & PEASE, *supra* note 123, *passim* (making an historical comparison between the lives of women in two antebellum societies with respect to domesticity and sexuality, noting gender, class, race, and regional differences).

206. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 18, 22-23 (1979) (arguing that women are always required to be sexually attractive).

207. See Karen A. Getman, Note, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115, 125-26 (1984) (detailing discriminatory impact on women of antimiscegenation laws, which controlled the sexual behavior of white women while allowing plantation owners to enjoy the economic benefits of their illicit relationships with slave

color.²⁰⁸ As we have seen, white women often have had to conform to an ideal of mythic purity and chastity in order to be eligible for the law's protection.²⁰⁹ But African American women were not offered that "pedestal."²¹⁰ Racial patriarchy distin-

women); see also HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL, WRITTEN BY HERSELF 13 (Maria Child & Jean Fagan Yellin eds., 1987) (describing poignantly a white woman's reaction to a young slave girl dying "soon after the birth of a child nearly white": "Her mistress stood by, and mocked at her like an incarnate fiend. 'You suffer, do you?' she exclaimed. 'I am glad of it. You deserve it all, and more too.'"); JACQUELINE HALL, REVOLT FROM CHIVALRY (1993) (discussing narratives of resistance).

208. "Americans," as Cornel West has written,

are obsessed with sex and fearful of black sexuality . . . the fear is rooted in visceral feelings about black bodies fueled by sexual myths of black women and men. The dominant myths draw black women and men either as threatening creatures who have the potential for sexual power over whites, or as harmless, desexed underlings of a white culture.

CORNEL L. WEST, RACE MATTERS 83 (1993).

The depiction of the oversexed-black-Jezebel is not so salient in American culture as that of the black-beast-rapist/lynch victim, but she has sufficient visibility to haunt black women to this day. The stereotypical black woman not only connotes sex, like the working class white woman, but unlike the latter, is assumed to be the instigator of sex.

Nell Irvin Painter, *Hill, Thomas and the Use of Racial Stereotype*, in RACE-ING JUSTICE, EN-GENDERING POWER 209-10 (Toni Morrison ed., 1992) [hereinafter RACE-ING JUSTICE]. Susan Douglas, discussing images of African American women, in popular culture and sixties rock and roll in particular, wrote that because black women were stereotyped as more sexually active, "it was easier, more acceptable, to the music industry and no doubt to white culture at large that black girls, instead of white ones, be the first teens to give voice to girls changing attitudes toward sex." SUSAN DOUGLAS, WHERE THE GIRLS ARE 93-95 (1994).

209. See *supra* text accompanying notes 119-27.

210. Recall *Frontiero*, 411 U.S.677, 684 (1973) (decrying the "romantic paternalism" which placed women "not on a pedestal but in a cage"). Despite his long relationship with his slave Sally Hemings, Thomas Jefferson spoke of the "limited intellectual capacities and . . . bestial sexuality" of African American women. Adele Logan Alexander, "She's No Lady, She's a Nigger": *Abuses, Stereotypes, and Realities from the Middle Passage to Capitol (and Anita) Hill*, in RACE, GENDER AND POWER IN AMERICA, THE LEGACY OF THE HILL-THOMAS HEARINGS (Anita Faye Hill & Emma Coleman Jordan eds., 1995), (citing Fawn M. Brodie, *Sally Hemings*, in BLACK WOMEN IN AMERICA: AN HISTORICAL ENCYCLOPEDIA 554-55 (Darlen Clark Hine ed., 1993)). Indeed, no black woman had "the option of saying no and making it stick when any man wanted to exploit her sexually." *Id.* at 8 (emphasis in original). Angela Harris wrote that:

[d]uring slavery, the sexual abuse of black women by white men was commonplace. Even after emancipation, the majority of working black women were domestic servants for white families, a job which made them uniquely vulnerable to sexual harassment and rape . . . [for] the rape of a black woman . . . was simply not a crime. Even after the Civil War, rape laws were seldom used to protect black women . . . since [they] were considered promiscuous by nature.

guished between the “goodness, purity, innocence, and frailty of women, and the sinful, evil strength and carnal knowledge of women,”²¹¹ designating the symbolic white woman as the embodiment of the former and the symbolic African American woman as the latter.²¹²

In this section, we explore certain mythologies of female sexuality, again exposing the mythic dichotomy of women receiving welfare and women in paid labor. In both situations, myths about the sexuality of women of different races and classes often validate the use of simplistic solutions for complex problems.

A. *The Essence of Womanhood*

Despite the formal “gender neutral” equality model of the fair employment legislation of the sixties,²¹³ myths about some women’s sexual purity have reinforced the notion of their unsuitability for paid labor.²¹⁴ *Dothard v. Rawlinson*²¹⁵ is illustrative.

Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 595, 598-601 (1990).

For the documentation of the sexual exploitation of slave women see BYNUM, *supra* note 22, at 36-41, 90-97; FOX-GENOVESE, *supra* note 22, at 49, 189, 211-99, 325-26; JACOBS, *supra* note 207, at 53-57; see also MELTON A. MCLAUREN, CELIA, A SLAVE (1991). McLaurin tells the true story of the murder trial of Celia, a slave repeatedly raped by her master for five years. The first time occurred when she was fourteen on the way home after he purchased her. When she ultimately refused to have sexual relations with him because of illness and he persisted, she killed him. The judge at her murder trial denied Celia’s counsel’s request for an instruction that the rape of a slave was not the property right of the master.

211. WEST, *supra* note 208, at 83.

212. There is Jezebel (the seductive temptress), Sapphire (the evil, manipulative bitch), or Aunt Jemima (the sexless, long-suffering nurturer). The myths offer distorted, dehumanized creatures . . . distinguished from the white norm of beauty and whose feared sexual activities are . . . disgusting Yet . . . behind closed doors the . . . disgusting sex and funky sex associated with black people is often perceived to be more intriguing and interesting Everyone knows it is virtually impossible to talk candidly about race without talking about sex.

Id.; see also BARBARA OMOLADE, THE RISING SONG OF AFRICAN AMERICAN WOMEN 5 (1994) (citing WINTHROP JORDAN, WHITE OVER BLACK 3-43 (1968)). “Over-determined by class and by race, the black-woman-as-whore appears nearly as often as black women are to be found in representations of American culture.” Painter, *supra* note 208, at 210.

213. Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-n (1995); Equal Pay Act of 1963, 29 U.S.C. §§ 206(d), 216(b) (1995). See *supra* note 165. We recognize the open-endedness and elusiveness of legal rights (equality), which often result in indeterminate outcomes. We also recognize that the formal norm of legal neutrality is itself a myth. See *supra* text accompanying notes 13-14, 43.

214. Joan Hoff suggested that “to the degree that women increasingly entered the public realm in the 1830s and 1840s through the temperance and abolitionist

The maximum security prison system in Alabama was a "peculiarly inhospitable"²¹⁶ environment, characterized by disorganization and violence. The inmates (twenty-six percent of whom were sex offenders) were not classified or segregated according to their offense or their level of dangerousness. Thus, according to the Supreme Court, "more . . . [was] at stake" than a woman's right under Title VII to make her own choice about working as a prison guard. The "real risk" was sexual assault both by sex offenders and "other inmates, deprived of a normal heterosexual environment."²¹⁷ The "employee's very womanhood,"²¹⁸ her unavoidable and omnipresent sexuality, disqualified her from employment.

Dothard again exemplifies Barthes's insight that myth is the process of historically contingent "facts" becoming natural "facts," of particular myths being naturalized as "true."²¹⁹ First, the *Dothard* Court appears to assume that a woman's sexuality transcends her other attributes.²²⁰ The Court did not consider that some women might choose to risk dangerous working conditions, or that other women, perhaps because of their physical strength or "moral authority,"²²¹ might not share the Court's fear

movements, their own claim to being private paragons of virtue both in the family and society gradually diminished." JOAN HOFF, *LAW, GENDER AND INJUSTICE* 4-7 (1991). Hoff also described how the loss of the "monopoly on virtue" contributed to the failure of reformers to secure legislation protecting women from physical abuse because once some women entered public life, all women were perceived to be less virtuous. This transforms sex into sexuality. *Id.*

215. 433 U.S. 321 (1977).

216. *Id.* at 334. Indeed, the District Court held that the "jungle" conditions in Alabama's penitentiaries were unconstitutional. *Pugh v. Locke*, 406 F. Supp. 318, 325 (D. Ala. 1976). The District Court in *Pugh* issued a comprehensive order to cure the Alabama prison system of 8th Amendment violations. *Id.*

217. *Dothard*, 433 U.S. at 335.

218. *Id.* at 336. "Womanhood" in this sense invokes helplessness and/or the ability to be raped.

219. See BARTHES, *supra* note 3, at 129; EAGLETON, *supra* note 5, at 135. To Barthes, once the myth takes over, the original historical reality disappears. In one of his most famous examples, Barthes traced the creation of an imperialist French mythic symbol out of a picture on a magazine cover of a black French soldier saluting. On one level, the soldier has a historical and political reality independent of myth. But once turned into a mythical image, the soldier loses his historical specificity and becomes a different type of speech/myth. BARTHES, *supra* note 3, at 143. To Barthes, "myth is a type of speech." *Id.* at 109.

220. Justice Marshall, dissenting, decried the Court's reliance on "one of the most insidious of the old myths . . . that women, wittingly or not, are seductive sexual objects." *Dothard*, 433 U.S. at 345.

221. Justice Marshall noted that prison guards are typically unarmed and rely primarily on "the moral authority of their office and the threat of punishment" to

for their safety. Instead, every woman, regardless of her individual capabilities or attributes, was precluded from working as a guard.²²²

Second, albeit in the particular context of prisons,²²³ *Dothard* naturalizes the unmanageability of male sexuality, reinforcing the dangerous idea that women alone are responsible for curbing uncontrollable male reactions.²²⁴ It is “normal”²²⁵ for men to experience women as sexual provocateurs.²²⁶

deter inmate uprisings, citing the testimony of an expert that the qualities a guard needs to deal with the dangers of his or her job are “common sense, fairness, and mental and emotional stability.” *Id.* at 343; *cf.* *Johnson v. Phelan*, 64 U.S.L.W. 2297 (Oct.24, 1995) (holding that routine monitoring of nude male prisoners by female guards does not violate the Due Process Clause or the 8th Amendment and finding that efficient deployment of prison staff is a valid justification for cross-sex monitoring and reduces the potential for conflict with Title VII).

222. Just as in the toxic workplace cases, the *Dothard* Court placed the burden of the inhospitable workplace on the women job applicants, rather than relying on different mythologies which would place the burden on the state of Alabama to reallocate prison resources or to reorganize the prison population, or on the prisoners themselves. *See supra* text accompanying notes 177-203. Thus, sexuality mythologies allowed the Court to “solve” the prison conditions problem by depriving women of economic opportunities.

223. The Court’s sweeping reference to the “employee’s very womanhood” indicates its acceptance of myths of women’s unsuitability for a wide range of workplaces far beyond the prison setting.

224. A group of contemporary women writers criticize what they view as the characterization of women as helpless victims and argue against date rape, asserting that women ought to assume responsibility for themselves. *See* KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS* (1993) (criticizing women who do not take responsibility for date rape); Christina H. Sommers, *Sister Soldiers*, *NEW REPUBLIC*, Oct. 5, 1992, at 29-30, 32 (“Academic feminism, particularly the National Women’s Studies Association, is largely concerned . . . with anti-rational ‘victim studies’ that often resemble mass therapy and New Age healing rituals more than scholarly endeavors.”). Camille Paglia noted that the solution to date rape is “female self-awareness and self-control.” CAMILLE L. PAGLIA, *SEX, ART AND AMERICAN CULTURE* 53 (1992). For an analysis of this challenge to more traditional feminist scholarship, see Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 *COLUM. L. REV.* 304 (1995).

225. *See, e.g.*, *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 461 (D. Mich. 1977) (stating that if overt sexual suggestion, innuendoes, and harassment were actionable under Title VII, there would be federal suits “every time any employee made amorous or sexually oriented advances toward another. The only way an employer could avoid such judgments would be to have employees who were asexual.” (quoting *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975)); *see also infra* note 269 (discussing cases in which the interaction of men and women in the workplace is assumed to have sexual undertones).

226. There is a voluminous literature on differential gender perceptions, themselves socially constructed, of this phenomenon. *See* Kim Lane Scheppelle, *The Revision of Rape Law*, 54 *U. CHI. L. REV.* 1095, 1104-13 (1987) (citing Antonia Abbey, *Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females’*

Thus, like mythologies of motherhood, mythic thinking about female sexuality has constrained legal doctrine and limited women's employment outside the home. Although women have entered paid labor in record numbers,²²⁷ issues involving sexuality in the workplace remain among the most intractable and the least amenable to legal remedy.²²⁸ A man's sexuality is almost never an aspect of his employment or of public policy debates,²²⁹

Friendliness?, 42 J. PERSONALITY & SOC. PSYCHOL. 830 (1982) ("Men see women's friendliness as evidence of seductiveness and promiscuity when the women themselves think they're merely being polite.")). "When given the same cues . . . , men are more likely than women to see the relationship as potentially sexual and to expect more sexual activity to be forthcoming." *Id.* "Men seem to sexualize their descriptions of women and of social situations, seeing women as being sexually receptive and as leading men on even with the most meager evidence." *Id.*; cf. CAMILLE PAGLIA, *SEXUAL PERSONAE* 13 (1990) (criticizing feminists who dismiss female eroticism as harmful to women and asserting that "[t]he primary image [of women in world mythology] is the femme fatale, the woman fatal to man.").

227. See, e.g., CLAUDIA GOLDIN, *UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN* 10-57 (1990).

228. Consider, e.g., the notion that sexual harassment is but an individual, private romantic relationship which therefore cannot constitute gender-based group discrimination. Judge Manion, in his dissent in *King v. Board of Regents of the University of Wisconsin*, 898 F.2d 533, 541-42 (7th Cir. 1990), noted that if the alleged harassment is directed at one particular woman, it is not gender-based discrimination because not all women are the focus of the harasser's attentions. This not only fails to recognize that sexual harassment is about abuse of power and not about unsuccessful romantic overtures, but also illustrates the judiciary's reluctance to consider sexual aggression as abnormal. See also *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995) (finding that if an employee's environment, however unpleasant, is not due to gender, she is not a victim of sex discrimination); *Huebchen v. Dept. of Health & Social Sciences*, 716 F.2d 1167, 1172 (7th Cir. 1983) (holding that a male employee failed to establish a sex discrimination claim against a female supervisor because her vengeful reaction toward plaintiff was based on the end of their romantic relationship and not plaintiff's gender). *But see Volk v. Coler*, 845 F.2d 1422, 1433 (7th Cir. 1988) (finding that where plaintiff had not previously been in a consensual relationship with defendant, "[d]iscrimination and harassment against an individual woman because of her sex is a violation of the equal protection clause"). For a discussion of whether defendant's treatment of plaintiff in sexual harassment cases is sexually motivated within the meaning of discrimination law, see Peter M. Panken & Johna G. Torsonone, *Sexual Harassment in the Workplace: Employer Liability for the Sins of the Wicked*, C874 A.L.I.-A.B.A. 385M, 420-21 (1993).

Moreover, this approach invokes the mythic notion of public and private spheres. See *supra* note 176. A woman can never leave her sexuality at home, but if it gets her into trouble at work, it is "private," not "public," trouble, unless it becomes legally cognizable sexual harassment.

229. Interestingly, in the debate over permitting gays in the military, heterosexual men were concerned that they would be the objects of homosexual lust. "The prejudice against openly gay men in the military is based on the assumption that they will assault straight men, that they will treat straight men the way straight men treat women." Judy Mann, *Conduct Unbecoming*, WASH. POST, July 7, 1993, at E13; see also RANDY SHILTS, *CONDUCT UNBECOMING* 210, 215-16, 237-38 *passim* (1993).

yet reductive and distortive myths about women's sexuality envelop their employment prospects and cloak the conceptual inadequacy of public policy discourse.

B. *Sexuality As An Asset: She Walks In Beauty*²³⁰

Mythologies that naturalize socially constructed expectations about beauty, devaluing a woman's other qualities and prizing her sexual attributes as her primary value, shape judicial opinions regarding employee appearance standards.²³¹ The courts have both constrained and condoned employer exploitation of female sexuality. While the more obvious and blatant marketing of sex has been rejected as discrimination,²³² in other situations courts have accepted a woman's appearance as a commodity, a legitimate product for employers who can assess the worth of and profit from this sexual "value."²³³ In so doing, the

For the same argument as applied to lesbians, see *id.* at 720 *passim*; see also Abrams, *supra* note 84, at 2515 (concluding that courts are more sympathetic to male sexual harassment claims "when they present the image of a normative, unambiguously male subject who receives unexpected sexual attention from another male in the workplace. This is attributable in part to the straight male fear of the spectral homosexual predator . . ."); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 218-21 (suggesting that lesbians and gay men are outside legal norms and expectations of biological maleness or femaleness); see also *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 459 (N.J. 1993) ("[O]ur general observation of a current social debate suggests to us that many men find the prospect of sexual harassment by other men extremely insulting and intimidating and not at all a 'comparatively harmless amusement.'").

230. LORD BYRON, *She Walks in Beauty*, reprinted in GEORGE NOEL GORDON, *THE POETICAL WORKS OF LORD BYRON 77* (Oxford Univ. Press, 1959).

231. Karl E. Klare, *POWER/DRESSING: REGULATION OF EMPLOYEE APPEARANCE*, 26 NEW ENG. L. REV. 1395 *passim* (1992) (suggesting that appearance law naturalizes socially constructed differences and empowers authority figures to reinforce suppression of women); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto*, in MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* 128-31 (1992) (arguing that legal discourse explains and rationalizes sex distinctions as natural); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 370 (relating appearance practices to the domination of racial and gender groups).

232. See, e.g., *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981) (requiring female employee to wear sexually revealing costume is discrimination based on sex under Title VII).

233. For a discussion of the judicial acceptance of gender stereotypes in the employment practices of the airline industry, see Pamela Whitesides, *Flight Attendant Weight Policies: A Title VII Wrong Without A Remedy*, 64 S. CAL. L. REV. 175 (1990).

courts have been unwilling to reimagine certain mythic gendered assumptions about sexuality.²³⁴

In *Diaz v. Pan American World Airways*,²³⁵ for example, the Fifth Circuit rejected the female-only hiring policy for flight attendants despite the defendant's expert testimony (accepted by the District Court) concerning its customers' belief that their psychological needs were better met by female flight attendants. The Fifth Circuit held that sex was not a bona fide occupational qualification because the "primary function" of the defendant airline was safe transportation of passengers.

Ironically, the airline's expert seemed to attempt to invoke madonna mythology, rather than that of the whore.²³⁶ Describing the cabin of an airliner as a "sealed enclave" (womb), the expert, Dr. Eric Berne, explained that the cabin was a unique environment which "creates three typical passenger emotional states with which the air carrier must deal; first and most important, a sense of apprehension; second, a sense of boredom; and third, a feeling of excitement." Dr. Berne opined that female stewardesses, because of the nature of women's psychological relationship to persons of both sexes, would be better able to deal with each of these psychological states.²³⁷ However, sexuality myths still normalized the invocation of gendered appearance standards: the court noted the "obvious cosmetic effect that female stewardesses provide."²³⁸

A later airline case, *Wilson v. Southwest Airlines*,²³⁹ questioned the defendant's overt efforts to sell an "overall love image"²⁴⁰ by marketing the femininity and seductiveness of its female employees in order to attract male business passengers. Like the *Diaz* court, this court rejected the airline's female-only hiring policy, holding that the company had failed to prove that,

234. Note Professor Klare's insight that these assumptions, developed within the context of social power, both exploit and repress female sexuality. Klare, *supra* note 231, at 1431, 1433.

235. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

236. *But see supra* note 18 (positing that the madonna/whore myths are not dichotomies). Indeed, fantasies of sexuality can be conjured up from the expert's words.

237. *Diaz*, 311 F. Supp. 559, 565 (S.D. Fla. 1970), *rev'd*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

238. 442 F.2d at 388.

239. 517 F. Supp. 292 (N.D. Tex. 1981).

240. The advertising campaign promoted the company as the "love" airline, promising "tender loving care" for male passengers. *Id.* at 294.

despite the centrality of sexual allure to its advertising campaign (and, indeed, to its identity), sex was a bona fide occupational qualification for the job of cabin attendant. Again, however, the court cautioned that its holding “does not eliminate the commercial exploitation of sex appeal” where the “essence” of the business relates to that sex appeal.²⁴¹ Southwest lost only because it had failed to prove that relationship.

Where the marketing of sexual attractiveness is more subtle, challenges by women employees have been less successful. The courts have often failed to expose the gender discrimination embedded in “facially neutral” socially constructed appearance gender norms,²⁴² instead relying on sexual mythologies of how women behave, how they should appear, and how they are most valued, to insulate adverse employment decisions from judicial scrutiny.²⁴³ Provided that the employment policy applies at least in theory to both men and women, the legal fiction of gender neutrality is satisfied.²⁴⁴

241. *Id.* at 302-05. In conclusion, the court also noted that “in our quest for non-racist, nonsexist goals, the demand for equal rights can be pushed to silly extremes” and warned that “inability to absorb the minor indignities suffered daily by us all without running to court” would trivialize the rule of law. *Id.* at 304-05.

242. The doctrinal distinction between facially gendered and facially gender neutral policies often allows the perpetuation of the myth that physical decorative appearance is much more important for a woman than a man. *Diaz and Wilson* involved facially discriminatory women-only-no-men-need-apply hiring policies. But where job classifications are predominantly female or where there are different grooming standards applied “evenhandedly” to men and women, Title VII is not violated. See Katherine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms and Workplace Equality*, 92 MICH. L. REV. 2541, 2559-65 (1994); Klare, *supra* note 231, at 1417-18; Whitesides, *supra* note 233, at 212, 231

243. See Bartlett, *supra* note 242, at 2560-65 (analyzing dress and appearance codes in terms of whether they further gender-based disadvantage and recognizing that community-based norms are critical to law reform); Klare, *supra* note 231, at 1417-18 (asserting that courts, by relying on commonly accepted social norms or generally accepted community standards, rely on sexist and patriarchal norms); Mary Whisner, Comment, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 84 (1982) (arguing that to rely on accepted social norms discriminates against women and defeats the purpose of antidiscrimination legislation).

244. Indeed, an employer maintaining a sex-segregated labor force may work against a female employee's challenge to appearance standards. For example, in *Jarrell v. Eastern Airlines*, the court readily accepted the employer's right to market an image of thin and attractive flight attendants. *Jarrell v. Eastern Airlines*, 430 F. Supp. 884 (E.D. Va. 1977), *aff'd*, 577 F.2d 869 (4th Cir. 1978). The *Jarrell* court held that the high number of women in flight attendant positions showed that weight standards for those jobs did not have a discriminatory effect despite the greater difficulty women had in meeting the weight maximums. Nor was the policy discrimina-

Christine Craft's challenge to appearance standards illustrates the dilemma.²⁴⁵ Craft, a television anchorwoman, argued that by being subjected to appearance standards that were not applied to male news anchors (her hairstyle, clothing, and make-up failed to conform to her employer's standard of female beauty), she was being evaluated according to her looks and not according to her job performance. Yet Craft failed to prove discrimination in violation of Title VII. The court found that the employer had based its decisions on "community standards" and that the community did not treat the appearance of men and women the same way.²⁴⁶ The viewing community's negative response to Craft's appearance was sufficient justification for her dismissal because Title VII permits an employer to require appearance standards for both men and women, if those standards are applied in an "evenhanded" way.²⁴⁷ If the public places gendered appearance demands on a female anchor that it does not place on a male one, the employer's reliance on public preference is not discrimination.²⁴⁸

tory on its face because weight restrictions were also imposed on male flight attendants. The argument is circular: the existence of job segregation precluded the plaintiffs from effectively challenging the weight rules since enough women were able to meet the standards; *accord* Leonard v. National Airlines, Inc., 434 F. Supp 269 (S.D. Fla. 1977) (taking judicial notice of how attractive the flight attendants were, the court held weight controls did not have a negative impact on the number of females in flight attendant positions, and therefore the weight policy did not violate Title VII); *cf.* Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982), *cert. denied*, 460 U.S. 1074 (1983) (finding that plaintiff's prima facie case that gender specific weight requirements violated Title VII was not rebutted by airline's interest in using attractive flight attendants to compete against other airlines). The *Boston Globe* reported that a woman employee who fought her termination for failure to wear make-up was reinstated by Continental Airlines. Chris Reidy, *Ticket Agent Who Fought Makeup Rule was the Wrong Person to Pick On*, BOSTON GLOBE, May 21, 1991, at 53; *see also* Whitesides, *supra* note 233, at 183-87 (describing the sexual exploitation of women by the airline industry).

245. Craft v. Metromedia, Inc., 572 F. Supp. 868 (W.D. Mo. 1983), *aff'd in part, rev'd in part*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).

246. 766 F.2d at 1214-16.

247. *Id.* at 1214, n.11 (citing *Craft*, 572 F. Supp. at 877); *see also* Barker v. Taft Broadcasting Co., 549 F.2d 400, 401 (6th Cir. 1977) (concluding that employer's requirement of different hair lengths for men and women does not violate Title VII); Knott v. Missouri Pac. R.R., 527 F.2d 1249, 1252 (8th Cir. 1975) (holding that reasonable appearance standards applied in evenhanded manner do not violate Title VII); Willingham v. Macon Telegraph, 507 F.2d 1084 (5th Cir. 1975) (Title VII does not prohibit different grooming standards for men and women).

248. Thus, Walter Cronkite can grow old and be valued for his experience and wisdom, and Andy Rooney may appear increasingly rumped and jowly and viewers may identify with him, but Barbara Walters must age as little as is surgically possible. *See* Patti Buchman, Note, *Title VII Limits on Discrimination Against Television*

Thus, although some “blatant” and “egregious” promotion of sexual allure violates Title VII, the statute does not prevent employers from marketing gendered public perceptions of female beauty.²⁴⁹ Mythologies naturalize gendered standards of beauty, insulating employers’ exploitation²⁵⁰ of culturally imbedded preferences²⁵¹ from judicial reimaging.²⁵² Christine Craft had failed to heed William Butler Yeats’ admonition to “labour to be beautiful.”²⁵³

Anchorwomen on the Basis of Age-Related Appearance, 85 COLUM. L. REV. 190, 202-15 (1985) (arguing that “audience preference for attractive young anchorwomen as evidenced by ratings, audience research or otherwise, can neither create a bona fide occupational qualification under the EEOC’s ‘entertainment exception’ to section 703(e) [of Title VII] nor give rise to a business necessity defense”). For a discussion of the problem of viewer surveys, see Leslie S. Gielow, *Sex Discrimination in Newscasting*, 84 MICH. L. REV. 443, 458-59, 473-77 (1985).

249. Doctrinally, neither the disparately gendered effect of the policy nor the employer’s reliance on socially constructed assumptions about women were sufficient to constitute the requisite sexist animus. The model of the Title VII prima facie case which controls appearance cases requires plaintiff to prove defendant’s subjective animus. For a critique of the animus requirement see Brown & Baumann, *supra* note 16, at 593-94; Brown et al., *supra* note 166, at 590-618. For a particularly Freudian explanation of the choice of model problem, see Lemons v. City & County of Denver, 17 Fair Empl. Prac. Cas. (BNA) 906 (D. Colo. 1978), *aff’d*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980) (describing the application of disparate impact model to comparable worth cases as “pregnant with the possibility of disrupting the entire economic system”).

250. Klare, *supra* note 231, at 1420, 1437-38 (suggesting that appearance law disciplines employees and reinforces employer power).

251. See NAOMI WOLF, *THE BEAUTY MYTH* (1991) (describing the effect of social norms on women’s body image and sexuality). Ninety percent of all anorexics are women. ROBERTA P. SEID, *NEVER TOO THIN: WHY WOMEN ARE AT WAR WITH THEIR BODIES* 26 (1989); see also Reena N. Glazer, Note, *Women’s Body Image and the Law*, 43 DUKE L.J. 113 (1993) (discussing effects on women’s body image of legal prohibitions on public nudity); Susan Bordo, *Reading the Slender Body*, in *FEMINISM & PHILOSOPHY* 467 (Nancy Tuana & Rosemarie Tong eds., 1995) (analyzing society’s preoccupation with slenderness as an explanation of power in general and gender relations in particular). Most cosmetic surgery is performed on women. Edward O. Terino, *Implants for Male Aesthetic Surgery*, 18 CLINICS IN PLASTIC SURGERY 731 (1991) (In 1970, the average surgery practice included 1% male patients; by 1991, male patients were 10-20% of the cases.). The myth here is captured in the aphorism “no woman can be too rich or too thin.” JOHN BARTLETT, *FAMILIAR QUOTATIONS* 782 (16th ed. 1992). Bartlett lists this as an anonymous saying “frequently attributed to the Duchess of Windsor and others.” *Id.* at n.9.

252. Kathryn Abrams notes that the “dominant understanding of discrimination is that discriminatory actions or judgments are workplace specific barriers that hinder employment opportunity, rather than parts of a larger system of discrimination that shapes the consciousness of those subject to it or intersects with other systems of discrimination.” Abrams, *supra* note 84, at 2523; Klare, *supra* note 231, at 1414-15 n.81 (“lookism and sexism are inextricably linked”).

253. “To be born woman is to know . . . we must labour to be beautiful.” William Butler Yeats, *Adam’s Curse*, from *IN THE SEVEN WOODS* (1904), in *SELECTED*

Thus, law iconizes the mythic woman who perfectly balances her sexual allure, using it when appropriate and suppressing it when necessary.²⁵⁴ Indeed, a woman who does not conform to normative myths of femininity or sexual attractiveness may suffer in the workplace.²⁵⁵

By measures of "male professional competence,"²⁵⁶ Ann Hopkins should have been a partner at Price Waterhouse. An aggressive high achiever, she was one of the firm's best "rainmakers."²⁵⁷ Yet the firm denied her partnership because she lacked conventional "femininity" in dress and demeanor; that is, she failed to conform to the male partners' mythic notions of appropriate female behavior.²⁵⁸ Evaluations by male partners found her not womanly enough:

POEMS AND THREE PLAYS OF WILLIAM BUTLER YEATS 29 (Macha Louis Rosenthal ed., 1986). Moreover, the Court chastised Craft for her inability or unwillingness to remedy her "appearance problems." *Craft*, 572 F. Supp. at 878. As Professor Klare suggests, courts punish women who depart from male-created expectations. Klare, *supra* note 231, at 1398.

254. The courts allow the exploitation of her attractiveness by employers; but if the enticement results in sexual harassment, it is the woman who must prove that her sexuality did not invite it. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68-69 (1986) (plaintiff must establish that the sexual harassment was unwelcome; her "sexually provocative speech or dress" are admissible in the court's evaluation of her claim); see *infra* text accompanying notes 267-307; cf. *Young v. Mariner Corp.*, 65 Fair Empl. Prac. Cas. (BNA) 555, 558 n.1 (D. Ala.) (rejecting sexual harassment claim because female plaintiff "wore little makeup and her hair was not colored in any way . . . [and] considering the appearance of [defendant's] wife, it is obvious that [plaintiff's] appearance . . . was not attractive to [defendant]").

255. Women who are masculine are considered deviant. See J. Cindy Eson, Casenote, *In Praise of Macho Women: Price Waterhouse v. Hopkins*, 46 U. MIAMI L. REV. 835, 843-44 (1992) (explaining that Ann Hopkins was perceived as an "iron-maiden" because her interpersonal skills were determined by male supervisors to be "overly aggressive, unduly harsh, difficult to work with and impatient with staff"). For an interesting analysis of the cases invoking individuals who diverge from the gender expectations for their sex, see 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) (comparing *Price Waterhouse* with cases upholding employers' rights with respect to "effeminate" males and "masculine" women).

256. See Brown et al., *supra* note 166, at 580 (discussing the workplace as defined by male terms).

257. *Price Waterhouse v. Hopkins* 490 U.S. 228, 233-34 (1989).

258. *Id.* at 235-36. Hopkins' failure to maintain her appearance in accordance with Price Waterhouse's expectations reflects the significance of dressing as a statement about gender identity and relationships. See Duncan Kennedy, *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1366-69 *passim*. For an analysis of the case as an example of "gender bending," see Case, *supra* note 255, at 36-57 *passim*.

One partner described her as 'macho;' another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school.' Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing 'because it's a lady using foul language.' Another supporter explained that Hopkins 'ha[d] matured from a tough-talking somewhat masculine hard-nosed manager to an authoritative formidable but much more appealing lady partner candidate.'²⁵⁹

Hopkins was advised to " 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.' "²⁶⁰

The Supreme Court focused its doctrinal inquiry on the causal connection between defendant's behavior and plaintiff's injury.²⁶¹ Since the company could not show that it would have made the same decision in the absence of gender bias, Hopkins prevailed.²⁶²

But even *Price Waterhouse* did not substantially reframe old myths or fashion new ones. The Court simply gave relief to one particularly "successful"²⁶³ woman whose value to her employer was negated by mythic thinking about her lack of "normal" female sexuality. In a sense, *Price Waterhouse* perpetuates the

259. *Price Waterhouse*, 490 U.S. at 235.

260. *Id.*

261. The Court ignored much well-established Title VII doctrine regarding defendant's impermissible motivation. "Today the Court manipulates existing and complex rules for employment discrimination cases . . ." *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., dissenting). Hopkins would have been required to prove defendant's gendered animus under the disparate treatment model of the prima facie case. See *supra* note 249. However, even the record of sexist comments in her partnership evaluations might not have been evidentiarily sufficient to meet that burden.

262. Beyond the notion that sex stereotyping is sex discrimination, the Court's precise doctrinal framework in *Price Waterhouse* is difficult to ascertain. Compare Justice Brennan's plurality opinion (arguing that he is simply following the Court's own precedents in disparate treatment cases) with Justice O'Connor's concurring opinion (distinguishing the disparate treatment model of proof). See § 107 of the Civil Rights Act of 1991, Pub. L. 102-66, 105 Stat. 1071, which reverses part of *Price Waterhouse*. Section 107 expands Title VII liability by defining an unlawful employment practice to include any practice influenced in part by unlawful motivation. However, the 1991 Act restricts the relief; if a plaintiff proves the adverse employment act was in part the result of unlawful motivation, but defendant proves that it would have made the same decision, even absent discriminatory motive, plaintiff's remedy is limited to declaratory and injunctive relief. This was precisely the reasoning which all the justices in *Price Waterhouse* used to excuse the employer from Title VII liability.

263. Hopkins had exceeded the performance standards set for men, e.g., in the amount of business she generated and the billings for which she was responsible.

competing mythologies of two conflicting archetypes for women.²⁶⁴ Ann Hopkins succeeded in traditional male terms; to demand that she also act like a woman was offensive, particularly to Justice O'Connor, whose achievements also far surpassed most men in her field.²⁶⁵ It is unlikely that Hopkins would have been able to establish a discrimination claim simply because comments were made about her lack of femininity.²⁶⁶

C. *Sexuality as a Liability: Sexual Harassment*

Sexual harassment claims expose the cultural framing of mythic assumptions about sexuality and sexual behavior (e.g., the temptress, the vengeful woman), and judicial discourse in these cases contributes to the construction of sexual mythology. Despite the success of some women plaintiffs,²⁶⁷ both judicial opin-

264. As we have noted, *supra* note 19, these mythologies are not themselves dichotomies.

265. For an analysis of Justice O'Connor's approach as feminist, see Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 605-08 (1986) (arguing that Justice O'Connor favors contextual standards over rigid rules). *But see* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1553 (1991) ("One author has even concluded that my opinions differ in a peculiarly feminine way from those of my colleagues."); *see also* Justice O'Connor's majority opinion in *Wimberly v. Labor and Industrial Relations Commission of Missouri*, 479 U.S. 511 (1987) (denying the bias in characterizing rules about maternity leave as gender neutral), discussed in Brown et al., *supra* note 166, at 602-03, 634-35.

266. When competence is defined in less "quantitative" terms, courts have been reluctant to scrutinize the gender bias behind what is termed "subtle and subjective criteria." *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 751 F. Supp. 1175 (E.D. Pa. 1990), *rev'd*, 983 F.2d 509, 512, 526-37 (3d Cir. 1992) (deferring to the judgment of the law firm's partners who felt that Ezold's legal analytical capacity did not meet the firm's standard); *see* Tracy Anbinder Baron, *Keeping Women Out Of the Executive Suite: The Courts' Failure To Apply Title VII Scrutiny to Upper Level Jobs*, 143 U. PA. L. REV. 267 (1994); Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982). Since workplace decisions are often simply the collective expression of the individual opinions of employment superiors (most of whom are still men) (*see* THE GLASS CEILING COMMISSION, THE GLASS CEILING FACT-FINDING REPORT, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995)), cases like *Ezold* insulate impressions based on gendered mythology about woman's comparative competence from the reach of employment discrimination laws. This is particularly true after *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993) (holding that plaintiff must show independent evidence of defendant's animus; it is no longer sufficient to show that a defendant lied when articulating a "gender-neutral" reason for behavior).

267. *See, e.g., Weeks v. Baker & McKenzie*, 66 Fair Empl. Prac. Cas.(BNA) 581, 65 Empl. Prac. Dec. 43, 327 (Cal. Super. Ct. 1994) (reducing punitive damages for sexual harassment from \$6.9 million to \$3.5 million).

ions and public debate²⁶⁸ are plagued by fears that expanding the definition of sexual harassment beyond the most outrageous conduct will totally disrupt “normal” interaction,²⁶⁹ and that men will be unjustly penalized by groundless sexual harassment claims²⁷⁰ simply for behaving in the way “normal” men behave.

268. See L. Gordon Crovitz, *Rule of Law: The Most Frivolous American Lawsuits of 1991*, *ASIAN WALL ST. J.*, Jan. 3, 1992, at 6 (criticizing the allegations brought by female employees of Stroh's Brewery that an ad campaign featuring a group of men agreeing that “it doesn't get any better than this” until a “Swedish bikini team” parachuted in to join them helped create a “hostile environment”); Alex Markels, *Employers' Dilemma: Whether to Regulate Romance*, *WALL ST. J.*, Feb. 14, 1995, at B1.

Good lovin' gone bad. The claim strikes fear in the hearts of managers everywhere. Just ask Lawrence J. Ellison, chief executive of Oracle Corp., who is now defending himself against a sexual harassment suit. A former employee claims that after she threatened to break off their 18 month relationship, Mr. Wilson fired her. His trial is set to begin today — Valentine's Day. Consider, too, Bobby Kimbrell, a now-retired South Carolina police chief. His former dispatcher claims in her harassment suit that after she broke off a seven year affair he made ‘persistent sexual advances.’ Mr. Kimbrell says the relationship never happened.

Id.

269. For example, in *Jones v. Wesco Investments, Inc.*, 846 F.2d 1154, 1157, n.6 (8th Cir. 1988), the defendant argued that:

one of the traditional places where man meets woman is at the work place. Such meetings often result in dating, blossom into love, and eventually into marriage If civil liability is implanted on an employer to its employees['] natural interaction between the genders, either the collapse of our commercial system or the end of the human race can be foreseen. No employer could safely employ both males and females and the number of marriages with children will be substantially decreased.

Id.; see also *Miller v. Bank of America*, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979) (noting that “[t]he attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions.”); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 464 (E.D. Mich. 1977), citing *Tomkins v. Public Service Elec. & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1976) (stating that the attraction of men to women and women to men is “a natural sex phenomenon,” so if plaintiff's claim were to prevail:

no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turns sour at some later time. And if an inebriated approach by a supervisor to a subordinate at a Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.)

Id.

270. Although the overwhelming number of sexual harassment cases involve female victims and male perpetrators, the only popular movie about sexual harass-

As a result, courts cannot imagine creative mythologies which distinguish between illegal harassment and "normal" gender relationships.²⁷¹

As in the appearance standards cases, the sexual harassment courts have outlawed behavior viewed as egregious, but have not examined the "facts" naturalized in their acceptance of other sexually offensive acts as typical,²⁷² usually welcome,²⁷³ and almost inevitable in the work place.

ment, *Disclosure*, involves a female perpetrator, a male victim and a falsely accused man. Maria L. Ontiveros, reviewing the novel *Disclosure* by Michael Crichton (the basis for the film), identified the fear of being accused of sexual harassment as the central theme of that novel and of the play *Oleanna* by David Mamet. Ontiveros wrote: "both of these popular fictional works dealing with harassment take as their paradigm lying women and unfairly accused men." She also identifies two other fictional works involving falsely accused men. Maria L. Ontiveros, *Fictionalizing Harassment, Disclosing the Truth*, 93 MICH. L. REV. 1373, 1381 (1995). Professor Kennedy discusses the "unmistakable group [male] interest in avoiding having to worry about enforcement excesses." Kennedy, *supra* note 258, at 1326 (1992).

271. See Kennedy, *supra* note 258, at 1320, 1323-28 (exploring how the residuum of abuse (including harassment) tolerated by our legal system affects people's lives: "men and women gain and lose from the practices of abuse, *whether or not* they themselves are actually abusers or victims," because of the "pervasive way that it structures relations between men and women"); MACKINNON, *supra* note 206, at 22-23 (asserting that sexual harassment is business as usual and not an aberration and arguing that women have always been required to be sexually attractive and at least seem to be sexually available to employers).

272. Asra Q. Nomani, *Love in the Workplace: A Special News Report About Life on the Job and Trends Taking Shape There*, WALL ST. J., Feb. 14, 1995, at A1. "Simply cautioning workers not to engage in office romance at all is like telling people in a mosquito swamp that it is a mistake to scratch. Everybody acknowledges that this is sound advice, but nobody who is actually bitten will hesitate for a second before disobeying it." Judith Martin, *Miss Manners' Guide to Office Romance*, WALL ST. J. EUROPE, Nov. 14, 1991, at 8. Hal Lancaster wrote:

I'm amused by pundits who solemnly advise against office romances. How do you stop a force of nature? Think about it: more women in the workplace. More men and women working and traveling together under the kind of pressure that forges close bonds. More hours on the job, less time for an outside social life. Greater fear of entanglements with strangers in the age of AIDS. What do you think is going to happen under those conditions?

Hal Lancaster, *How to Make Certain Your Office Romance Won't Hurt Your Job*, WALL ST. J., Oct. 17, 1995, at B1. It is therefore not surprising that courts rely on myths that most sexual interaction in the workplace is "normal" and that their job is to simply constrain that activity which is most assaultive and clearly "unwelcome."

273. Ontiveros, *supra* note 270, at 1391, observed that Michael Crichton's novel *Disclosure* "argues that women often welcome sexual attention in the workplace, crying 'harassment' only when things do not work out or because they do not want to take responsibility for their action."

Within culturally and historically constructed power relationships, the majority of women generally do not "welcome" sexual encounters in the workplace. One study reported that 67% of the men surveyed indicated that they would be "flat-

The Supreme Court recognized in *Meritor Savings Bank v. Vinson*²⁷⁴ that sexual harassment is gender discrimination within the meaning of Title VII and further held that a sexually hostile or offensive²⁷⁵ environment could violate that statute. Yet the *Meritor* Court left critical questions informed by our myths of female sexuality unanswered:²⁷⁶ How severe and pervasive must

tered" if they were propositioned by a woman at work, while only 17% of the women agreed. Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C.L. REV. 499, 522 (1994) citing Barbara Gutek, *Sex and the Workplace: The Impact of Sexual Harassment On Men*, in WOMEN AND ORGANIZATIONS 96 (1985). See also Jim Kennedy, *American Workplace is Changed Forever*, SAN FRANCISCO CHRON., Oct. 21, 1991, at B2 (reporting results of a California survey in which 75% of men found sexual advances in the workplace to be flattering, while 75% of women found such advances offensive); Anne C. Levy, *Sexual Harassment Cases in the 1990s: Backlashing The Backlash Through Title VII*, 56 ALB. L. REV. 1, 6 (1992), citing Alan Deutschman, *Dealing with Sexual Harassment*, FORTUNE, Nov. 4, 1991, at 145, 148 ("sixty-seven percent of the men surveyed 'would feel flattered if a colleague of the opposite sex propositioned them,' while sixty-three percent of the women surveyed would be offended in a similar situation."); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991). Plaintiff's expert, Dr. Susan Fiske, testified that a study of sexual approaches in the workplace revealed "a near flip-flop of attitudes." Approximately two-thirds of the men responded that they would be flattered by such an approach, and only 15% would feel insulted; the women's responses indicated the reverse. *Id.*

274. 477 U.S. 57 (1986). But the *Meritor* Court, declining to rule definitively on employer liability for harassment, suggested that the issue be guided by agency principles and held that employers will not automatically be liable for sexual harassment by supervisors and will not necessarily be insulated from liability due to lack of notice. *Id.* at 72. Where there is an express policy and the victim does not take advantage of the available procedure, an employer may be shielded from liability unless there was actual knowledge of the sexually hostile environment. In all other cases, the employer is liable if it has actual knowledge of the harassment or if the victim had no reasonably available avenue for making her complaint known to appropriate management officials. *Id.* at 71-72.

275. There are two types of actionable sexual harassment: "quid pro quo" and hostile environment. Quid pro quo sexual harassment addresses situations where "terms, conditions, or privileges of employment" are conditioned on the individual's acquiescence to "[u]nwelcomed sexual advances, requests for sexual favors, . . . [or] other verbal or physical conduct of a sexual nature." See *Meritor*, 477 U.S. at 65-66; 29 C.F.R. § 1604.11(a) (West 1995). Hostile environment cases are based on "severe or pervasive" sexual harassment that alters employment conditions and creates an abusive environment. 477 U.S. at 66; 29 C.F.R. § 1604.11(1)(3) (West 1995).

276. Sexual harassment cannot be separated from the exploitation of women that pervades American culture. Davis and Wildman observed, "Many, if not most of the advertisements that interrupted the Senate Hearings (on Anita Hill's charges of sexual harassment) to sell products featured women portrayed as sexual objects." Adrienne D. Davis & Stephanie M. Wildman, *Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367, 1372 (1992); see also Alexander, *supra* note 210, at 5-12 (showing how the treatment and perception of African American women as promiscuous and untrustworthy made it impossible "for any of the television transfixed society" to respond other than as they did to the hearings).

the harassment be to be actionable? How must the plaintiff show that defendant's advances were unwelcome?²⁷⁷ How relevant is the plaintiff's "sexually provocative speech or dress?"²⁷⁸ In short, *Meritor* is only definitional, leaving the lower courts to struggle with the application of the temptress myth.²⁷⁹ Also underlying these questions is the (mythic) fear that every "innocent" or playful ("normal") remark²⁸⁰ will be the basis for a

277. The woman who is too sexual is outside the law's protection from rape or sexual harassment. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 815-31 (1991). Estrich compared the requirement of "unwelcomeness" and the relevance of a woman's appearance in sexual harassment cases to the obligations of resistance, corroboration, and fresh complaint in rape cases. She argued that these cases "embrace female stereotypes which real women cannot meet," noting that the sexual harassment cases are a doctrinal disaster because, like rape cases, they involve sex and sexuality and focus on the conduct of the woman victim. *Id.* at 815. "Unwelcomeness has emerged as the doctrinal stepchild of the rape standards of consent and resistance, and shares virtually all of their problems." *Id.* at 827. Estrich suggested that the "unwelcomeness" requirement in sexual harassment cases "perform[s] the doctrinal dirty work of the consent standard in rape law." *Id.* at 830. In determining whether sexual advances are unwelcome, courts borrow from the rule in rape law that "no means yes, or at least maybe." *Id.* at 829. "Where the relationship is 'appropriate' at least to the court's eyes, judges tend to see sex, not rape. Similarly, in Title VII cases, they see sex, not sexual harassment." *Id.* at 831. Male prerogatives around sex with women are protected "by the manipulation of these [and other] legal doctrines to embrace female stereotypes which real women cannot meet." *Id.* at 815.

278. The *Meritor* Court stated that the relevance of these factors was "obvious." 477 U.S. at 69. See *Loftin-Boggs v. City of Meridan*, 633 F. Supp. 1323, 1327 (S.D. Miss. 1986), *aff'd*, 824 F.2d 971 (5th Cir. 1987) (finding that plaintiff's sexual banter prompted any harassment she received); *Barrett v. Omaha Nat'l Bank*, 584 F. Supp. 22, 29 (D. Neb. 1983), *aff'd*, 426 F.2d 424 (8th Cir. 1984) (concluding that plaintiff's talk about her relationship with her boyfriend indicated that talk about sexual activity did not shock her); See *infra* text accompanying notes 306-08. *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 565-66 (8th Cir. 1992); cf. *Spencer v. General Elec. Co.*, 697 F. Supp. 204 (E.D. Va. 1988) (holding that participation in sexual horseplay did not waive sexual harassment claim); *Swentek v. US AIR, Inc.*, 830 F.2d 552 (4th Cir. 1987) (finding that plaintiff's foul language and overt sexual behavior did not waive legal protection from sexual harassment).

279. Judges have long accepted society's preoccupation with the sexual reputation of women. See Andrew J. King, *Constructing Gender: Sexual Slander in Nineteenth-Century America*, 13 LAW & HIST. REV. 63 (chronicling judges' acceptance of prevailing social ideas about female chastity and women's role in society as reflected in judicial and legislative reactions to sexual slander). Plaintiffs in sexual harassment cases are interrogated fiercely about their sexual background. The fear of large jury verdicts makes defendants "want to show that the plaintiff is a nut or a slut." Ellen E. Schultz & Junda Woo, *The Bedroom Ploy: Plaintiffs' Sex Lives Are Being Laid Bare in Harassment Cases*, WALL ST. J., Sept. 19, 1994, at A1 (quoting Attorney Philip Kaye).

280. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) ("Conduct that many men consider unobjectionable may offend many women."); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) ("A male supervisor might believe

sexual harassment claim by a vengeful or scorned woman,²⁸¹ and that men and employers need to be protected from such unwarranted claims.²⁸² After all, we do not want to invite women to use the courts to bring sexual harassment claims every time a romance sours.²⁸³ Thus, despite some significant progress, sexual

. . . that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive."); *Yates v. ACVO Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987) ("[M]en and women are vulnerable in different ways and are offended by different behavior").

281. When Sen. Orrin Hatch charged that Anita Hill's experience is the fantasy of a spurned woman, he "evok[ed] the myth that black women have no right to refuse the sexual advances of any man." Charles R. Lawrence III, *Cringing at Myths of Black Sexuality*, 65 S. CAL. L. REV. 1357 (1992); see also *Bowman v. Heller*, 651 N.E.2d 369, 372 (Mass. 1995) (defendant alleged that plaintiff "harbored a desire for revenge"), cert. denied, 116 S. Ct. 682 (1995); *Toscano v. Nimmo*, 570 F. Supp. 1197, 1201 (D. Del. 1983) (defendant argued that plaintiff was a "woman scorned," and that she did not want the promotion that was the basis of her complaint but that she filed the lawsuit in revenge against the defendant for "jilting" her and ending their affair); *Board of Educ. v. Jennings*, 607, 651 P.2d 1037, 1042 (N.M. 1982) (finding state board was justified in rejecting plaintiff's testimony because she was "a scorned love" and therefore "would have a powerful motive to lie in order to 'fix' defendant").

282. Nellie Y. McKay wrote that because Anita Hill did not fit any of the stereotypes of black women (mammy, slut, virago), the Senators had to classify her in some way that was comfortable to them. Thus, she became "the delusory opportunist who bided her time while she planned the destruction of Thomas for imaginary wrongs he did to her, the calculating, frustrated spinster whose amatory intentions toward her ambitious aspiring superior had been rebuffed, and woman rejected because of her insane sexual drive." Nellie Y. McKay, *Remembering Anita Hill and Clarence Thomas: What Really Happened When One Black Woman Spoke Out*, in *RACE-ING JUSTICE*, supra note 208, at 285-6.

283. *Cram v. Lanson & Sessions Co.*, 49 F.3d 466 (8th Cir. 1995) (dismissing a claim as "a simple case of a romance gone sour," and finding that the defendant male co-worker could not have sexually harassed plaintiff because they had a prior consensual relationship); *Montgomery v. Big Thunder Gold Mine, Inc.*, 531 N.W.2d 577, 578 (S.D. 1995) (reversing jury's award of \$25,000 to plaintiff in sexual harassment case and noting that the alleged harassment arose out of plaintiff and defendant's relationship turning sour); *Rothenbush v. Ford Motor Co.*, 61 F.3d 904 (6th Cir. 1995) (upholding verdict for defendant, the court characterized plaintiff's claim for sexual harassment against her ex-husband and co-worker as a "classic story of workplace romance turned sour"); *Swinson v. Tweco Products, Inc.*, 1992 WL 190686 at *7-*8 (D. Kan. July 17, 1992) (finding no sexual harassment where plaintiff was friendly with the defendant after he sexually harassed her); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 212-14 (7th Cir. 1986) (finding no harassment where plaintiff and harasser continued friendly relations); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 464 (E.D. Mich. 1977) (citing *Tomkins v. Public Service Elec. & Gas Co.*, 422 F. Supp. 553, 557 (D. N.J. 1976) ("An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turns sour at some later time.")).

But most women who are subject to sexual harassment do not file formal complaints; they fear reprisal, blame, loss of privacy, loss of the job, or opportunities for promotion. Some believe that complaints are futile; some are concerned about get-

harassment doctrine has reified mythologies that women in paid labor are primarily sexual, not economic, beings.²⁸⁴

Of course, we cannot simplify women's sexuality; differing mythology reflects and constructs some women's desires some of the time. We acknowledge that sexuality in the workplace is a

ting the harasser in trouble. Radford, *supra* note 273, at 523 (citing UPDATED MERIT SYSTEM BOARD STUDY, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 27(1988)). Some authors have noted that women of color are not as likely to respond forcefully to sexual harassment because of cultural values, feelings of self-blame, economic disadvantage, and in some cases, a lack of understanding of legal rights. See Judith I. Avner, *Sexual Harassment: Building a Consensus for Change*, 3 KAN. J. L. & PUB. POL'Y 57, 63 n.17 (1994) (citing Audrey Murrell Study); Maria Ontiveros, 3 *Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 821-24 (1993). In addition, many women of color may be ambivalent about sexual harassment because they must "choose race/ethnicity over gender when it appears that the community will 'come under attack' or when a male community member may suffer some loss, embarrassment, or some other . . . defeat." *Id.* at 63; see also Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L. J. 151, 208 (1994) (detailing cultural factors that may make African American women more vulnerable to sexual harassment on the job and more likely to tolerate it).

284. The legacy of the sexual abuse of African American women slaves is reflected in the disproportionately high number of sexual harassment cases brought by plaintiffs of color. See Kimberlé Crenshaw, *Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, *supra* note 208, at 412. African American women faced sexual harassment long before it became an issue for the "women's movement." Barbara Omolade described domestic work:

Sexual harassment reinforced the demeaning character of the work. White men assumed, stereotypically, that Black women who were available for domestic work were also available to meet their employer's sexual needs. The sexual aspects of the work were a major reason married women preferred day work and Black families tried to keep their daughters educated and away from service altogether.

OMOLADE, *supra* note 212, at 47. *But see*, Ontiveros *supra* note 283, at 821-24 (suggesting that women of color are not as likely to respond forcefully because of cultural values, feelings of self blame, and lack of understanding of legal rights).

The coupling of racial epithets with denigrating sexual remarks racializes the sexual harassment of women of color. Professor Crenshaw suggests that the frequency with which sexual insults like the objectification of women as "cunts", "beavers," or "pieces," are coupled with "black," "nigger," or "jungle" explains the higher number of sexual harassment cases brought by black women. Crenshaw, *supra*, at 412. "Racism may well provide the clarity to see that sexual harassment is neither a flattering gesture nor a misguided social overture but an act of intentional discrimination that is insulting, threatening and debilitating." *Id.* The juxtaposition of racial and gender slurs often reveals that the harassment was not meant to be an innocent, romantic, or flattering overture. See also *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) (finding sexual but not racial harassment for a plaintiff who was repeatedly propositioned by her supervisor, and forcibly exposed to racist pornography accompanied by racial slurs); *Clay v. BPS Guard Serv.*, 1993 WL 222380 (describing plaintiff exposed to physical assault on account of race verbal abuse, including repeated use of "nigger bitch" and descriptions of people of her race as "those who liked to live off welfare because they are lazy").

complicated and highly particularized phenomenon which is difficult to reduce to judicial doctrine. Rather, our point is that mythology has naturalized certain socially constructed contingencies as normative — the sexually provocative woman,²⁸⁵ the oversensitive woman,²⁸⁶ the woman who is more interested in sexual re-

285. The woman's appearance — her "sexually provocative speech or dress" — is "obviously relevant" in deciding whether the alleged harassment was unwelcome. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69 (1986). See, e.g., *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991) (finding that plaintiff "welcomed" sexual harassment because she "participated" in creating the "atrocious work environment" by using "offensive" language and not wearing a bra); *Weinsheimer v. Rockwell Corp.*, 754 F. Supp. 1559 (M.D. Fla. 1990) (concluding that plaintiff "welcomed" the sexual harassment because she used vulgar speech, had sexually-oriented magazines in her locker and spoke abusively to her boyfriend on the phone); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (determining "unwelcomeness" by considering the plaintiff's personality as well as her "assumption of the risk" by entering a workplace with a hostile environment). But see *Carr v. General Motors*, 32 F.3d 1007 (7th Cir. 1994) (holding that despite plaintiff's occasional crude behavior, the sexual harassment was "unwelcome" based on the disproportion between her conduct and that of the men and the "asymmetry of [their] positions" as she was the only woman in the department); *McGregor Elec. Indus. v. Burns*, 955 F.2d 559 (8th Cir. 1992) (finding plaintiff's act of posing nude for a magazine outside her work was irrelevant to her claim of sexual harassment in the workplace); *Swentek v. US AIR, Inc.*, 830 F.2d 522 (4th Cir. 1987) (finding evidence regarding plaintiff's conduct that is unknown to defendant harasser to be irrelevant); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (finding that a woman who uses foul language or innuendo does not waive her legal protections against unwelcome harassment). See *supra* note 276, *infra* notes 287, 293; see also *Estrich*, *supra* note 277, *passim*; *Frug*, *supra* note 231, at 12 (arguing rape and sexual harassment doctrines grant or deny women protection by interrogating their sexual promiscuity. The more available or desirable she looks, the less protection she gets.).

As in other sexual violence cases, the question becomes how the perpetrator will understand the victim's clothing and personality, thus focusing on the perceptions of the predator and not the victim. See Professor Kennedy's discussion of the various meanings and consequences of the "sign" of sexy dressing by women and his critique of the conventional discourse. Kennedy, *supra* note 258, at 1344-57.

286. Courts denigrate women as "hypersensitive." See *Muench v. Township of Haddon*, 605 A.2d 242, 249 (1992) (reversing trial court's holding that plaintiff's reaction to harasser's conduct was "the eccentric response of a hypersensitive woman"); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3rd Cir. 1990) ("[A]n objective standard must be utilized to prevent hypersensitive plaintiffs from recovering"); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984) ("Title VII does not serve as a vehicle for vindicating the petty slights suffered by the hypersensitive"); see also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1504 (M.D. Fla. 1991) (defendants argued that plaintiff was "hypersensitive to pornography and therefore atypical among female shipyard workers"); *Klink v. Ramsey County*, 397 N.W. 2d 894, 897 (Minn. 1987) (defense psychiatrist described plaintiff as "hypersensitive"). But see *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 615 (W.D. Tex. 1988) (plaintiff not hypersensitive because a "normal individual would have been affected by the attempted rape"); see also Nancy Ehrenrich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1202-07 (1990) (arguing that the use of the

relationships than her job performance,²⁸⁷ the normality of the male response to women as primarily sexual beings²⁸⁸ — and thus has prevented advocates and judges from imagining mythologies which would explore and expand gender interaction.

One competing mythology to “natural” sex play is “severe or pervasive” harassment. *Meritor* teaches that unless sexual harassment rises to an “unacceptable” level of aggression, it is not actionable. Feminist lawyers have begun to advocate that “unacceptable” should be viewed from a more gendered perspective:²⁸⁹ the “reasonable woman” instead of the “objective” “rea-

reasonableness standard in sexual harassment cases allows the court to marginalize plaintiffs in sexual harassment cases by characterizing them as peculiar, overly sensitive women, fighting what social consensus accepts).

287. Popular “women’s” books, magazines, and prime time television programs celebrate office romances. See, e.g., HELEN GURLEY BROWN, *SEX AND THE SINGLE GIRL* (1965); Karol Kelley, *A Modern Cinderella*, 17 J. OF AM. CULTURE (1994) (analyzing the gender expectations of the Cinderella story and the film *Pretty Woman*); Robert Eli Rosen, *Ethical Soap: L.A. Law and the Privileging of Character*, 43 U. MIAMI L. REV. 1229 (1989); see also Lisa Genasci, *Office Romances Becoming A Fact Of Company Life*, L.A. TIMES, Feb. 10, 1995, at 6; Caleb Solomon, *Sex and Power in the Office: Romancing Co-Workers Gets Riskier*, WALL ST. J., Oct. 18, 1991, at B2.

288. *Mitran v. Williamson*, 197 N.Y.S. 2d 689, 690 (1960) (describing that defendant, who was sued for humiliation, mental, and bodily distress for soliciting plaintiff for purpose of illicit intercourse argued that since no action was taken, “there’s no harm in asking”); cf. *Thorenson v. Penthouse Int’l*, 563 N.Y.S. 2d 968, 976 (1990) (holding that defendant’s request for sexual compliance “by itself constituted an act of sexual harassment without regard to plaintiff’s response” and law “removes sexual advances or solicitation by an employer from the traditional rule that ‘there is no harm in asking.’ ”).

289. Ironically, when *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (applying Title VII to law firm partnership decisions), was on appeal to the Supreme Court, the firm had its annual summer outing which included the traditional wet T-Shirt contests for all women employees, including lawyers. *Wet T-Shirt Lawyers*, WASH. POST, Dec. 23, 1983, at A14.

In *Lipsett v. Rive-Mora*, the court denied female resident’s claim for sexual harassment, stating:

[S]ome cases have distinguished situations where the advances are the result of a personal romantic attraction of a supervisor to a particular employee from those situations where the sexual demands are merely the result of discriminatory and exploitative attitudes based on sex, forced upon the employee because of the supervisor’s power over employment conditions.

669 F. Supp. 1188, 1199-2000 (D.P.R. 1987), *rev’d*, 864 F.2d 881 (1st Cir. 1988). The court concluded:

[A]lleged flirtations could perhaps have been the prelude to an invitation [to submit to sexual acts], as plaintiff ‘sensed’ they were, but the truth of the matter is that they never developed into anything which could be construed as such, except in plaintiff’s mind. There is simply no evidence that these ‘advances’ or flirtations ever developed into

sonable man”(person),²⁹⁰ e.g., the oppressed rather than the oppressor. In so doing, they suggest another mythology which assumes and naturalizes as “true” that many men and women experience sexuality differently.²⁹¹

sexual demands. Additional facts showing that these casual approaches led to some sexual encounter between them would be needed To permit a quid pro quo sex harassment claim on a speculative basis such as this would come close to judicial blackmail for claims of this nature could never be dismissed summarily and defendant would in all probability settle the case rather than submit to the aggravation that a public trial on such sensitive and private matters would undoubtedly cause.

Id. at 1200-01. The court dismissed plaintiff’s hostile environment claim as well, stating that these:

incidents were so trivial and isolated that they cannot lend any support . . . for an actionable constitutional wrong. [Defendant’s] flattering remarks or ‘piropos’ were neither indecent nor obscene. They portray a treatment based on romantic attraction rather than on a desire to discriminate because of gender and, they were clearly not the demeaning or humiliating type of incident discussed in the caselaw.

Id. at 1203; see also Kim Lane Scheppele, *The Reasonable Woman*, 1 RESPONSIVE COMMUNITY, Fall 1991, at 36, 42 (discussing *Lipsett* and the reasonable woman standard).

290. See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (adopting the “reasonable woman” standard to evaluate what constitutes a hostile environment); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (allowing expert testimony regarding the presence of sexual harassment in defendant’s work environment); *Radtke v. Everett*, 471 N.W.2d 660, 664-65 (1991) (adopting a “reasonable woman” standard to evaluate hostile environment sexual harassment claim). As in rape cases, allowing defendants to introduce evidence of plaintiff’s sexual fantasies and provocative dress incorporates into legal doctrine the myth that when a woman says “no” to harassment she really may mean “yes.” It preserves the myth that all women are flattered by sexual advances, regardless of what they say or do. Susan Estrich explains:

[T]he objective standard of pervasiveness is defined by an idealized woman who simply may not exist. Such a woman is tough, not ‘hypersensitive’; she is aggressive, not passive. Such a woman complains in a way that effectively stops the harassment. Such a woman does not suffer in silence or confide only in other women. In short, the ‘reasonable woman’ is very much a man.

Estrich, *supra* note 277, at 846.

291. Quare whether application of the “reasonable woman” standard would merely substitute another reductive gendered mythology: the mythology of powerlessness, of women as helpless victims in need of the law’s protection. Sexual harassment, after all, is as much about abuses of power as it is about sexual oppression. See MACKINNON, *supra* note 206, at 9-10 (arguing sexual harassment is the “unwanted imposition of sexual requirements in the context of a relationship of unequal power”). To Professor MacKinnon, sexual harassment exploits and perpetuates women’s inferiority and indeed exemplifies the dominance/submission dialectic which characterizes all gender relations. MACKINNON, *supra* note 75, at 10, 241 (“As sexual inequality is gendered as man and woman, gender inequality is sexualized as dominance and subordination.”). Viewed this way, the EEOC’s sexual har-

Indeed, the requirement that the sexual advances be "unwelcome" is premised on the myth that most sexually aggressive behavior in the workplace is gladly received. The burden is clearly on a woman to put men on notice that she does not "welcome" their advances,²⁹² and unless she persuades a factfinder that she did so, a plaintiff will not be able to establish a sexual harassment claim.²⁹³ Thus, the *Meritor* Court's acceptance of the relevance of plaintiff's appearance is nothing more than deference to certain socially constructed sexuality myths.²⁹⁴

In *Harris v. Forklift Systems, Inc.*²⁹⁵ the Supreme Court attempted to draw a line separating the amount of sexual harassment that is acceptable from that which is not.²⁹⁶ The Court described the issue as whether, to be actionable, conduct "seriously affect[s] an [employee's] psychological well-being' or leads the plaintiff to 'suffer injury.'" If the work environment "would reasonably be perceived, and is perceived, as hostile or abusive,"

assment guidelines are merely another form of protective legislation, appealing to the powerful patriarchal state to protect powerless women victims. 29 C.F.R. § 1604.11 (1995).

292. See Estrich, *supra* note 277, at 829.

293. Doctrinally, "unwelcomeness" is an element of plaintiff's prima facie case. See Ann C. Juliano, *Did She Ask For It?: The Unwelcome Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1570 (1992) ("Although the term 'harassment' implies unwelcomeness, the plaintiff must . . . affirmatively prove that the conduct was 'unwelcome.'"); see also Carr v. General Motors, 32 F.3d 1007, 1008 (7th Cir. 1994) ("'Welcome sexual harassment' is an oxymoron . . .").

294. Estrich argued that the courts' quest for the deserving victim permits them to protect "a broad category of sexual relations in the workplace, so long as these relations appear, at least to the men judging them, typical and acceptable." Estrich, *supra* note 277, at 831.

295. 510 U.S. 17 (1993).

296. The Magistrate found that the president of Forklift often insulted plaintiff "because of her gender and often made her the target of unwanted sexual innuendoes." He told her:

on several occasions, in the presence of other employees, 'You're a woman, what do you know' and 'We need a man as the rental manager'; at least once, he told her she was 'a dumb ass woman.' Again in front of others, he suggested that the two of them 'go to the Holiday Inn to negotiate [her] raise.' Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendoes about Harris's and other women's clothing.

Id. at 19. The district court held that this conduct did not create an abusive environment, finding that although some of the comments offended plaintiff and would offend the reasonable woman, they were not so severe as to seriously affect plaintiff's psychological well-being and therefore would not rise to the level of interference with job performance. The Sixth Circuit affirmed. *Id.* at 19-20.

plaintiff need not also prove psychological injury.²⁹⁷ Although the Court offered a list of factors to consider in determining whether an environment is so hostile or abusive as to amount to discrimination, the Court tacitly limited judicial intervention to “extreme” behavior which “most” people would find offensive. *Harris* thus represents a missed opportunity to envision new mythologies about the sexuality of women in paid labor. Moreover, *Harris* did not revisit *Meritor*’s acceptance of the myth of the relevance of a plaintiff’s dress and behavior to a sexual harassment claim.²⁹⁸

Hence, *Harris* provides no competing myths exposing the gendered framing of the pertinence of factors like those relied on in *Rabidue v. Osceola Refining Company*:²⁹⁹ the background and experience of a plaintiff; “the lexicon of obscenity in the workplace;” and the reasonable expectations of plaintiff upon “voluntarily” entering that environment. The presence of legally actionable sexual harassment depends upon the personality of the plaintiff and the prevailing work environment:

It cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to — or can — change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of the American worker.³⁰⁰

297. The circumstances listed by the Court include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.* at 21. Psychological harm is relevant, but no single factor is required. *Id.*

298. Again, the complexity of sexual interaction in the workplace cannot be overstated. Although we do not believe that dress and behavior are relevant to sexual harassment doctrine, we understand that they are signifiers of socially constructed sexuality. Kennedy, *supra* note 258, at 1342-57. Our point is that the courts in relying on certain, often reductive, mythologies, have failed to grapple with these complexities.

299. 805 F.2d 611 (6th Cir. 1986).

300. *Id.* at 620. Judge Posner, concurring in *Bohen v. City of East Chicago*, wondered why the defendant should bear the responsibility for dispelling prevailing mythology about women in the workplace and raised the issue of whether, in sexual harassment cases, the defendant is being asked to do more for women than for men. 799 F.2d 1180, 1191 (7th Cir. 1986). Although he concurred that the plaintiff should be allowed to proceed with the § 1983 claim against the city, he questioned whether it is fair to make the city bear the burden of re-educating itself and changing social mores. *Id.* at 1192.

Rabidue simply relied on mythologies that a woman entering paid labor chooses to accept whatever offensive behavior occurs in the workplace.³⁰¹ Indeed, if she is the kind of woman who has "freely contracted" to work in that sort of atmosphere, she probably neither needs nor deserves the law's patriarchal protection.³⁰² Although *Rabidue* has been criticized,³⁰³ it is hardly an isolated case. For example, in *Burns v. McGregor*³⁰⁴ the trial court indulged in a lengthy recital of the plaintiff's sexual misdeeds, characterizing the plaintiff, whose nude photo appeared in a magazine, as a woman unworthy of the blessing of the legal regime. The Eighth Circuit reversed, but on remand the district court reiterated its earlier findings: the plaintiff had posed nude, and her father had pierced her nipples. Therefore, her testimony that she found lewd comments offensive and unwelcome was not credible.³⁰⁵ On re-appeal,³⁰⁶ the Eighth Circuit again objected to the lower court's episode by episode assessment of plaintiff's

301. Justice Keith rejected the majority's focus on the workplace before the woman entered it as well as the notion that women "assume the risk" of sexual harassment when they accept a job. 805 F.2d 611 (1986) (Keith, J., dissenting). The dissent in *Rabidue* is frequently cited. Its analysis was adopted in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1526-27 (M.D. Fla. 1991) and in *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). In *Robinson*, the court wrote: "a pre-existing atmosphere that deters women from entering or continuing in a profession or a job is no less destructive to and offensive to workplace equality than a sign declaring 'Men Only.'" 760 F. Supp. at 1526.

Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the . . . cinema, and in other public places. In sum, Henry's vulgar language, coupled with the sexually oriented posters, did not result in a working environment that could be considered intimidating, hostile, or offensive

Rabidue, 805 F.2d 611, 622.

302. See Schultz & Woo, *supra* note 279 (describing the tactics defense lawyers use to reveal the sex lives of plaintiffs in sexual harassment cases. "Weeping on the witness stand in federal court . . . Rosemary J. Martin tackled a lawyer's tough questions: Did she ever watch X-rated films with her husband? . . . Didn't Ms. Martin sleep with her husband before marriage? Before dating him, did she date other men?").

303. See, e.g., Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 *passim* (1989).

304. 807 F. Supp. 506 (N.D. Iowa 1992), *rev'd and remanded*, 989 F.2d 959 (8th Cir. 1993).

305. The court then concluded that she was offended not because of the nature of the comments but because of who uttered them. *Id.* at 508-09.

306. 955 F.2d 559 (8th Cir. 1992).

conduct, noting that while *Meritor* allows consideration of the plaintiff's dress and behavior, her actions outside the workplace were not material to an assessment of what happened at work. What is noteworthy is the trial court's intransigent refusal to abandon the myth that a woman too far from the madonna image cannot be heard to object to sexual aggression.

In challenges to appearance standards, as well as in sexual harassment cases, most courts have been unable and unwilling to confront socially constructed gender norms and imagine a workplace free of sexual exploitation. By failing to recognize the discriminatory assumptions of the rigid sexuality myths themselves, courts are unable to comprehend sexual harassment as gender bias unless it mimics the overt marketing and commodification of sex.

E. *The Promiscuity Myth for Poor Women*

The sexuality of welfare (AFDC) recipients has been a central issue for welfare policy,³⁰⁷ and distortive mythologies of welfare recipients as promiscuous are reflected in legal discourse. If a woman receives welfare, she should be, but is not, chaste. If she is unmarried, she is, by definition, an irresponsible parent. The normative myth evokes the response that women must control their sexuality or suffer the adverse consequences.³⁰⁸

The first welfare case before the Supreme Court, *King v. Smith*,³⁰⁹ challenged an Alabama regulation that assumed the existence of a "substitute father" if the AFDC mother was cohabiting with a man. This assumption made the family categorically ineligible for AFDC as there was no "absent parent." The plaintiff, Mrs. Sylvester Smith, was a "worthy" recipient in many ways: she was not an unwed mother; her first husband and father of her first three children had died and her second husband and father of her last child had abandoned the family. She worked in

307. BELL, *supra* note 30, at 29-39; FINEMAN, *supra* note 20, at 106-18.

308. Note the absence of madonna myths. See generally JILL QUADAGNO, *THE COLOR OF WELFARE* (1994); Williams, *supra* note 25; Williams, *supra* note 34. Compare the pregnancy as punishment theory of *Michael M. v. Superior Court*, 450 U.S. 464 (1987), in which the Supreme Court acknowledged that the threat of pregnancy is sufficient punishment for young women who have sexual intercourse; thus, statutory rape laws that punish only young men are constitutional. Frances Olsen notes that *Michael M.* was a missed opportunity to examine the differences in the construction of men's and women's sexuality. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *TEX. L. REV.* 387, 428 (1984).

309. 392 U.S. 309 (1968).

paid labor as a waitress six days a week from 3:30 a.m. to noon for only sixteen dollars a week;³¹⁰ therefore, even though she received AFDC, she was not "lazy" or totally "dependent." There is no indication of fraud.³¹¹ The only characteristic which did not fit the "good" welfare recipient image was the prerequisite for the termination of her benefits — she was allegedly having sex with a man to whom she was not married. In addition, she was African American.

The plaintiffs filed the initial complaint as a class action on behalf of all affected African American mothers and children.³¹² While the plaintiff's briefs documented that most AFDC recipients in Alabama were African American³¹³ and that the vast majority of those terminated under the "substitute father" provision

310. 277 F. Supp. 31, 34 (M.D. Ala. 1967), *aff'd*, 392 U.S. 309 (1968).

311. Brief for Appellants at 8, *King v. Smith*, 392 U.S. 309 (1968) (No. 949) [hereinafter Brief for Appellants, *King*]. The District Court decision states that: [W]hile the evidence on this point is conflicting, it reflects with reasonable certainty that Dallas County, Alabama caseworker Mrs. Jacquelyn Stencil received a report that Willie E. Williams was periodically visiting in the home of Sylvester Smith and that from time to time Willie E. Williams and Sylvester Smith were engaging in sexual activity.

King, 277 F. Supp. at 35. The State's Brief to the Supreme Court stated that the caseworker testified that prior to the substitute father regulation, there was information in the file regarding a man living with Mrs. Smith on weekends and that the source of the information was Mrs. Smith herself. Brief for Appellants at 8, *King*. In her own deposition, Mrs. Smith denied admitting any relationship to her caseworker. *Id.*

The termination may have been in retaliation for Mrs. Smith exercising her democratic rights: a few weeks prior to her termination, she had sent a letter to President Johnson protesting the inadequacy of her grant among other welfare policies. This letter was forwarded to Alabama welfare officials. Complaint for Declaratory Judgment and Injunctive Relief at 5, *Smith v. King*, 277 F. Supp. 31 (M.D. Ala., Nov. 8, 1967) (No. 2495-N) [hereinafter Complaint, *King*]. Another way of interpreting this, however, is that she was not grateful for what charity she was receiving; she was "uppity" and wanted more.

312. Complaint, *King*, *supra* note 311, at 5. Martha Davis has stated that this class was not so much intentional as based on using as a model the pleadings in *Anderson v. Schaefer*, Civil Action No. 10443 (N.D. Ga. 1966). DAVIS, *supra* note 147, at 62. In addition, the legal strategy for a series of cases at this time was to obtain strict scrutiny by alleging racial disparity in regulations. *Id.* at 62.

313. Brief for Appellants, *King*, *supra* note 311, at 7, quoted the Welfare Commissioner's testimony that:

[I]n 1966 there was a total of 17,157 families in the State receiving ADC, that 67.3% were members of the Negro race and 32.4% were members of the white race and .03% of other races. Prior to the promulgation of the substitute parent regulation there were in 1964 a total of 22,373 families receiving ADC, 66% were members of the Negro race, 33.7% were members of the white race, and .03% were of other races.

were African American,³¹⁴ framing the case in terms of race invoked myths of African American women as Jezebels.³¹⁵ In addition, the plaintiffs themselves submitted "evidence" that most illegitimate children in Alabama were African American.³¹⁶

The state's brief reinforced mythologies of welfare recipients as unsuitable mothers,³¹⁷ of African Americans as more promiscuous than whites³¹⁸ (and having illegitimate children),³¹⁹ of welfare mothers as women who do not perform paid labor and who

The Alabama composition is not reflective of the national empirical data. See 1994 GREEN BOOK, *supra* note 31.

314. Of the 184 cases closed due to the challenged regulation in a two and a half year period in Mrs. Smith's county, 182 involved African American families. In one month alone, all of the 600 terminated families in seven representative Alabama counties were African American. DAVIS, *supra* note 147, at 64 (citing MARTIN GARBUS, *READY FOR THE DEFENSE* 159-61 (1971)); *see also* BELL, *supra* note 30, at 29-39, 137-51 (discussing how "suitable home" provisions were used to exclude African Americans from AFDC).

315. The practical proof issue, according to Martha Davis, is: "whether more 'Negro' applicants cohabited and whether the ratio of blacks to whites among those whose benefits were cut off matched the ratios of those receiving welfare." DAVIS, *supra* note 147, at 62.

316. Plaintiff noted that AFDC was the only public assistance program in Alabama which had more African American than white recipients, and cited to a 1963 Alabama study finding that "there were 16 times as many Negro illegitimate children receiving aid as white children." Brief for Appellees at 24-25 & n.12, *King* [hereinafter Brief for Appellees, *King*].

317. The state used the term "roving arrangements" in describing that the regulation "[p]ermits the mother to choose which situation she wants to be in." Brief for Appellants at 5, *King*.

In response to a question regarding whether this regulation was punitive to young children who are the direct victims, the Alabama Welfare Commissioner said:

No, I don't consider it punitive, because the mother has a choice in this situation to give up her pleasures or to act like a woman ought to act like and continue to receive aid; and even in those cases later on where she decides that she wants to continue her nightly pleasures, if she decides later on that she wants to cut it out, then there are methods, and there are reasonable methods for it to be removed.

Deposition of Ruben K. King at 103-04, *King* (No. 2495-N) (emphasis added) [hereinafter Deposition, *King*].

Comments by the state about the worthiness of some AFDC mothers implied that other AFDC recipients are not of the same caliber. "The desire of many ADC mothers, Negro and white, to keep their children together in a family unit in the face of extreme adversity should command everyone's respect." Brief for Appellants, *King*, *supra* note 311, at 37. "Many ADC mothers have a sense of responsibility to their children as is evident from their interest in them. In one study it is reported that 33.4% belong to Parent Teacher Associations." *Id.* at 37 n.18.

318. The State argued that while virtually all of the families terminated under this rule were African American, the policy was applied race neutrally. "There was no evidence that any white family or any Negro family to which the policy was applicable was still receiving aid or that any family to which the policy was not applicable had had their aid terminated because of the policy." *Id.* at 9.

would only marry the fathers of their children if the state terminated their benefits.³²⁰ The State cited the testimony of the Wel-

There are numerous opinions and views of the differences in cultural practices in respect to informal arrangements among the poor. If statistics showing number of illegitimate births give a fair picture of informal practices, it does appear that these informal practices are considerably more numerous among the lower income members of the Negro race in this country than among other ethnic groups. The Alabama agency does not believe that members of the Negro race would wish to be excused from the application of a fair rule just because of their race. Under the law it is quite clear that members of the Negro race are to be treated as full members of society, and this includes the low income members.

Id. at 36-7.

319. The Alabama Welfare Commissioner stated in his deposition that the major factor in public dissatisfaction with the program was that it appeared to promote illegitimacy. Deposition, *King, supra* note 317, at 75. The state's characterization of his testimony was that the AFDC program "was very controversial and that there had been talk about abolishing the program," and that after a study he promulgated the challenged regulation. Brief for Appellants, *King, supra* note 311, at 5. "[I]t was a question in his mind of whether it would be necessary to remove three or four thousand persons from the ADC rolls or whether it would be necessary to discontinue the entire ADC program." *Id.* at 7. The Court stated:

No doubt a State public welfare administrator has plenty of opportunities to learn that the public does not always share this point of view. And though the social worker vigorously protests that mothers are not going to bring into this world a baby in order to receive a welfare grant of \$11.69 a month, a spokesman for the public who resists putting more money into the program could counter, 'but by giving a grant or more money, you are approving of bringing another child into existence in a family that cannot afford to care for it — you are using my tax money to underwrite a situation which is bringing about a necessity for more of my tax money — not less!' How does a state administrator, under the present ADC statutes, realistically come to grips with this dichotomy? Can a welfare administrator with a limited budget honestly deal with the public concern and ignore the basic reason children are born in these situations? Does the public have an interest in welfare agencies facing up to the reason poor children are born? The Alabama agency is convinced that children born into poor families come into being like children born into richer families — as a result of their parents cohabiting. One of the differences a state welfare administrator must face is that families who cannot financially care for these children do look to the public to help care for them. Is it, therefore, fair for the public to ask the poor not to increase the tax burden if they wish to continue receiving help?

Id. at 38-39. For a discussion of the largely distortive and reductionist nature of this public perception, see Williams, *supra* note 25, at 1188-96; Williams, *supra* note 34, at 736-41. Note the similar reliance on community standards as a justification in *Craft v. Metromedia, Inc.*, 475 U.S. 1058 (1986). See *supra* text accompanying notes 245-248.

320. "[I]t is time for everyone to be rehabilitated and go to work. It does not appear that any of the major Congressional thrusts directed to solving poverty problems show any letup in sight for persons who really want to remain dependent."

fare Commissioner that “the policy permits the mother, instead of the State, to make a choice about discontinuing this type of relationship . . .”³²¹ thereby implying that those women who “choose” illicit sex over the economic survival of their children are bad mothers.

The Supreme Court, while “finding” that Congress had concluded that “illicit sexual behavior” and “illegitimacy” should be dealt with through other mechanisms,³²² stated that “[a]ll responsible governmental agencies in the Nation today recognize the enormity and pervasiveness of social ills caused by poverty,”³²³ and that, “notwithstanding their mother’s impropriety,” children without a “breadwinner” or “father”³²⁴ are not benefitted by the presence of their mother’s “paramour.”³²⁵ Thus mythologies of AFDC recipients as African American, promiscuous, and lazy dominated the Court’s reasoning in spite of the portrayal of Sylvester Smith’s own life.

After *King*, several states tried to financially reduce or terminate benefits by assuming the availability of income from a “man-assuming-the-role-of-spouse” (MARS), whether or not the man was legally responsible for or actually contributing any funds to the support of the children. Interestingly, in challenging this practice in *Lewis v. Martin*,³²⁶ the *plaintiffs* painted AFDC mothers as living in unstable and transitory (*i.e.*, promiscuous) situations in order to persuade the Court that mothers receiving

Brief for Appellants, *King*, *supra* note 311, at 16-17 (emphasis added). In contradiction of the picture painted by the plaintiffs that the mothers and children would suffer from AFDC termination due to the man-in-the-house rule, the state cited a statistical summary which showed that “many of the mothers [terminated due to application of the rule] married.” *Id.* at 17 n.6.

The State had no problem in arguing that abuses of the regulation could be corrected through an administrative hearing process. In other words, it was perfectly reasonable to expect women in Ms. Smith’s situation to be required to have an evidentiary hearing about whether the cohabitation had been “regular, frequent or continuous.” *Id.* at 25.

321. *Id.* at 6.

322. The District Court stated: “Certain phenomena have become apparent and a matter of realistic concern to everyone is the continued procreation of illegitimate children by persons who seem economically unable to care for them and undoubtedly in some instances seem to lack initiative or the desire to properly care for them.” 277 F. Supp. at 40 n.8 (emphasis added).

323. 392 U.S. at 334.

324. These statements were not, however, applicable to Mrs. Smith who was herself employed. They were also arguably inconsistent with the “employable mother” tenor of the 1967 Amendments. See *supra* notes 141-45 and accompanying text.

325. *King*, 392 U.S. at 329.

326. 397 U.S. 552 (1970), *rev’g* *Lewis v. Stark*, 312 F. Supp. 197 (N.D. Cal. 1968).

AFDC would not actually receive money from the MARS.³²⁷ As in *King v. Smith*, however, the "facts" of the named plaintiffs were fashioned to highlight "middle-class" values: Mrs. Lewis had two children and was divorced; she had pursued a court order for child support which her husband had not paid; and the man she was living with had a paid job as a maintenance man, but was deeply in debt.³²⁸ Mrs. Percy, who had one child, tried unsuccessfully to find paid work, and was taken in by a male friend who was able to provide them with shelter.³²⁹

The state, in response, portrayed the relationships as stable, in which the woman would have the power to enforce contributions from the man.³³⁰ However, even within that context, the state invoked distortive mythologies of the welfare recipient as a lazy slut who was trying to "have her cake and eat it too:"

In other words, she urges that despite the presence in her home of a 'breadwinner,' . . . she remains totally eligible for public assistance unless the man wishes, and does, comply with the law by paying the support he owes As welfare recipients they claim the right to all of these things, plus the pleasures of 'marriage,' but with no formalities and no obligations attached. And they complain that the California laws which prohibit such an Elysian state, deny them due process.³³¹

In addition, the state emphasized that it would have to *prove* actual contributions, implying that the woman might lie about the receipt of contributions and invoking fraudulent welfare recipient mythologies.³³² The District Court opinion conjured up mythologies of the harmed ex-husband; if a woman was immoral enough to establish a relationship with another man, the natural

327. Brief for Appellants at 3, 21, *Lewis v. Martin*, 397 U.S. 552 (1970) (No. 829) [hereinafter Brief for Appellants, *Lewis*] (calling plaintiffs "mothers [who] reside with men," rather than calling them "wives" as the state does in Defendant's Motion to Affirm at 4, *Lewis* (No. 829)); Brief for Appellants at 7-8, 50-53, *Lewis* (discussing how lower California courts have never enforced financial obligation of MARS and that men will not voluntarily comply); *id.* at 31 (discussing unstable nature of relationship); Jurisdictional Statement at 22, *Lewis* (No. 829) ("It may be suggested that the welfare mother is gratifying her sensual appetites at her children's expense and that her alternative is rather to eschew immorality.").

328. Brief for Appellants, *Lewis*, *supra* note 327, at 9.

329. *Id.* at 10.

330. Brief for Appellees at 13-14 n.14, *Lewis* (No. 829) [hereinafter Brief for Appellees, *Lewis*] (referring to "his family" and positing that, since the woman does not have the baggage of undoing a formal marriage through a costly divorce, she has power to threaten that the MARS must leave unless he pays).

331. Defendant's Motion to Affirm at 9-10, 11, *Lewis*.

332. Brief for Appellees, *Lewis*, *supra* note 330, at 2, 6.

father of the children should be allowed to “devote his resources to his new family.”³³³ Thus, the woman, who after all is responsible for her own situation, must rely on the new “boyfriend” for support, however illusive. The Supreme Court, in striking down the regulation, appeared to accept the plaintiffs’ mythic portrayal of the ephemeral nature of the relationships.

In *Dandridge v. Williams*,³³⁴ plaintiffs challenged a Maryland regulation which denied any additional incremental benefit to families with more than five children.³³⁵ The plaintiffs included a single mother of eight and a married couple with eight children, thus eliciting mythologies of promiscuous, lazy, welfare recipients having large numbers of children in order to be eligible for higher benefits. Again, the portrayals of the named plaintiffs belied these mythologies: all of the adults were disabled, *i.e.*, nonemployable, and all the children had been born prior to the time that the parents applied for AFDC.³³⁶ The plaintiffs attempted to evoke mythologies of welfare recipients as unable to work due to illness or disability³³⁷ and as a discrete and insular minority lacking meaningful access to the political process.³³⁸ In

333. *Lewis v. Stark*, 312 F. Supp. at 204.

334. 397 U.S. at 471 (1970).

335. The regulation placed a \$250 cap on the amount which any AFDC family could receive regardless of how many children were in the family. *Id.* at 474.

336. Brief for Appellees at 24-25, *Dandridge v. Williams*, 397 U.S. 471 (1970) [hereinafter Brief for Appellees, *Dandridge*]. This attempt to portray the image of the “worthy” client created a dialogue in the Supreme Court argument which highlighted the “other:”

Mr. Matera: All of them were born prior to the time [they] were required to seek welfare assistance The Court: Well, would it make any difference to your argument if these children were born after they went on relief? Mr. Matera: Your Honor, we would still maintain that it is an invasion here of marital privacy, and the right of procreation. We would still have to maintain that. The Court: So, the time when they were born, then, in relation to the relief, has nothing to do with the case? Mr. Matera: It has something to do with the case, in this sense, that we are punishing the parents of children for an act which they had a perfect, legitimate right to exercise even prior to the time that they were required to seek welfare assistance. The Court: Well, do I get out of that a suggestion that their right is different, after they go on relief? Mr. Matera: Their right is no different, Your Honor. The Court: Well, then- Mr. Matera: It is only relevant, in this case, to point out how it affects families who perhaps have already had their children prior to the time they go on welfare.

Oral Argument of Joseph A. Matera, Esq., on Behalf of Appellees, *Dandridge*, 397 U.S. 471.

337. Brief for Appellees, *Dandridge*, *supra* note 336, at 25-26.

338. *Id.* at 42-43; Brief for Amici Curiae: The Center on Social Welfare Policy and Law, National Welfare Rights Organization, Associated Catholic Charities, Inc.,

addition, the plaintiffs, attempting to trigger maternal myths, highlighted that the purpose of the maximum grant regulation was "to coerce *mothers* of large AFDC families, who are rarely employable, to seek employment."³³⁹

In spite of the presented stories of the named plaintiffs, the state asserted that two of the reasons for its maximum grant policy were to encourage parents to limit family size and to provide an incentive for parents to seek employment,³⁴⁰ thus reinforcing mythologies of promiscuity and irresponsibility.³⁴¹ Although the state recognized that the second incentive did not apply to the named plaintiffs if they were truly disabled, Maryland argued (and the Supreme Court agreed)³⁴² that the state did not have to develop a policy which imagined and interpreted the complex and diverse experiences of welfare recipients, but rather used reductive mythologies to support reductive policy.³⁴³ The state drew upon mythologies of laziness in painting the majority of AFDC mothers as fraudulent malingers, citing a study which found that women as a group are more "prone to abuse of generous unemployment and disability insurance systems."³⁴⁴ The

& Seven Neighborhood Legal Services Offices Now Prosecuting Similar Cases at 22, *Dandridge v. Williams*, 397 U.S. 471 (1970) [hereinafter Brief for Amici Curiae, *Dandridge*]. Use of this phrase, of course, invokes one of the traditional arguments for stricter judicial scrutiny. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53, n.4 (1938).

339. Brief for Appellees, *Dandridge*, *supra* note 336, at 10, 23 (emphasis added); Brief for Amici Curiae, *Dandridge*, *supra* note 338, at 37.

340. *Dandridge*, *supra* note 334, at 467 (supplemental opinion on motion); see also Appellant's Jurisdictional Statement at 3, *Dandridge*, 397 U.S. 471 (1970); Brief for the Appellants at 34-35, 39-40, *Dandridge*.

341. The state used words such as "illegitimacy," "promiscuity and lack of family responsibility." *Id.* at 38 (quoting STEINER, *supra* note 90, at 131).

342. *Dandridge*, 397 U.S. at 486.

343. The Court found rational foundations for the policy in the state's legitimate interests both in encouraging employment and in ensuring that the welfare family is never better off than the lowest paid working family. *Id.* at 484-87. The state argued that one reason for the policy is to maintain public confidence in and support for the fairness of the welfare program "on the part of employed wage-earning groups earning modest incomes." Appellant's Jurisdictional Statement at 3, *Dandridge* (No. 131); see also Ross, *supra* note 137, at 1540 (articulating the theme of moral weakness of the poor as it is presented in the *Dandridge* case, and noting how Justice Stewart "conceptually separated those families in poverty and receiving public assistance from other families.").

344. Appellant's Jurisdictional Statement at 18, *Dandridge*; Brief for the Appellants at 33, *Dandridge*, 397 U.S. 471 (citing study which found that "most of the people drawing [unemployment and disability] benefits and not looking for work were married women who wished to attend to family responsibilities"). Juxtapose Justice Marshall's dissent in which he stated that the "vast proportion of these mothers are in fact unemployable because they are mentally or physically incapaci-

state and the Court evoked the mythology of poor and African American women as bad mothers³⁴⁵ in deeming unimportant³⁴⁶ that the consequence of the state's policy might be to encourage AFDC families to send their children to live with other relatives where they could receive a full AFDC grant to support them.³⁴⁷

Thus, reductive myths of poor and African American women's sexual promiscuity and availability transcended the "facts" of the named plaintiffs and, in combination with the lack of madonna imagery, separated and stigmatized them as "others."

CONCLUSION

The processes by which myths are imagined and reimagined, and transform legal doctrine is subtle and complex. The ways in which lawyers frame their legal claims, select and portray plaintiffs, and develop "facts" reify certain mythologies and/or contribute to the creation of other competing or reinforcing myths. Yet advocates frequently do not recognize or consider the mystical authority of mythology and therefore fail consciously to analyze the ideological and cultural assumptions which underlie legal strategies, stories, and language.

For example, the lawyers in *Jefferson v. Hackney*,³⁴⁸ in their race-based claim, reinforced the mythology that welfare mothers are primarily African Americans.³⁴⁹ Similarly, the lawyers may have invoked myths of welfare mothers as "immoral" by arguing

tated, because they have no marketable skills, or most prominently, because the best interests of the children dictate that the mother remain in the home." *Dandridge*, 397 U.S. 471, at 526 (Marshall, J., dissenting). The state argued that a large majority of mothers on AFDC were employable. Reply Brief for the Appellants at 10-11, *Dandridge v. Williams*, 397 U.S. 471 (1970). Cf. discussion *supra* notes 191, 201 (mythologies of women's efforts in paid labor).

345. Similarly, Thomas Ross discusses the rhetoric of "moral weakness" present in *Wyman v. James*, 400 U.S. 309 (1971), the case which upheld home visits to AFDC residences. Ross, *supra* note 137, at 1522. Ross noted the Court's "assumption of a propensity of the mother to act contrary to the interests of her children" in Justice Blackmun's reliance on the State's justification that it must ensure that the benefits are being spent for the child and protect children from "exploitation," and in the implied suggestion of child abuse by the plaintiff even though the state had not premised its need for a home visit on any suspected abuse. *Id.* at 1523-24.

346. "The kinship tie may be attenuated but cannot be destroyed." *Dandridge*, 397 U.S. at 481.

347. *Id.* at 477; Brief for Appellees, *Dandridge*, *supra* note 330, at 28-30, 67.

348. 304 F. Supp. 1332 (N.D. Tex. 1969), *vacated and remanded*, 397 U.S. 821 (1970), unreported district court opinion, *aff'd*, 406 U.S. 535 (1972).

349. The judicial response was that they could and should get paid jobs consistent with the historical role of African American women.

that their failure to conform to "society's mores" made them politically unpopular.

Likewise, progressive lawyers often assume that the plaintiff's "facts" and evidence will create a primary image in the judge's mind. Thus, they attempt to select "named plaintiffs" for class actions who are "clean." But myths can trump "evidence." The depiction of the named plaintiff in *King v. Smith*³⁵⁰ as a widow working in paid labor did not override mythologies of immorality and laziness. Similarly, although in *New York Department of Social Services v. Dublino*³⁵¹ the lawyers chose named plaintiffs with severe transportation and child care difficulties, the Court's upholding of the restrictive work program was based on the need to get welfare mothers "who can work to do so."

Read together, these cases relied on myths which naturalized historically contingent "facts" embedded in the power dynamics of slavery: welfare recipients are sexually profligate and unwilling to perform paid work, thus undeserving of society's largesse. In constraining the judicial imagination, such mythologies lead to reductive legal doctrine.

The same phenomenon occurs in cases involving gender based discrimination in paid labor. Thus, for example, structuring complaints about the toxic workplace as gender-based employment discrimination claims can reify maternal mythologies that women's primary function is reproduction of the race. This perpetuates the paternalism that iconizes the "good" woman's reproductive health above all and diverts judicial attention from the underlying problems of dangerous workplaces and worker powerlessness.

Similarly, the cases celebrating the fantasy of the romantic workplace rely in part on myths which elevate a woman's sexual identity above her economic role. Feminist advocates in sexual harassment cases are presently debating the use of a "reasonable woman" standard. While this strategy has an obvious appeal, it risks resurrecting myths of women's helplessness. The use of gendered quasi-rape myths to challenge abuses of power in the workplace can also depict women as victims in need of the law's protection.

We recognize that remything is a gradual and arduous process. Since mythology constructs "reality" and since our "real-

350. 277 F. Supp. 31 (M.D. Ala. 1968), *aff'd* 392 U.S. 309 (1968).

351. 348 F. Supp. 290 (W.D.N.Y. 1972), *rev'd and remanded*, 413 U.S. 405 (1973).

ity” is dominated by media images,³⁵² the media is integral to the remything process. Image production and reproduction is part of the larger social context; thus, representations do not simply reflect gender differences but also construct them.³⁵³ But merely portraying women differently in the mass media, without more, will not reconceptualize gender myths.

We need to understand the critical importance of reconfiguring gender through creative mythologies about poor women and women in paid labor. We cannot operate outside mythology. Advocates must directly address the current distortive myths about women. We cannot pretend that these myths are “wrong;” indeed, myths distill some set of stories and experiences. So merely describing, exploring, and decoding patriarchal power relationships cloaked and naturalized by some myths is only the first step. We must advance beyond the critique or evasion of existing mythologies to the imagining of more creative ones. We must look with fresh eyes at particular women’s experiences, using them to construct new and persuasive generalizations, interpreting and retelling the stories of women’s lives in ways which begin to evoke more diverse and nuanced mythologies of gender.

352. Walters, *supra* note 9, at 60-61; Williams, *supra* note 25, at 1171-73; WILLIAM A. GAMSON, TALKING POLITICS 24, 178-79 (1992). We are all familiar with the conflicting and confusing media images of women as workers (including women juggling child care, homemaking, and a job) with images of women as subordinate sexual objects. See DOUGLAS, *supra* note 208, for a detailed description of the mixed message about women projected by television. Her thesis is that mass media offers both new possibilities, as well as limitations, which can either encourage or blunt change.

353. Walters, *supra* note 9, at 73. See also Gaye Tuchman, *The Symbolic Annihilation of Women by the Mass Media*, in HEARTH AND HOME: IMAGES OF WOMEN IN THE MASS MEDIA 8 (Gaye Tuchman et al. eds., 1976) quoted in Walters, *supra* note 9, at 67 (“The mass media deal in symbols and their symbolic representations may not be up-to-date”); see also FALUDI, *supra* note 123, at 112-99 (making the same point about popular culture). For an examination of the psychodynamics of seduction in the visual arts, see generally SEDUCTION AND THEORY: READINGS OF GENDER, REPRESENTATION, AND RHETORIC (Dianne Hunter ed., 1989).

