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SOCIAL CONSTRUCTION, ROVING BIOLOGISM, AND REASONABLE WOMEN: A RESPONSE TO PROFESSOR EPSTEIN

Kathryn Abrams*

INTRODUCTION

Richard Epstein has presented us with an article that is provocative in more than its title. In *Gender Is for Nouns*, he emphasizes the role of biology in socially observable differences between men and women, and previews his broader proposal for the repeal of employment discrimination laws. In responding to an article whose perspectives and normative commitments lie at some distance from my own, I will endeavor to meet the same goal Professor Epstein sets for himself: to court controversy, while avoiding descent into the merely “captious.”

Professor Epstein’s arguments rest on two primary persuasive efforts. First, he seeks to persuade us that his principal opponents—those who view gender differences as socially constructed—seek to banish biological influences from their accounts of differentiation between women and men. Second, Professor Epstein hopes to demonstrate that Title VII seeks to erase all differences—whether biologically or socially created—between men and women in the workplace, and impose an artificial, potentially costly, identity. In this article, I will question both of these propositions. First, I will address Professor Epstein’s account of sex—or gender—differences, explaining that, in theory and in practice, the positions of social construction advocates are considerably more complex, and demonstrably more necessary, than Professor Epstein suggests. Second, I will offer a competing view of Title VII litigation, one which suggests that antidiscrimination efforts have been characterized by multiple remedial strategies, some of which may

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require revision, but few of which bear any resemblance to the rigid, totalizing efforts Professor Epstein predicts.

I. BIOLOGY AND THE WORKPLACE

One might infer from Professor Epstein's account that proponents of social construction—that is, those who believe that "gender" is for something other than nouns—are a dominant, unitary force on the contemporary political scene. My own experience in feminist theory and politics suggests the contrary. First, although arguments that institutional and social structures shape the attributes of those who live under them are hardly new to the realm of social theory, they have waged an uphill battle for influence in contemporary discussions of gender. Far more pervasive, in the history of arguments about the role of women, are arguments tracing socially observable differences to, or basing social or familial roles on, accounts of biological differentiation.

Second, the term advocates of social construction comprehends a wide variety of theoretical and political positions. Not all advocates agree, for example, that the most salient differences constructed are those between men and women: Some focus, as we shall see, on the social influences that create differences within these groupings. Moreover, while a few within this heading may attribute variations to the amorphous "social order" to which Professor Epstein refers, many others have become involved in the burgeoning project of specifying the numerous, intersecting sources of social influence.


5. Differentiation, according to these emerging accounts, may be conditioned by law—from federal statute to local workplace regulation—by public or private social practices of numerous types, by the attitudes of government bureaucrats, by employers, or by spouses. For efforts along these lines that specify the sources of social construction in different contexts, see Arlie Hochschild & Anne Machung, The Second Shift: Working Parents and the Revolution at Home (1989) (examining work-family conflict); Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1749 (1990) (studying sex segregation in

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Perhaps most important, while some advocates of social construction may seek to banish any trace of biological influence from their account of gender differences, many seek not to banish but to interrogate assertions of biological influence. These theorists recognize that neither the gathering nor the interpretation of biological data is a value-free enterprise, that the investigation and articulation of biological differences, in this way, reflect the influence of social construction. They also understand that there is a complex, variable pattern of interaction between these (socially constructed) biological variables and other institutional or attitudinal influences. Thus, one goal of social construction theorists comports with Professor Epstein's project: the goal of analyzing the intersection of biological and environmental influences. Another goal, that of checking broad extrapolation from qualified biological evidence, is one that Professor Epstein claims to share. Yet several of his discussions display more enthusiasm for extrapolation than for its limitation. A brief review of some of these discussions reveals why the activity of social construction theorists—far from being a blindered, dominant account—is a useful corrective to many popular, and some scholarly, conceptions.

One might profitably begin with Professor Epstein's account of the division of labor in the family. According to this understanding, everything from maternal responsibility for child care to the sex segregation of many workplaces seems to stem from one biological fact: Women are physically capable of nursing small infants. This automatically makes women "the better candidate[s] for staying with the child," which produces two adaptive consequences. First, the woman develops "[t]he nurturing instincts . . . that reduce the cost of doing activities that help promote the survival of both her and her offspring." Second, the man is free "to engage in a broad class of explorative activities" and develop his abilities in spatial percep-

6. For a description of the different approaches of social scientists to evidence of biological differences, see Cynthia Fuchs Epstein, Deceptive Distinctions: Sex, Gender and the Social Order 50-51 (1988).

7. For two accounts of this interaction that differ in tone perhaps more than substantive analysis, see Cynthia Fuchs Epstein, supra note 6, at 12-16, 17-45; Carol Tavris, The Mismeasure of Woman 42-56 (1992).

8. See Epstein, supra note 1, Part II.

9. Id. at 990.

10. Id.
tion.11 Although Professor Epstein concedes that “modern women operate in settings far different from those of their ancient mothers,” he states that “the initial tendency still remains: If nurturing brings greater pleasure or requires lower cost for women than for men, then we should expect to see women devote a greater percentage of their resources to it than men.”12 The arrangement that results “should be accepted for what it is: a healthy adaptation that works for the benefit of all concerned, and not as a sign of inferiority or disrespect.”13 It is an arrangement that persists even as women struggle into activities “that were once a male preserve”:14 Their comparative weakness in spatial perception—which either was or has become biologically ingrained—and their comparative strength at nurturing make it preferable for them to turn in greater numbers to counseling and guidance than to architecture.15

Many things about this explanation demand closer scrutiny, in particular, the kind of scrutiny that many theorists of social construction are equipped to provide. First, one might note that of all the possible influences over the division of labor within the family, Professor Epstein begins from a biological capacity that is no longer inexorably linked to differentiation. Breast milk is not, nor has it in memory been, the only alternative for nourishing infants. I was formula-fed myself, and given the technology and the fashions of the day, it seems likely that Professors Epstein and Strauss met a similar fate. To enshrine this difference as central, at a time when we have the technological capacity to generate adequate substitutes, is a bit like describing the structure of contemporary society as arising from the human inability to master air travel.16 However, Professor Epstein argues that despite the changes wrought by contemporary technology, the critical seeds of differentiation have already been sown: Once the adaptations described “become embedded in the brain, the glacial pace of evolutionary change means that they cannot be undone in an age when infant formula is a tolerable sub-

11. Id.
12. Id.
13. Id.
14. Id.
15. Id. at 990-91 (arguing that women should be at a relative advantage in seeking counseling and guidance positions “that demand more of the nurturing and intuitive skills associated with the female roles in child rearing”).
16. Cf. CYNTHIA FUCHS EPSTEIN, supra note 6, at 70-71 (describing how “cultural and technological change can influence the impact of a group’s biological heritage” and noting that “as humans are ordered by nature, so too do they order it”).
stitute for mother's milk." So it seems that these adaptations also require scrutiny.

The male adaptation is arguably more plausible, though it might still be challenged as insufficiently empirically grounded or as inadequately explained. Some scholars have argued that differences in spatial perception are reflected in, and reproductively transmitted as, differences in the brain—although Professor Epstein's strong version of these findings neglects qualifying warnings about the extravagant and sometimes contradictory conclusions that have emerged from theories of brain lateralization. Moreover, it is not clear from Professor Epstein's explanation why the initial division of labor arising from breastfeeding would necessarily reinforce these advantages. Why should the male adventurer have more opportunity to develop these capacities than the female, who is constantly balancing and shifting her infants, or cannily judging the distance between her children and danger?

The female adaptation—the development of a gender-wide capacity for nurturance—is even more problematic. Nurturance is an attitude, an attribute of personality. Only the most extreme proponents of sociobiology—those who begin with Darwin and "extrapolate from the species to the individual and from physical characteristics to psychological ones"—would assert that nurturance is or comes to be embodied in a particular portion of the brain. Although it is still unclear from his present argument whether Professor Epstein seeks to join this small but hardy band, it may be useful to juxtapose a countervailing explanation offered by proponents of social construction, one that reflects not only greater plausibility but the analytic complexity of such efforts.

Nurturance is an attitudinal characteristic that arises in response

17. Epstein, supra note 1, at 990.
18. For a survey of the lateralization theories and the countervailing critiques and warnings, see Cynthia Fuchs Epstein, supra note 6, at 52-56; Tavris, supra note 7, at 43-56.
20. Professor Epstein does not explicitly ground his contentions about the transmission of nurturance to the work of sociobiologists; in fact, his description of how these characteristics are passed from generation to generation of women is somewhat vague. See Epstein, supra note 1, at 990 ("The nurturing instincts usually attributable to women are a set of attitudinal adaptations that reduce the cost of doing activities that help promote the survival of both her and her offspring. Although modern women operate in settings far different from those of their ancient mothers, the initial tendency still remains . . . ." (emphasis added)).
to certain circumstances and is passed on—to the extent that it is not a function of continuing adaptation to changing circumstances—by women watching and mothering each other. It thus becomes important to ask: To what is nurturing a necessary adaptation? It seems plausible that it was a response, at one time, to the evidently restrictive need to feed an infant, from one’s own body, every few hours. But to describe it simply, and contemporarily, in this way is to overlook the numerous social and attitudinal structures that grew up to reinforce women’s restriction to these tasks. These include the convictions of husbands, which may have emerged originally to protect their access to the “broad class of explorative activities” that women’s childrearing labor permitted them, but continued in response to solidifying social convictions that childcare is “women’s work” or that it is a sign of a husband’s weakness or failure to provide if a wife with children “has to work.” Nurturance may also have been an adaptation to limited opportunities for women outside the home, which began with workplaces that excluded women entirely, excluded pregnant women as unseemly or unfit, or regulated the hours of working women in deference to their “first task” in the home. In more contemporary times, women’s decision to develop this aspect of their personalities may have responded to employers’ failure to accommodate workers who are also parents, or spouses’ failure to share the domestic tasks that fall disproportionately to mothers who continue to work. This explanation should not be understood to undercut the value of nurturance, or to deny that there are many attributes of small children that are

21. See Muller v. Oregon, 208 U.S. 412, 421 (1908) (barring factory work by women for more than ten hours a day on the ground that “as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care”); Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (excluding women from the practice of law on the ground that “[i]t is not the destiny and mission of woman to engage in the practice of law”); Muller v. Oregon, 208 U.S. 412, 421 (1908) (barring factory work by women for more than ten hours a day on the ground that “as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care”); Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (excluding women from the practice of law on the ground that “[i]t is not the destiny and mission of woman to engage in the practice of law”).

22. See Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1184 (1989) (noting that “women are often channeled into jobs that accord them little respect and few opportunities for advancement”); Mary Joe Frug, Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U. L. Rev. 55, 55 (1979) (stating that “full and equal achievement in the work force is still beyond many women because the structure of the labor market makes participation extremely difficult for individuals with major child care responsibilities”); Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 801 (1989) (arguing that the relationship between work and family responsibilities is at the “core of the contemporary gender system which systematically enriches men at the expense of women and children”).

23. See Hochschild & Machung, supra note 5.
attractive, lovable, or inducing of nurturant impulses. It is intended simply to suggest that to describe nurturance as an adaptation to the capacity to breastfeed, passed on through some variant of Lamarckian evolution, is to miss many features of the social world in which human beings have evolved.

A third critical point of controversy is Professor Epstein's conclusion that because nurturance brings more pleasure or lower cost to women than men, it should be accepted as a "healthy adaptation that works to the benefit of all concerned." Setting aside the doubts previously raised about the origins of this development, this assertion makes the further error of confusing results that have some biological basis with results that are socially or normatively acceptable. This conflation, which is sometimes achieved through the imposition of the term natural, is a primary subject of Professor Strauss's response. I would add only that in rhetorical terms, Professor Epstein's argument rests more on the positive cost/benefit ratios achieved through perpetuation of biologically based differences than on an unreflective association of the "natural" with the normative, and that some of these cost/benefit conclusions do not withstand careful scrutiny. The lower cost of nurturance to women was even arguably traceable to biological causes only when they were the sole source of nourishment to their infants. At the present time this lower cost is attributable largely to the fact that, given the rigidity of familial patterns and workplace structures, many men have never been given the opportunity to develop it. Moreover, lower cost (in relation to men) should not automatically be associated with greater pleasure in nurturing for women. The increasingly audible discontent of women with the current division of labor in the family belies this conclusion, as the low pay and low social valuation of those who perform childcare in place of biological mothers belies the conclusion that the current specialization is no "sign of inferiority or disrespect." In addition, Professor Epstein's analysis does not account for the costs of enforcing the present arrange-

24. Epstein, supra note 1, at 990.
26. See Rosanna Hertz, More Equal Than Others: Women and Men in Dual Career Marriages (1986); Hochschild & Machung, supra note 5.
ment—through the variety of attitudes and workplace policies described above—that point not only to a different normative conclusion, but to the fact that biology may have less of a role in ordaining current arrangements than he suggests.\textsuperscript{28}

A final disturbing attribute of Professor Epstein's account is its tendency to press biologically based differences into realms where their influence becomes frankly attenuated. The idea that the division of familial labor will make men better architects and women better guidance counselors is one example.\textsuperscript{29} That the attributes manifested in the workplace should be based exclusively, or even primarily, on those cultivated in the home is an interesting yet dubious proposition. Empirical studies of work/family conflict offer us many examples of men who bring meticulous attention to detail to their law practices, but can't seem to see a dusty cabinet or an unwashed dish at home.\textsuperscript{30} Moreover, the extension of the familial division of labor to the workplace assumes that there are few other social contexts in which future workers develop the qualities that they later bring to the workplace. This has never been true for men, and it is decreasingly true for women, who are now educated and employed, and often delay marriage, childrearing, and other nurturant activities. Given this multiplicity of influences, one would expect to see the differentiation and sex segregation, whose enduring propriety Professor Epstein celebrates, eroding over time, if they are not reanimated by restrictions having social as opposed to biological origins.

An even more troubling example is Professor Epstein's assertion that Al Unser's estimation of Janet Guthrie's race-car driving ("she drove to finish but never to win") represents the practical, contemporary application of the reproductively driven difference in risk preferences he cites.\textsuperscript{31} Most scholars would balk at taking Janet Guthrie as representative of all women race-car drivers, or at taking Al Unser's assessment of Janet Guthrie as representative of Janet Guthrie. In addition, they might also demand to know the reasons why race-car drivers should—through conscious effort or instinct—apply strategies for reproductive success when entering the

\textsuperscript{28} See Cynthia Fuchs Epstein, supra note 6, at 10 (noting that social arrangements relating to gender are often maintained by coercive force, which suggests that biological differences may be less determinative than sociobiologists and others argue).

\textsuperscript{29} Epstein, supra note 1, at 10.

\textsuperscript{30} See Hochschild & Machung, supra note 5.

\textsuperscript{31} Epstein, supra note 1, at 993 n.23.
Indy 500.32

If theories of social construction may be described as richly varying attempts to respond to the extrapolations of a surprisingly pervasive, roving biologism, we might ask whether proponents of Title VII might also be described in a less monolithic fashion. My answer, not surprisingly, is also, Yes. To view Title VII as seeking to extinguish all differences—whether biologically or socially created—between men and women in the workplace is to miss critical aspects of recent enforcement strategy. It is more accurate to say that Title VII is aimed at extinguishing most discrimination in the workplace, and to this end, advocates and enforcement officials have targeted a range of behaviors—those that neglect, as well as those that exaggerate or reinforce, difference. In the next section, I will focus on this multiplicity of enforcement strategies and highlight some efforts that may require correction—though not the correction Professor Epstein seeks.

II. Title VII Litigation: Plural Enforcement Strategies and the Pluralism of Women's Experience

Title VII and other civil rights laws that address discrimination on the basis of gender were first formulated and litigated under the influence of one of the earliest feminist theories, one that is often referred to as equality theory. This theory, which was influenced by the struggle of blacks for civil rights, did not deny all biological differences, but denied their relevance to a number of institutional settings in which they had previously been treated as determinative. Equality theory also suggested that the failure to recognize certain functional similarities between men and women was attributable to episodic, irrational prejudice that could be ameliorated through education and limited in its practical effect by vigorous enforcement. As embodied in Title VII, equality theory has been responsible for opening to women a range of workplaces that had not been accessible before and for challenging many preconceived notions about women’s capabilities. But over time it has become evident that equality theory is not adequately comprehensive, either as an account of women’s experience of gender discrimination or as an approach to rectifying discrimination in the workplace.

32. For a discussion and critique of the scientific evidence tracing behavior differences in animals to gender-specific strategies for reproductive success, see Cynthia Fuchs Epstein, supra note 6, at 60-70.
Equality theory, with its focus on women's similarities, fails to address those forms of discrimination that arise from neglect or devaluation of women's differences. Because it describes gender discrimination as a matter of episodic, irrational prejudice, it does not see or untangle the set of entrenched, institutionalized attitudes that create a system of discrimination against women. Equality theory has also been of limited use in dealing with workplace discrimination that goes beyond problems of access. Once women entered a range of historically male workplaces, they discovered a number of difficulties—sexual harassment, stereotyping, failure to accommodate parenting—that could not easily be described as a failure to give women what men already had.

In the face of these developments, feminist advocates and enforcement officials have embraced a new goal; they have used employment discrimination law to require the workplace to accommodate women, not simply admit them. Accommodation has meant a plural approach to including women in the workplace: acknowledging not just women's similarities but women's differences, whether these differences are physical (in utero gestation), socially constructed (greater sensitivity to pornography in the workplace), or some combination of the two (primary responsibility for early child care). This strategy has required that advocates propound a series of generalizations about women, so that employers and lawmakers know what has to be accommodated. These generalizations, for example, describe how women's professional life-cycles proceed, how women perceive sexual conduct in the workplace, and how their performance and characteristics are likely to be perceived by others. It is this second-phase strategy of accommodation through generalization on which I want to focus here. There are largely unexamined dangers that accompany such efforts, notwithstanding their potential to move women beyond the equality-driven stages of antidiscrimination efforts. In the remaining portion of this article, I will explore some of these dangers and suggest ways in which they can be mitigated, without abandoning the useful effort to require workplaces to accommodate women.

We should begin by asking where one can identify this process of generalization in antidiscrimination enforcement. There are many answers. Some generalizations about women are offered in the process of defining the set of people who are entitled to relief. Some statutes may justify the creation of a class of beneficiaries by refer-
ring to certain differences that distinguish them from other groups. A statute requiring maternity leave, for example, might contain legislative history describing the importance of family in the lives of many women, the costs of work/family conflict for workers who are mothers, or the prevalence of mothers as primary care providers. In some litigation contexts, a generalization is offered to explain the dynamics that justify a particular claimant's recovery. In Price Waterhouse v. Hopkins, plaintiff's attorneys argued successfully that Ann Hopkins had failed to attain her promotion because evaluations of her performance were mediated by stereotypes about commanding women. Even in the context of individual litigation, this strategy had broader educative purposes: Focusing on stereotyping not only explained what Hopkins had been subjected to, but it also illuminated the nature of the assumptions to which the average woman is exposed in the workplace (for example, the fact that qualities which would be viewed as virtues if they came in a male package are not necessarily viewed as virtues when they come in a female package).

A second litigation-based context in which advocates and courts may engage in generalizations is in determining the proper perspective from which to evaluate alleged discrimination. A good example comes from the area of sexual harassment. In cases involving hostile environment sexual harassment, a plaintiff may recover if she can demonstrate conduct that was "abusive" or "hostile, intimidating or offensive." The question that arises, however, is from whose vantage point should such conduct be assessed? For many years the courts employed a "reasonable person" standard—judges should evaluate the conduct in question as a "reasonable person" might. Over time, a number of feminist scholars, including myself, began to argue that it is difficult to develop an average, gender-neutral per-

33. 490 U.S. 228 (1989).
34. See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (holding that hostile-environment sexual harassment is actionable under Title VII); see also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (holding that for sexual harassment to be actionable it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (holding that conditions of employment include psychological and emotional work environment, and thus subjecting an employee to sexually stereotyped insults and demeaning propositions can affect the conditions of employment).
35. See, e.g., Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986) (holding that the trier of fact, when judging the totality of the circumstances of the asserted abusive and hostile environment, must adopt the perspective of a reasonable person).
spective on sexual harassment. Empirical data suggest that women and men respond differently to sexual overtures in the workplace, for reasons that have to do with their security in the workplace and their constructions of their own sexuality. Rather than assert that there is some gender-neutral, reasonable perspective on all this, courts should acknowledge that men's and women's perspectives vary and that, if our goal is to scrutinize conduct that has made workplaces inhospitable to women, we ought to assess conduct from the "reasonable woman's" perspective. Last year in Ellison v. Brady, the United States Court of Appeals for the Ninth Circuit embraced this reasoning in a deliberate and explicit fashion. The Ninth Circuit held that the "reasonable person" was simply a means of instantiating a "reasonable man's" perspective in law, and if workplace behavior was going to be reformed, the "reasonable woman" was the necessary and appropriate standard. So here a set of generalizations about women became the basis for recovery, not by establishing who was entitled to make a claim, but by establishing how assessment of claims would proceed.

At one level, there is much about this general approach that represents a step forward. It makes clear that not all employment discrimination problems are problems of access, that social attitudes and corresponding institutional practices can make a workplace unmanageable for recent arrivals. It also demonstrates that the tendency to neglect women's differences can be just as damaging as neglecting their similarities. As part of this demonstration, the approach highlights some of the more salient differences. The "reasonable woman" standard, for example, illustrates the distinctive perceptions of sex in the workplace that distinguish many women from many men; similarly, the claims regarding stereotyping explain how disparate views of comparable characteristics in men and women can give ostensibly uniform standards a discriminatory twist. Finally, litigation strategies that highlight differences in perspective, like the "reasonable woman" approach, unmask the false universality and neutrality that abounds in law and that often works to the

36. See, e.g., Abrams, supra note 22, at 1202-15 (arguing that men in the workplace "regard conduct ranging from sexual demands to sexual innuendos differently than women," and that "because men still exercise control over most workplaces," the norm is established by men).
37. See Barbara Gutke, Sex and the Workplace (1985). The construction of the sources of gender-based differences described in the text is offered in Abrams, supra note 22, at 1202-09.
38. 924 F.2d 872 (9th Cir. 1991).
39. Id. at 879-81.
disadvantage of women.

At another level, however, this approach has many of the drawbacks feminist theorists have come to associate with difference theory. These include problems that arise from the use of these generalizations by legal decision-makers, and problems that arise from the application of unitary characterizations to a highly diverse group of women. I will illustrate these difficulties primarily by referring to the use of the "reasonable woman" standard in sexual harassment cases, but will include other examples as well. I should add that this exploration reflects at least a partial revision of my earlier view: It was my previous contention that something like a reasonable woman standard should be applied in hostile environment sexual harassment cases; yet the following considerations have encouraged me to qualify or modify this approach.

The problems that arise from the failings of decision makers are perhaps more obvious. The "reasonable man" or "reasonable person" standard that has historically been employed in the area of tort has been easily applicable for one of two reasons. First, in many cases it has been (correctly) assumed that judges could apply this standard by consulting their own experience or intuitions as to what the "reasonable person" would believe. Second, where judges lacked such direct access—where the question was, for example, what a "reasonable medical practitioner" would do—they have been willing and able to admit expert testimony to help them. In applying the reasonable woman standard, many contemporary judges lack both these advantages. Despite marked gains, it is still the fact that the vast majority of federal judges hearing sexual harassment claims are white males. This means that decision-makers lack any direct—experiential or intuitive—access to how a "reasonable woman" would think about sexual actions in the workplace. This lack of intuitive access was central to the Ellison court's rationale for adopting the standard: The reasonable woman was necessary be-

40. See Abrams, supra note 22 at 1209-15.
cause the reasonable person had become infused, through its application, with male perspectives. But declaring a new standard is only of limited benefit when the same decision makers approach its application with the same experiential limitations and preconceptions. Moreover, expert testimony—the usual recourse in cases where experiential access is lacking—has not always been availing in these cases. Part of the problem with expert testimony is the lack of empirical data itself. Questions of what differentiates women, or groups of women, in the workplace are only beginning to be explored as relevant to workplace research. But an even larger problem is the reluctance of some courts to allow the use of experts. The great controversy that has surrounded the admission of expert testimony in cases involving battered women's self-defense (another question of reasonableness in women's legal actions) has become well known. In other areas courts have sometimes been reluctant to qualify experts because of their uncertainty about whether different types of gender studies constitute fields, or what constitutes an expert in such fields.

A second difficulty with decision makers arises from the still-prevalent tendency, remarked above, to naturalize observed differences between men and women. One might demur that equality theory, too, involves generalizations about women, but in our society, assertions that women are similar to men are not likely to stigmatize women. The same cannot be said of assertions that women are different from men. Even some judges who accept certain differences between men's and women's perceptions of sexual harassment, for example, may describe those differences in ways that are ultimately stigmatizing or limiting to women. Decision makers who are unfamiliar with the dynamics of socialization or the complex and variable process of social construction may find it easier to ascribe differences to biology and to present them as universal or noncontingent. Thus the differences in women's perceptions of sexual conduct in the

43. See Ellison, 924 F.2d at 879.
44. See Elizabeth Schneider et al., Lesbians, Gays and Feminists at the Bar: Translating Personal Experience into Effective Legal Argument—A Symposium, 10 WOMEN'S RTS. L. REP. 107, 137-38 (1988) (discussing the importance of expert testimony to the jury's understanding of the myths and misconceptions about battered women); Elizabeth M. Schneider, Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering, 9 WOMEN'S RTS. L. REP. 195, 198 (1986) (stating that the purpose of expert testimony on the battered-woman syndrome is "to explain the common experiences of, and the impact of repeated abuse on, battered women" and "to assist the jury and the court in fairly evaluating the reasonableness of the battered woman's action").
workplace may be ascribed not to the fact that longstanding discrimination has made women less secure in the workplace, nor to the fact that the high incidence of sexual violence against women in our society has made many women see coercion in potential sexual encounters. Instead, differences in perceptions may be described as transcultural, a part of the natural modesty or chastity through which women attempt to conserve their limited reproductive endowment.

These factors, in and of themselves, might seem to be reason enough for hesitating about the use of a standard, such as the "reasonable woman," that attempts to characterize women as a group. But, to my mind, more important reasons to hesitate lie in the diversity that exists among women. One of the most telling critiques of difference feminism, the theoretical home of the "reasonable woman" standard, is the claim that it falsely essentializes women: By describing women as a uniform group, difference theory partakes of the same false universalism of which difference feminists accuse the equality-based standard. This critique also has a dimension that relates to power inequalities: When general characterizations of women are rendered, it is usually the most privileged groups (privileged on the basis of such characteristics as race, class, or sexual orientation) who enjoy the power to describe their own perceptions or experiences as the norm. And finally, the critique questions whether difference theory is capable of providing a full account of discrimination: If white, straight, middle-class women's experiences are described, even by implication, as all women's experiences, we will lose the opportunity to study, understand, and remediate the forms of discrimination suffered by less-privileged women, which are no less "gender" discrimination because of their intersectional

45. See Martha Minow, The Supreme Court, 1986 Term—Foreword: Justice Engendered, 101 Harv. L. Rev. 10, 12 (1987) (arguing that refusing to acknowledge differences such as race, gender, religion, or membership in any other group perpetuates their importance in "a world with some groups, but not others, in mind") [hereinafter Minow, Justice Engendered]; Martha Minow, Feminist Reason: Getting It and Losing It, 38 J. Legal Educ. 47, 47-48 (1988) (noting that feminists seeking a "female" point of view run the risk of "ignoring differences of racial, class, religious, ethnic, national, and other situated experiences").

46. See Spelman, supra note 4 (noting that the focus on women "as women" in feminist theory reflects the experience of only one group of women—white, middle-class women from Western, industrialized countries); Harris, supra note 3; Minow, Justice Engendered, supra note 45, at 62-70 (stating that ignoring differences among women permits "relatively privileged women to claim identification with all discrimination against women, while also claiming special authority to speak for women unlike themselves").
characteristics.\textsuperscript{47}

We can see these dangers of essentialism in many of the difference-based strategies I described at the outset. The "reasonable woman" is a useful device for exploding the notions that everybody thinks about sexual conduct in the workplace the same way, and that gender socialization has nothing to do with it. But it seems likely, based on evidence both popular and scholarly, that not all women think about sexual conduct in the workplace the same way. Take, for example, the Thomas-Hill hearings: There was widespread agreement among women that the harassment question demanded fuller hearings, but once those hearings had been held there was far less agreement about what they had demonstrated. One of the most interesting anecdotal findings I read was that many working class women tended to display less sympathy with Professor Hill than professional women. These women described a long history of looking out for themselves in coercive environments and faulted Hill for not doing the same.\textsuperscript{48} At a more theoretical level, when I think about the factors that some scholars, including myself, have identified as most important to shaping one's attitudes toward sexual conduct in the workplace—one's sense of security in the workplace and one's understanding or construction of one's own sexuality—there is good reason to believe that both of these factors vary among groups of women.\textsuperscript{49} One of the great risks in going too far down the road toward the reasonable woman—at least, without assessment of its potential costs—is that the reasonable woman will begin to sound a lot like a white, straight, upper-middle-class professional, thereby excluding the perceptions and experiences of a majority of women who actually occupy the workplace. These difficulties have already emerged in some of the other areas I mentioned. For example, in the

\textsuperscript{47} See Speelman, supra note 4; Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics, 1989 U. Chi. Legal F. 139; Harris, supra note 3, at 585 (arguing that a unitary "essential" women's experience, viewed independently of race, class, sexual orientation, and other realities, silences the same voices that the mainstream legal voice silences).


\textsuperscript{49} For several interesting narrative descriptions of the way that race and class can influence the construction of women's sexuality, see Cherie Moraga & Gloria Anzaldua, This Bridge Called My Back: Writings By Radical Women of Color (1981).
area of stereotyping, Ann Hopkins was able to recover for discrimi-
nation on the basis of a stereotype that affects white, upper-middle-
class professional women (the domineering, aggressive manager),
yet other women have not been as successful in recovering where
they alleged compound stereotypes—such as those involving gender
and weight, or gender and age, or gender and religion.\(^5\) Similarly,
in some recent cases, courts have held that black women may not
serve as class representatives in a class action claiming violation of
Title VII on behalf of all women in a particular workplace.\(^5\)

So what is to be done about all of this? Must we abandon the
advantages of generalizing about women’s differences and women’s
treatment because of these difficulties? And does antiessential-
ism—defined as the practice of insisting on the diversity of women
as a group—offer anything better for directing a program of femi-
nist antidiscrimination litigation? Is it, as some critics suggest, so
inherently fragmenting that it will offer little around which to con-
struct a positive program? These are, to my mind, the next large set
of questions facing feminist theorists, as antiessentialism begins to
move from critique to prescriptive program. But I suspect that in
antidiscrimination litigation, as in other areas, they can be ad-
dressed in ways that strike useful balances between the need to say
something about women as a group, and the need to understand and
acknowledge all the groups that make up women. What approaches
will work best will vary in different circumstances, but I will suggest
several strategies that may be of use.

In factual circumstances where we are only beginning to learn
about the differences among women, two kinds of steps can combat
the difficulties with decision makers I discussed earlier.\(^5\) The first is
to make sure that all accounts of women’s distinctive patterns, all

\(^5\) See Madeline Morris, Stereotypic Alchemy: Transformative Stereotypes and Antidis-
crimination Law, 7 YALE L. & POL’Y REV. 251 (1989) (stating that in discrimination cases in-
volving a combination of suspect and nonsuspect characteristics, the nonsuspect characteristic,
such as weight, may be used as a vehicle for discriminating against a suspect class). The 1991 Act
should be of help to plaintiffs complaining of improper workplace behavior involving compound
stereotypes. In so-called mixed-motive cases, once the plaintiff establishes that an impermissible
criterion (gender) was a “motivating factor” in an employment decision, she has made out a
violation of Title VII. To limit the relief awarded to the plaintiff, the employer may then show
that it would have taken the same action without the presence of the forbidden factor. Civil

\(^5\) For a description and incisive critique of these cases, see Crenshaw, supra note 47.

\(^5\) See supra notes 41-43 and accompanying text.
characterizations of the "reasonable woman," are linked to full accounts of whatever highly contingent social construction tends to generate these differences. This approach does not mean that biological explanations should be banished, but rather that where biology is not the cause of differentiation or where its influence is shaped or amplified by social construction, these social and institutional influences should be spelled out. This may keep judges and other decision makers from naturalizing the differences they hear. Of course, this is often easier said than done. When I advocated a modified reasonable woman standard in 1989, I steeped the attitudes I described in detailed accounts of social construction. When the Ninth Circuit decided *Ellison* last year, it adopted the "reasonable woman" standard, cited my argument, and eliminated any emphasis on the social construction of differences. Still, the effort to make the connection strikes me as highly valuable: Some courts may be more receptive to a full account, and whether or not they adopt it, they may become more familiar with the notion of socially constructed differences as a result of hearing these kinds of arguments.

The second step that can be taken to address the problems with decision makers is to continue empirical work on the sources of differences among women. In addition, antidiscrimination lawyers need to familiarize themselves with the work that exists. We already have a store of telling experiential accounts that document differences among women, and my point here is not to derogate such accounts or set up an epistemological hierarchy. But we need to learn about differences in as many ways as possible, and we need to document these differences in ways that courts will accept. Where a body of knowledge on difference is well established, expert testimony on women (on stereotypes, "reasonable women," or anything else) is more likely to be admitted.

In circumstances where information about differences among women is well established, advocates can do one of several things to avoid the problems of essentialism I described earlier. The first is to use the full body of information regarding such differences as the factual base from which to draw any generalizations about women.

53. It is worth noting, however, that the *Ellison* court did not rely on a biological explanation. In fact, it eschewed any explanation or implication regarding how such differences have emerged. See *Ellison v. Brady*, 924 F.2d 872, 878-81 (9th Cir. 1991).

This approach still has the problem of false universalism: Whenever one generalizes about a factual base, one risks slighting differences in favor of similarities, or highlighting some differences while submerging others. But at least with a factual base that reflects differences among women, we are more likely to mitigate the inequalities of power: Generalizations will be based on a range of women’s experience rather than on the experiences of privileged women alone. Still better might be an approach that does not attempt to create a modal woman, but rather confronts the litigation-driven need for unity by making an explicit, normative choice about how to characterize women for litigation purposes. Some feminist scholars, for example, have begun to think about characterizing the “reasonable woman” in sexual harassment litigation in this way. Martha Chamallas has argued that the “reasonable woman” should be one who is aware of patterns of subordination in the workplace and wants to ameliorate them.\(^{55}\) I might suggest, instead, that we articulate a portrait of the “most vulnerable woman” (who, as the Thomas-Hill hearings suggest, is not necessarily the least-privileged woman), and use that woman’s perspective as the standpoint for evaluating sexual conduct in the workplace.

A final proposal for reflecting the diversity that exists among women is to increase reliance on nonlitigated solutions. This is one important area in which Professor Epstein and I see eye to eye, though obviously for different reasons. The need for unity in characterization may be tempered in the litigation context, but it is surely stronger here than in prophylactic contexts such as workplace education programs. Educational programs that rely on narrative strategies (for example, exposing male employees to women’s accounts of the experience of sexual harassment) might produce greater flexibility and sensitivity in their audiences by highlighting the variety of women’s perceptions and experiences. An emphasis on such programs would, importantly, spare plaintiffs the expense and emotional anguish that accompany even a successful Title VII suit. Such efforts would amount to little were they not backed by the potential sanction of litigation; but operating in the shadow of legal enforcement, they can be used to reformulate workplace conduct while helping to bring women’s differences to light.

55. Id.
III. Conclusion

When gender-specific differences are understood to be complex, changeable phenomena rather than biologically ordained mandates, and Title VII is revealed to respect as well as to eradicate such differences, the case for Professor Epstein’s draconian solutions becomes less clear. Title VII is an imperfect instrument, capable of complicating women’s emancipation as well as increasing employers’ costs. Yet a fuller understanding of the past and present situation of women argues more powerfully for revision than for repeal.