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WOMEN, RESPONSIBILITY, AND THE MILITARY

*Diane H. Mazur**

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INTRODUCTION

Feminist writers have had difficulty finding an appropriate place for the concept of responsibility, probably because it can mean so many different things. Responsibility can refer to blame or fault, as in being "held responsible" for past harm. It can also refer to the capacity or ability to make constructive choices, as in "taking responsibility" for one's well-being or for the prevention of future harm. Feminists have focused primarily on the first definition, minimizing the assignment of responsibility to women in an effort to avoid blame or fault for harms committed by men. In this sense, victims of sexual harassment, for example, are not responsible for the harms they suffer, and they should have access to legal protection or relief regardless of their own behavior. If gender oppression limits the ability of women to act

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independently and effectively in resisting or preventing these harms, then the victim's conduct should be irrelevant.

The negative side of minimizing responsibility in women, however, is that lack of responsibility is all too close to irresponsibility. If gender oppression limits the ability of women to make independent, autonomous choices on their own behalf, then it also limits the ability of women to make the most responsible, constructive choices. Here the second definition of responsibility becomes important. If victims are not responsible with respect to the harms they suffer, does that also mean victims have a limited capacity to take responsibility for themselves by responding constructively to oppressive circumstances?

A number of writers have considered the dilemma that victimization and responsibility create for women, and they have generally relied on the theory of "partial agency" in resolving the conflict.¹ Agency is a broad concept that encompasses an individual's capacity for independent decision-making and ability to choose, to refuse, and to consent²—essentially all the personal ingredients required for the exercise of responsibility. For women, however, agency "is necessarily *partial* or constrained"³ because women "are limited by structures or

1 See Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 348–50, 361 (1996) [hereinafter Abrams, *Complex Claimants*]; Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 795–800 (1990) [hereinafter Abrams, *Ideology and Women's Choices*]; Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 324–29, 343–46 (1995) [hereinafter Abrams, *Sex Wars Redux*]; Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 YALE L.J. 1533, 1552–57 (1994) (book review) [hereinafter Abrams, *Songs of Innocence*]; Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1305–18 (1992); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1428–31 (1993); 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, 220–22 (1986) [hereinafter Schneider, *Describing and Changing*]; Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 548–67 (1992) [hereinafter Schneider, *Particularity and Generality*]. But see Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U. J. GENDER & L. 269, 292–301 (1996) (criticizing characterization of women as lacking in agency).

2 See Abrams, *Sex Wars Redux*, *supra* note 1, at 306 (defining agency as "capacity for self-definition and self-direction"); *Id.* at 306 n.11 (defining agency as "the ability to *develop* and *act on* conceptions of oneself that are not determined by dominant, oppressive conceptions"); *Id.* at 326 (defining agency as "capacity to exercise meaningful choice in the direction of her own life"); Schneider, *Particularity and Generality*, *supra* note 1, at 549 (defining agency as "autonomy, individual action, individual control, and mobility").

3 Abrams, *Sex Wars Redux*, *supra* note 1, at 306 n.11 (emphasis added).

relationships of oppression.”⁴ “It is remarkably difficult, in the face of contemporary findings on rape, sexual harassment, and the wage gap or work/family conflict, to conclude that women enjoy, and should be represented by feminists as enjoying, uncompromised powers of self-determination.”⁵

Partial agency is a best-of-both-worlds approach that first emphasizes that women, given the circumstances of gender oppression, cannot fairly be held to legal standards that assume a person with full and independent agency. “[W]omen must contend with—and are not presently capable of completely disarming, either collectively or individually—structures and practices that operate to deny or mitigate that capacity.”⁶

The dilemma of denying women’s agency is, of course, that it creates a picture of the “wholly dominated victim,”⁷ one completely incapable of doing anything to improve her lot in life. Partial agency attempts to avoid that extreme characterization by balancing the “backdrop of . . . systematic, gender-based oppression”⁸ with specific descriptions of the limited forms of agency that women do exercise despite oppression. The hope is that greater attention to women’s acts of resistance, even if those responses might not be the ones chosen by a person exercising full agency, will counteract the suggestion that victimization leaves women helpless to do anything to improve their lives.

Their response is to highlight, in the course of describing women’s oppression, those incidents of self-direction that emerge in the lives of systematically oppressed women. This approach seeks to acknowledge the limited but salient instances of resistance and responsibility that occur in that context, and to prevent the emergence of legal doctrines that add stigmatizing representations to the oppressions that women already endure.⁹

But does it work? Is it constructive—or is it counterproductive—for women to characterize themselves as limited by their partial agency? What kind of responsibility does partial agency give to, or take from, women? Does partial agency only establish that women are not responsible for the behavior of men, or does it also suggest women are unable to take the responsibility necessary to improve their own lives?

4 *Id.* at 366.

5 Abrams, *Ideology and Women’s Choices*, *supra* note 1, at 779.

6 Abrams, *Sex Wars Redux*, *supra* note 1, at 306 n.11.

7 *Id.* at 366.

8 *Id.* at 333.

9 *Id.* at 344.

There may be no one answer to these questions that applies to all women under all circumstances. Legal scholarship has examined partial agency largely in generalities; little attention has been paid to its application in the context of any specific institution.¹⁰ This Article takes that step and will test the productiveness of describing women as limited agents in the context of the United States military.

Although the military is a very separate¹¹ and little understood community, it is currently subject to enormous public scrutiny with respect to its treatment of women. The military now seems inextricably connected to the advancement of women, with the success of military women a measure of the progress of women in general. As a result, oddly enough, the military can serve as an excellent testing ground for feminist theory. If the notion of partial agency could be effective in advancing the status of military women, it would probably also advance the interests of women more generally. If, however, the notion of partial agency would work to the detriment of military women, we should at least reconsider the theory's general utility.

Part I of this Article contains an in-depth factual description of the nature of military duty and responsibility, using a nuclear-weapons assignment as a representative example of the working environment for military women.¹² This degree of factual specificity has been, unfortunately, almost uniformly absent from scholarly accounts of women's agency. Until feminist theory is applied in the context of specific institutions, it will be impossible to determine whether intentionally portraying women as limited by partial agency will ultimately undermine women's equality. If, for example, descriptions of women as agency-diminished are fundamentally inconsistent with the full agency required in order to successfully perform certain military tasks,

10 See Abrams, *Ideology and Women's Choices*, *supra* note 1, at 794-95 ("Little scholarship in this area has focused on the generation of these [ideologically influenced] attitudes among women, or, perhaps more importantly, on the relationship between ideological influence and institutional patterns and practices."); Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1037-38 (1992) [hereinafter Abrams, *Social Construction*] ("[S]ocial and institutional influences should be spelled out.").

11 See James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984).

12 From 1979 to 1983, I served as an aircraft maintenance officer and as a munitions maintenance (weapons storage) officer at Air Force bases in the United States and overseas. Both positions involved responsibility for the safety of nuclear weapons, as do many Air Force positions. Coincidentally, the stateside squadron to which I was assigned, the 319th Field Maintenance Squadron, is the same B-52 bomber maintenance squadron chronicled in Judith Stiehm's well-known volume on women in the military. See JUDITH HICKS STIEHM, *ARMS AND THE ENLISTED WOMAN* app. A (1989).

the theory of partial agency may unintentionally demote women to second-class servicemembers.

Part II examines agency theory in the context of sexual harassment law. Sexual harassment issues have been at the core of the recent scrutiny of the status of military women, creating a novel opportunity to examine the intersection of a number of concepts which relate to the law's expectations for women. Issues of agency, choice, responsibility, and blame have previously been intertwined in a way that prevented constructive evaluations of women's conduct under oppressive circumstances. This Part identifies parallel weaknesses in partial agency theory and in feminist criticisms of the "welcomeness" element in sexual harassment law, and offers in their place a definition of responsible behavior that better advances women's equality.

Part III expands on that new conception of responsibility and examines its application under specific factual circumstances of women and the workplace, including the military workplace. The key to devising an effective standard of responsible behavior is to realistically identify the agency that women do exercise under different factual circumstances, without unnecessarily diminishing that agency in a way that is counterproductive to equality. In the end result, the law should never validate behavior—by either men or women—that contributes to women's inequality in the long term.

I. WOMEN'S AGENCY IN THE MILITARY

One of the more frustrating aspects of the recent media focus on women in the military is the false impression of novelty it creates. Women always seem new, at the bottom of any ladder of rank or influence; women represent change, doing things that only men have done before; and men's misconduct is usually attributed to all this newness and change, a demonstration of their resentment at now having to share the military with women colleagues. This spurious novelty, however, exists mostly in the minds of those who have had few occasions to notice military women in the past,¹³

13 Novelty, I suppose, is what makes news news. During the Persian Gulf War, for example, reporters never tired of writing stories about military mothers with young children. Although these military mothers would be disproportionately lower in rank and tenure than military women in general, they were disproportionately featured as bearing the burden of women's military service. I always wondered how the cameras avoided showing the rest of the women, the ones who had been performing the same distinctly non-novel duty for years.

Civilian society has grown increasingly distant from military society since the beginning of the all-volunteer force. Today, military service makes a person distinctive rather than unremarkable, and, as a result, we lose an exchange of knowledge between the two worlds that contributes to understanding.¹⁴ Particularly in academia, there is an unfamiliarity with the military that handicaps our ability to make productive suggestions about how best to improve the institution. I often encounter, for example, unrealistic assumptions about the nature of military service. Many people have a narrow picture of military duty that features blind, fanatical obedience; an absence of rational, moral decision-making; and an atmosphere of retaliation and coercion imposed by a system of rank.

The divide seems even larger with respect to women. Feminist scholars have failed to examine in any specific sense the responsibilities that women accept as part of the military institution.¹⁵ "To the degree that servicewomen are discussed by feminists, they are characterized primarily as victims."¹⁶ But this sole focus on women's victimization necessarily results in a restricted view of women's agency. This view assumes that the only relevant forms of agency are those acts of resistance women take in response to sexually oppressive behavior, ignoring entirely women's agency in relation to their military responsibilities. The full scope of women's agency is far broader than just women's interaction with men, and should also include women's agency as part of the military institution they serve.

What follows is a description of just one example of women's military responsibility, one of the thousands of everyday tasks that women customarily perform. I rely on a job specialty from the U.S. Air Force because it is the service with which I have the most familiarity,¹⁷ and I focus on nuclear-weapons duty because it offers a clear illustration of agency and responsibility unrelated to sex.

Women actually made their first entrance into combat duty positions about twenty years ago when they were permitted to serve as U.S. Air Force missile launch officers.¹⁸ These officers—"missileers"—are

14 See Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1, 28 (1992).

15 See LEISA D. MEYER, *CREATING GI JANE: SEXUALITY AND POWER IN THE WOMEN'S ARMY CORPS DURING WORLD WAR II* 4 (1996) (noting "[f]eminist scholars' unwillingness to address women's position *within* the military").

16 *Id.*

17 See *supra* note 12.

18 For background information on U.S. Air Force missile duty and the integration of women as missile launch officers, see Richard Halloran, *Male-Female Missile Crews Pass Test*, N.Y. TIMES, Dec. 5, 1988, at B8; Richard Halloran, *Some Missile Crews to Pair*

generally in their mid-twenties and have been responsible since the early 1960s for the doomsday duty of launching nuclear ICBMs—intercontinental ballistic missiles—from underground silos buried across the central plains of the United States. Although missile crew members never see the enemy in a traditional line-of-sight sense, the Air Force treats missile launch duty as a combat assignment analogous to flying in combat aircraft. In fact, under the cold-war assumptions in place at the time women began to serve, missile crew members would probably have been the first to come under fire in a nuclear exchange.

Missile duty is a desolate assignment; for obvious reasons, missile launch control facilities are geographically separated from one another and from population centers. They are even geographically distant from the military bases to which the missileers are permanently assigned. A single missile wing, or the unit to which responsibility for all ICBMs at a single Air Force base is assigned, can have more than a dozen separate launch facilities spread over thousands of square miles. Maintenance personnel and launch crews may drive for hours to reach work sites and, given the northern location of many missile bases, winter snow over rural roads often complicates transportation further.

It should not be surprising that missile crew duty is not a nine-to-five job. Crew members descend to their work stations several stories below ground and remain for twenty-four-hour shifts. They lock themselves behind heavy blast doors inaccessible from “topside”; although crew members have electronic views of the outside, no one on the outside can view them. Unexpected changes in weather or crew availability could extend the around-the-clock shift.

Different generations of missiles in the nuclear arsenal have had different types of facilities and different crew sizes, affecting the manner in which women were gradually integrated to unlimited crew duties. At first, in 1978, women were permitted to join only four-person Titan missile crews (two officers and two enlisted persons),¹⁹ which

Men and Women, N.Y. TIMES, Dec. 8, 1987, at A1; Brad Knickerbocker, *Whither the Minuteman?*, CHRISTIAN SCI. MONITOR, Apr. 7, 1983, at 1; Howard Silber, *Single-Sex Minuteman Crews Ordered; Women Resent Silo Segregation*, OMAHA WORLD-HERALD, Jan. 19, 1986, available in 1986 WL 4075136; *The Warren Missileers*, AIR FORCE MAGAZINE, Jan. 1997, at 30; Bernard Weinraub, *Air Force Plans to Assign Women to Titan Missile-Launching Crews*, N.Y. TIMES, Sept. 24, 1977, at 1; *Women Are Cleared for Duty on Missile Launching Crews*, N.Y. TIMES, Feb. 8, 1985, at B5.

19 Judith Stiehm has written a short, very helpful primer containing many of the facts necessary for a basic understanding of military personnel, recruitment, promotion, and assignment policies. The article assumes no prior knowledge and would be

served in three-story underground crew capsules. The earliest women missileers were barred, however, from Minuteman missile sites, which were run by two-person crews from a single-room underground bunker containing the missile equipment, a cot, and a curtained-off restroom area. Later, in 1986, crews composed of two women (but not of one man and one woman) were added to Minuteman facilities as the Titan missiles began to be phased out of the military's inventory. By 1988, however, the Air Force finally grew weary of the scheduling problems created by sex-specific assignments and removed all restrictions on the use of women missileers.

It is probably very fortunate that missile launch crews were integrated to include women twenty years ago, because I have doubts that it would happen today. The crisis-level of attention currently given to issues of sexual misconduct in the military has created an atmosphere making it less likely, ironically, that women's military responsibilities would be expanded. Feminists have taken positions on behalf of servicewomen that sound very much like partial agency, which, in the context of the military, may be counterproductive in the long-term.

If military women's agency is only partial, then what is it missing? As discussed before, the theory of partial agency focuses entirely on agency related to sexual oppression by men. In an earlier essay, *The Beginning of the End for Women in the Military*,²⁰ I have written in more detail about the ways in which women's advocates have presumed that servicewomen are agency-diminished in the realm of sexual conduct, whether consensual or nonconsensual. In short, women are assumed to have less-than-full capacity to decline a noncoercive offer to engage in consensual sexual misconduct,²¹ less-than-full capacity to confront

particularly helpful to those without any exposure to military society. See Judith Hicks Stiehm, *Just the Facts, Ma'am, in It's OUR MILITARY, TOO!: WOMEN AND THE U.S. MILITARY* (Judith Hicks Stiehm ed., 1996). Her explanation of the difference between enlisted persons and officers is representative:

Officers and enlisted are ranked separately, but all officers outrank all enlisted. Enlisted and officers correspond roughly to those military personnel with high school diplomas and those with college degrees, respectively. . . .

Thus, young and inexperienced officers can find themselves giving orders to much older, highly competent, and experienced enlisted personnel.

Id. at 60.

20 Diane H. Mazur, *The Beginning of the End for Women in the Military*, 48 FLA. L. REV. 461 (1996).

21 Consensual sexual misconduct is almost a misnomer in the civilian world; normally conduct is not misconduct unless it is unwanted. The military is very different, as completely consensual intimate relationships can be prohibited and punished by military law. Fraternalization, most often defined as a personal relationship (either platonic or intimate) between an officer and an enlisted person, is against military law.

sexual harassment with an objection and demand to desist, and less-than-full capacity to report inappropriate behavior they cannot control to higher authority.

In their efforts to solve the problem of military sexual misconduct, women's advocates both outside and inside the military have proposed measures designed to compensate for limitations in servicewomen's agency. For example, military women could be barred from unmonitored one-on-one interaction with male colleagues or superiors; military women could be excused from penalty for consensual sexual misconduct with military men; and military women could be afforded alternate ways of reporting misconduct outside usual military channels.²²

These descriptions of limited or partial agency are not at all new; they have been raised before on behalf of civilian women in contending that the law of sexual harassment should reflect the perspective of the reasonable (female) victim, not the offending (male) harasser.²³ What is new is the suggestion in this Article that descriptions of women as partial agents with respect to sexually oppressive behavior may be so fundamentally inconsistent with the agency requirements of a particular occupation that they effectively exclude women from participation.

Returning to the issue of women missileers, one can imagine the din that would be raised if the military was first suggesting integration of missile launch crews today. The idea of locking a lone woman underground with either one or three men for around-the-clock (or longer) shifts, separated from any protective authority by miles of rural, snow-bound highway, without cameras to monitor misconduct, would be an impossible sell under current circumstances.

Interestingly, limitations on women's agency were never an issue when integrating women launch officers.²⁴ The concern at the time, in the late 1970s and into the 1980s, was that both women and men

Personal relationships between two officers or between two enlisted persons can also constitute fraternization if one of the two is responsible for supervising the other. See *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1995) part IV, ¶ 83. See generally David S. Jonas, *Fraternization: Time for a Rational Department of Defense Standard*, 135 MIL. L. REV. 37 (1992). Adultery can be a crime if "under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1995) part IV, ¶ 62.

22 See Mazur, *supra* note 20, at 465-70.

23 See *infra* Part II.B.

24 Women launch officers campaigned for the shift to mixed-sex Minuteman crews because they wanted to train under more senior, experienced male officers. On same-sex women's crews, relatively inexperienced officers were paired with one an-

might have a little more sexual agency than was appropriate—that women and men would capitalize on conditions of enforced privacy to engage in consensual misconduct. The Air Force polled spouses of male missileers for their opinions about women missileers and found that the wives were “generally supportive” of the women, provided they served only with each other and not with their husbands. If there had been any concern for the safety of women missileers, the Air Force would have been less likely to start the experiment with Titan facilities, which left the word of one woman against three men. More likely was the hope that consensual affairs were less likely to take place in the absence of the one-to-one privacy available in Minuteman facilities.

More importantly, lack of attention to the possibility of limitations in women’s agency was consistent with the reason for putting women on nuclear missile duty in the first place: to train the most qualified people available to prevent accidental, unauthorized, or mistaken use of nuclear weapons. Unlike the stereotypical view of military discipline that many hold—unquestioned obedience achieved through coercion and retaliation—safety in military technology, particularly nuclear weaponry, requires decentralized authority and decision-making. Even the lowest-ranking individual involved has the authority to challenge and overrule superiors in the interests of safety.²⁵

Reliance on the judgment of lower-ranking servicemembers plays a necessary role in the concept of “redundancy,” one of the most important factors in nuclear safety.²⁶ Redundancy in either personnel or technology can increase overall safety even if individual components of the system are less than perfectly reliable. For example, if one crew member would fail to notice an unsafe condition on one occasion out of one hundred, the reliability of the operation could be increased by the addition of another crew member with the same level of reliability. Provided that one crew member’s observations are not related to *and are not influenced or controlled by* the observations of the other, the ex-

other. See *Mixed-Sex Crews Signal Missile Policy Change*, OMAHA WORLD-HERALD, Jan. 25, 1988, available in 1988 WL 5256929.

25 See SCOTT D. SAGAN, *THE LIMITS OF SAFETY: ORGANIZATIONS, ACCIDENTS, AND NUCLEAR WEAPONS* 22 (1993).

26 Three other critical factors in nuclear safety are 1) the priority that leadership places on safety and reliability; 2) the development of a decentralized “culture of reliability” at all levels of the organization; and 3) the capacity to learn through trial and error. *Id.* at 17.

pected level of error would drop to only one occasion in ten thousand.²⁷

The Air Force's application of redundancy in the nuclear weapons field is called the "two-man policy,"²⁸ requiring that "a minimum of two authorized persons, each capable of detecting incorrect or unauthorized procedures with respect to the task to be performed and familiar with pertinent safety and security requirements, will be present."²⁹ The policy applies not only to missileers, but to every Air Force officer and enlisted person who repairs, stores, transports, or guards nuclear weapons or nuclear-weapons-loaded aircraft. Servicemembers can even be disciplined for unintentionally violating the boundaries of a "no lone zone"³⁰ during a routine job. The policy is taken extremely seriously,³¹ as it is "designed to ensure that no unstable individual could ever gain control of a nuclear weapon."³²

Of course, the two-man policy is useless unless both persons are individually willing and able to respond decisively if an accident or unauthorized act takes place. The responsibility remains the same whether the circumstances are routine or extreme. Assume, for example, a relatively minor incident³³ in which a maintenance technician

27 *Id.* at 19–21.

28 The phrase "two-man policy" was coined when only men worked with nuclear weapons, and to my knowledge it has not been changed since women have entered the field. It has about as much influence on the status of military women as the phrase "man-to-man defense" has on the status of women who play basketball. Women use both phrases without concern. See, e.g., Frank Litsky, *An Aggressive Old Dominion Pounds Stanford Out of the Final*, N.Y. TIMES, Mar. 29, 1997, at 27 (quoting Stanford basketball star Jamila Wideman, after the 1997 national semi-final game against Old Dominion University, on the reasons for Stanford's loss: "They play a more aggressive man-to-man defense than any team we played this season.").

29 SAGAN, *supra* note 25, at 83 n.87. See also ASHTON B. CARTER ET AL., *MANAGING NUCLEAR OPERATIONS* 50 (1987) ("Two-man rule requires every sensitive action taken with nuclear weapons to be accomplished by two people with the same training and authority.").

30 "No lone zones" are those areas in which the "two man policy" applies and no individual can enter alone. CARTER ET AL., *supra* note 29, at 50.

31 In *United States v. Cansdale*, 1 M.J. 894 (A.F.C.M.R. 1976), a security policeman stole tools from a tool box stored near a nuclear-weapons-loaded B-52 aircraft. He was not only charged with larceny, but also with dereliction of duty for entering a "no lone zone" by himself to steal the tools. "No lone zones" are designated around aircraft by thick red stripes painted on the flightline or by red rope strung on standards set up around the aircraft. See *id.* at 895.

32 SAGAN, *supra* note 25, at 250.

33 Cf. *BROKEN ARROW* (Twentieth Century Fox 1995). For those who have seen the film "Broken Arrow," starring John Travolta, the title phrase is borrowed from the military's system for reporting nuclear incidents or accidents. Events are categorized based on severity, ranging from catastrophic to minor, with the categories named by

bumps a weapon storage cart into a wall, causing a dent in the weapon. The incident has to be documented and reported, even if the person responsible for the accident is higher ranking, and even if that higher-ranking individual threatens to blame the accident on a subordinate or to ruin her career if she makes a report. Without full and unlimited agency with respect to nuclear-safety responsibilities on the part of both team members, nuclear safety is diminished.

The same full and unlimited agency is demanded under the ultimate circumstances for missile launch crews. To prevent an accidental, unauthorized, or mistaken launch of a nuclear weapon, each missileer must independently agree to act jointly in initiating the launch. The following is a description of Minuteman launch procedures:

Each [crew member] has the combination to a double-padlocked safe containing the sealed authentication codes and two launch keys. Each of the two officers would separately decode and compare the codes in the launch order with those in the safe. If the codes match, the officers would then identify another digital group in the launch order just received; this group of eight digits is plugged into the PAL [Permissive Action Link—an electronic lock for the missiles] system and, in effect, arms the missiles. The next step would require the officers to turn dual keys that are located too far apart for either to turn by himself.³⁴

Once a launch procedure begins, the only thing that will prevent an accidental, unauthorized, or mistaken use of nuclear weapons is the independent judgment and agency of an individual crew member.

variants on the "arrow" theme. "Broken Arrow" accidents, like the theft of nuclear weapons portrayed in the film, would be the most serious; "Bent Spear" incidents would be of intermediate severity; and "Dull Sword" would be the designation for incidents involving minor damage to nuclear weapons. See CARTER ET AL., *supra* note 29, app. D, tbl. 2D-1 at 62-63 (summarizing U.S. Army and European reporting requirements).

34 JOHN NEWHOUSE, *WAR AND PEACE IN THE NUCLEAR AGE* 281 (1989) (companion book to the Public Broadcasting System documentary television series with the same title). See also CARTER ET AL., *supra* note 29, at 167-68 (describing the Permissive Action Link control feature).

The Air Force has recently upgraded the original Minuteman command and control equipment housed in the launch facility. The two crew members are no longer physically separated and now sit side by side. But the "two man policy" aspect of the procedure is still retained; the launch now requires a "four-hand key-turn." With four hands necessary to launch, a single officer still cannot act alone. See William M. Arkin, *The Six-Hundred Million Dollar Mouse; Air Force Space Command's REACT Command System*, BULLETIN OF THE ATOMIC SCIENTISTS, Nov. 21, 1996, at 68.

There is no provision for any partial agency on the part of a woman missileer whose partner is a man.³⁵

II. WOMEN'S AGENCY AND SEXUAL MISCONDUCT

How close is the comparison between women's agency with respect to military responsibility and women's agency with respect to sexual misconduct? The two should not be that far apart. "The attributes associated with agency are necessary not only to such intimate pursuits as sexuality, but also to the range of public activities that constitute commercial exchange or citizenship."³⁶ Then why do we view women's agency with respect to sexual interaction so differently? We assume that women have complete capacity to consent in contract, absent extraordinary disparity in power, but question whether women exercise full agency in matters of sexual consent.³⁷ We recognize that women's equal responsibility for the burdens of military service is a prerequisite for equal citizenship,³⁸ but question whether women exercise full agency in response to breaches of military law.

Women's agency in response to sexually oppressive behavior is an extremely sensitive issue. To many feminists, agency leads to an assignment of responsibility, and responsibility then leads to an assignment of blame. As a result, if women are characterized as having anything more than partial agency, they are left open to charges that they are somehow at fault for men's conduct. Agency, however, need not lead inevitably to blame. Servicemembers with nuclear duties, for example, are asked to take responsibility for the misconduct of others and respond in a way that will ultimately improve safety. Taking this responsibility for reducing risk to themselves and others, however,

35 Consider what the military's response should have been if First Lieutenant William L. Calley, Jr., convicted of murder in the My Lai incident in Vietnam, had been a woman. See *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973). In comparison to the Vietnam War era, military women are now more often in a position to commit war crimes. If they are ordered by male superiors to commit war crimes, will we excuse them on the basis of their limited agency with respect to men?

Servicemembers have an obligation to disobey illegal orders from superiors despite the power and authority conferred by higher rank. "They must learn to follow orders *yet retain sufficient autonomy to refuse illegal orders . . .*" JAMES H. TONER, *TRUE FAITH AND ALLEGIANCE: THE BURDEN OF MILITARY ETHICS* 46 (1995). "No one can escape the dilemmas, whether he be a four-star general or a rifleman, a man or a woman." James Glover, *A Soldier and His Conscience*, in *THE PARAMETERS OF MILITARY ETHICS* 143, 143 (Lloyd J. Matthews & Dale E. Brown eds., 1989).

36 Abrams, *Sex Wars Redux*, *supra* note 1, at 351.

37 See Young, *supra* note 1, at 295-96.

38 See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 523-45 (1991).

does not mean that they are at fault in any way for the original misconduct.

There may be something in this view of responsibility that holds promise for women trying to counter sexually oppressive behavior. Martha Chamallas has described the "reasonable" woman as one who is "dedicated to eliminating or alleviating the effects of stereotyping"³⁹ and "consciously interested in improving [her] status in the workplace,"⁴⁰ but not "the average woman who has found a way to cope with, *but not to challenge*, sexually harassing conduct."⁴¹ I believe Professor Chamallas' intention was to describe what changes in the atmosphere of a workplace are reasonable for women to insist upon, but her words could also be read in a way that could potentially have even greater benefits for women. She could have been describing the role that women themselves could reasonably be expected to play in the process of achieving equality in the workplace.

I do not mean to suggest that an emphasis on women's partial agency is never appropriate or that women are never limited by oppressive circumstances in the choices they have available to them. A more specific analysis of women's agency in response to sexual oppression, however, might identify those circumstances in which it is both reasonable and necessary for the law to expect women to exercise greater agency.

A. *Avoiding the Extremes of Agency Theory*

Most propositions tend to swing wildly between extremes. The agency attributed to military women today—at least agency in sexual interaction with military men—is at its lowest possible ebb. More than fifty years ago, however, the equation of victimization and agency for military women was very different. During World War II, women were held largely responsible for inappropriate consensual relationships with military men. Even when the woman was the lower-ranking participant, she usually received disproportionately greater punishment.⁴² "[I]t was the servicewomen's responsibility to say 'no' to these encounters."⁴³

39 Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 116 (1992).

40 *Id.* at 135.

41 *Id.* (emphasis added).

42 See MEYER, *supra* note 15, at 138–39. For example, female officers who were nurses were punished for fraternization with enlisted male medical orderlies, and female enlisted soldiers were punished for fraternization with male officers. The only common denominator was that men were not responsible. See *id.* at 132–34.

43 *Id.* at 139.

This assignment of responsibility to women reflected more than just a "boys will be boys" sentiment. It was part of a characterization of military women that was packed full of agency. "Worries that servicewomen might become sexual victims were joined by depictions of Wacs [members of the Women's Army Corps] as sexual actors and agents engaging in the same types of promiscuity, drunkenness, and sexual adventure tacitly encouraged in male GIs."⁴⁴ Much the same thing happened during the Persian Gulf War. Consensual sexual misconduct within the military was represented as a failure in women's responsibility, as though the misconduct was something women could engage in by themselves.⁴⁵

It seems that all we have accomplished is to move from a system in which only women were punished for inappropriate sexual choices to one in which only men are punished, from one in which men had none of the responsibility to one in which men have all of it.⁴⁶ Neither extreme is helpful to women. "When we opt for either/or thinking, we actually opt out of thinking."⁴⁷ In her article *Surviving Victim Talk*, Martha Minow cautions against a view of victimization that silences any particularized discussion of responsibility. "Treating all participants as more than mere victims and more than mere perpetrators, recognizing the capacity of the most victimized for choice, redressing the structures of constraint, and treating responsibility not as blame but as the ability to respond—these elements seem to make a difference."⁴⁸

Treating responsibility not as blame but as the ability to respond—that is the key to characterizing the law of sexual harassment in a way that is

44 *Id.* at 34.

45 *See id.* at 183 ("These rumors placed the responsibility and blame for sexual activity on women and made no mention of their male sexual partners.").

46 The infamous case of First Lieutenant Kelly Flinn is distinguishable. She was discharged from the U.S. Air Force for conduct primarily related to an inappropriate consensual relationship with a civilian man, not a military man. We seem to grant a greater degree of agency to military women in their sexual interaction with civilian men; there is no excuse for failing to conform one's conduct to the law. However, Lt. Flinn's lawyer still did his best to portray his client, a B-52 bomber pilot, as incapacitated by the influence of manly charm. *See, e.g.,* Nancy Gibbs, *Wings of Desire*, TIME, June 2, 1997, at 28; Gregory L. Vistica & Evan Thomas, *Sex and Lies*, NEWSWEEK, June 2, 1997, at 26.

More generally, Lt. Flinn's case suffered from a number of misrepresentations and confusions created by both defense counsel and the military; the media were almost never knowledgeable enough to identify them. *See generally* Diane H. Mazur, *The Top Ten Things People Don't Understand About Kelly Flinn* (1997) (unpublished manuscript, on file with the author).

47 Minow, *supra* note 1, at 1443.

48 *Id.* at 1444.

constructive for women. But the temptation toward the categorical position seems irresistible, arising from an enormous reluctance to evaluate women's behavior at all. Suggesting that women have choices in how they respond to sexual harassment will inevitably lead to judgments of "bad" choices as well as "good" choices. Scholarship on sexual harassment, therefore, tends to minimize agency in an attempt to shield women's behavior from the risk of unfair review.

Entire categories of potential acts of agency in response to sexual oppression have been eliminated. As a result, we no longer make distinctions in capacity for agency under different circumstances—it is easier to start with the assumption that agency is restricted across the board. For example, in the context of noncoercive, consensual misconduct, women could potentially take responsibility to decline to participate. In the context of sexual harassment, women could potentially take responsibility to confront and object to the behavior, or to report to higher authority the misconduct they are unable to control. Once again, I am not suggesting that women are responsible for, or are at fault for, men's behavior—but they could potentially take responsibility for their own behavior in responding to misconduct in a constructive way. Whether the law of sexual harassment should encourage such constructive responses is a question that has not yet been answered.

Most writers in the field, however, prevent the question from being asked at all. With consensual misconduct, it is easier to eliminate the issue by simply declaring that "there is no such thing" as a consensual relationship under circumstances of inequality.⁴⁹ With sexual harassment, a woman acts reasonably even though she does not challenge, object to, or complain about misconduct, because it is possible she could lose her job if she refuses to be a compliant victim.⁵⁰ Both

49 See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 831 (1991) ("The more radical response to this argument is that there is no such thing as truly 'welcome' sex between a male boss and a female employee who needs her job."); Young, *supra* note 1, at 280 (criticizing blanket assumption that "no matter what the student may believe, no affiliation between a professor and a student is ever truly consensual").

50 See Abrams, *Sex Wars Redux*, *supra* note 1, at 365 ("These are the ways in which women under oppressive conditions seek to secure themselves from offensive conduct while preserving their employment opportunities and livelihood."); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 801 (1988) ("In both the rape and sexual harassment contexts, resistance on the part of the victim was apt to be risky. The noncompliant employee risked losing her job"); Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 527 ("This burden [of confrontation or complaint] . . . harshly ignores the real fears of many targets that either action could result in retaliation or discharge").

of these assumptions, although they carry some degree of truth, are "conversation stoppers." They leave no room for rational analysis of factual circumstances and no room for discussion of whether different assumptions might lead to a more effective remedy. Although, for example, there may be a possibility a woman could be fired for confronting harassment, there is almost a certainty the harassment will not end until she does confront it.

Even when sexual harassment scholars concede that women have some capacity for choice in responding to oppression, their options are characterized in stark extremes. Once an option for the exercise of agency is established as an unrealistic "straw man," it becomes easier to dismiss the possibility as unreasonable and unhelpful. For example, if the primary agency attributed to a victim of sexual harassment is her freedom to quit and go elsewhere,⁵¹ it seems unreasonable to expect her to exercise any agency at all because the consequences are so severe.

Overstatement or misrepresentation, even in the service of higher goals, is usually counterproductive. Lawyers can be some of the worst offenders; their zeal in representation can sacrifice long-term good for many in the process of achieving short-term good for one:

In justifying legal intervention or a mitigation of legal sanction, lawyers have described, and judges have acknowledged, a female subject wholly incapable of self-direction, whom the law must rescue from her plight or relieve of responsibility for her actions. The pragmatic interest of feminist lawyers in securing positive outcomes for their clients has often made them complicit in this dichotomizing tendency.⁵²

Descriptions of women as victims, stripped of capacity for independent agency, are "off-putting,"⁵³ to say the least, to some women. More importantly, descriptions that misrepresent the factual complexity of women's capacity for choice can harm women more

51 See Mahoney, *supra* note 1, at 1294 (explaining why "exit" is an unattractive choice for victims of sexual harassment). Professor Mahoney objects, as I do, to "[e]quating exit and agency," *id.* at 1285, but I believe she downplays the utility of more direct, confrontational forms of agency. She first notes a number of potential acts of agency in response to sexual harassment—"telling the perpetrator to 'knock it off,' filing complaints through company mechanisms, bringing lawsuits, or taking political action"—but then dismisses these options as unrealistic because they could result in stigma, bring emotional pain, or be ignored. *Id.* at 1290.

52 Abrams, *Sex Wars Redux*, *supra* note 1, at 351–52.

53 Abrams, *Ideology and Women's Choices*, *supra* note 1, at 762.

than it can help them in the long run.⁵⁴ Then why go down that road? Strangely enough, it is the concededly inaccurate, "over the top" nature of the characterizations that is rewarded with a measure of praise in some quarters. The more that pictures of women as agency-diminished are "amplified"⁵⁵ (a euphemism, I believe, for "exaggerated"), the more they seem to persuade skeptical audiences.⁵⁶

I always warn my students they should be wary of advancing arguments in which they will "meet themselves coming back around the other way." Less awkwardly phrased, overstatement for the benefit of one strategic purpose almost inevitably leads to vulnerability on another issue—and the end result is usually negative.⁵⁷ This warning has held true with the treatment of agency in the context of sexual harassment law.

B. Women's Agency and the Definition of "Welcomeness" in Sexual Harassment Law

The concept of women's agency finds its closest counterpart in sexual harassment law in the element of "welcomeness." Inappropriate sexual behavior in the workplace—conduct that creates a "hostile environment"—is actionable only if the behavior is unwelcomed by the plaintiff.⁵⁸ Agency and welcomeness are analogs to the extent that they both focus on the conduct of women; inappropriate sexual behavior is unwelcome when a woman demonstrates that it is unwelcome, normally "by her conduct."⁵⁹

The concepts of agency and welcomeness are also linked in the critiques they receive. Feminists have argued that it is inappropriate to examine women's behavior—whether for expressions of welcomeness or of agency—in a context in which men's behavior ought to be the focus. "[W]elcomeness serves as a means to keep the focus on the woman rather than the supervisor; on what she, rather than he, has done wrong; and on whether *she* deserves to be treated with human

54 See *id.* at 776 (recognizing that limited-agency arguments could support position "that women lack the capacities for self-determination necessary to give them autonomous control over all spheres of their existence").

55 *Id.* at 774.

56 See *id.* at 770–72, 774–76.

57 In an earlier article I explain why characterizations of gay military plaintiffs in both scholarship and litigation have been misrepresentative, and why those strategically-motivated mischaracterizations will be harmful in the long term. See Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223 (1996).

58 See generally Radford, *supra* note 50, at 503–05.

59 *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

decency, rather than whether *he* violated the standards of decency and humanity.”⁶⁰ It has “the potential to transform a claim of sexualized injury into a ‘trial of the victim.’”⁶¹

The strongest scholarly objection to the element of welcomeness would eliminate it entirely:

It is gratuitously punitive if the environment is found objectively hostile, for in that case the employer can nonetheless escape the burden of addressing the issue, by portraying this particular woman as so base as to be unworthy of respect or decency, and by arguing that she thus welcomed, through her conduct, an environment which a “reasonable” women would have perceived as hostile.⁶²

Other writers advocate shifting the burden of proving welcomeness to defendants, which would in the typical case require men to affirmatively prove that their sexual behavior was welcomed by women rather than require women to prove that it was not.⁶³ Even in these

60 Estrich, *supra* note 49, at 833.

61 Abrams, *Sex Wars Redux*, *supra* note 1, at 362 n.225.

62 Estrich, *supra* note 49, at 833.

63 See Radford, *supra* note 50, at 525–30. Welcomeness seems more in the nature of an affirmative defense, more properly provable by the defendant. The defense of welcomeness essentially concedes that the defendant inappropriately introduced behavior of a sexual nature into the workplace, but alleges that the plaintiff also contributed to that unprofessional workplace atmosphere by her own behavior. In that sense welcomeness is analogous to the equitable affirmative defense of “unclean hands.” See Chamallas, *supra* note 50, at 809 (describing the defense of welcomeness as the “‘clean hands’ approach”).

“Welcome” sexual behavior has been viewed by some courts as “an inevitable aspect of a gender-integrated work environment,” Radford, *supra* note 50, at 504, or as “ostensibly harmless sexual interplay thought to exist in most workplaces,” Abrams, *Sex Wars Redux*, *supra* note 1, at 362. It is not surprising that feminists are outraged when clearly rank, offensive sexual conduct is deemed welcome under this definition, because it suggests that rank, offensive sexual conduct is “inevitable” or “harmless.” The actual scope of welcomeness is something wider, also incorporating the “unclean hands” principle. Even if a defendant’s inappropriate sexual conduct was, considered alone, unwelcome, the plaintiff will not be afforded a remedy for that conduct if she also has brought inappropriate sexual behavior into the workplace.

It is misleading, in either case, to characterize welcomeness as a “*presumption* that most workers welcome sexual conduct.” See Radford, *supra* note 50, at 526 (emphasis added). Placing the burden of proof on sexual harassment plaintiffs to prove unwelcomeness does not presume conduct was welcome any more than placing the burden of proof on negligence plaintiffs presumes that injury occurs without negligence.

Burdens of proof are not presumptions; rather, evidentiary presumptions operate to help parties meet burdens of proof. “The term ‘presumption’ describes a device that sometimes requires the trier to draw a particular conclusion on the basis of certain facts.” CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 134 (1995). For example, the beneficiary in an insurance suit may benefit from a pre-

more moderate criticisms of welcomeness, however, one finds the underlying assumption that the concept is superfluous because women could have only one possible response to sexual interaction in the workplace. How could women possibly welcome conduct that is "humiliating, severely distracting, and potentially harmful to their ability to perform successfully at their jobs"?⁶⁴

This viewpoint, though, assumes the conclusion. Of course, women do not welcome conduct they find humiliating; whether they might welcome conduct they do not find humiliating is another question. Interestingly, critiques of women's agency and critiques of the welcomeness requirement echo one another in that both characterize women as diminished or limited in their capacity for responsible choice. If we assume that women are limited in their capacity to respond constructively to sexual oppression, then we never have to consider what a constructive response might be and whether the law should encourage it. If we assume that women are incapable of contributing to an unprofessional atmosphere of sexual interaction in the workplace, then we never have to consider whether their behavior is ever counterproductive for the advancement of women and whether the law should discourage it.

Once again, it all comes back to how one views the concept of responsibility. Critics of the current state of sexual harassment law believe that judicial scrutiny of welcomeness implies that women are ultimately responsible for men's misconduct. "[I]n making the determination of the harassment of women dependent upon the extent of 'sexually provocative' behavior by women, the Court adopts a rule which holds women responsible for their own torment."⁶⁵ But this criticism is overstated. Women are responsible for their own conduct,

sumption of accidental death that arises once the beneficiary offers evidence of the insured's sudden, violent death. The presumption allows the beneficiary to meet his or her burden of proof on the issue of accidental death without actually offering evidence that bears directly on cause of death. Because a presumption only assists in meeting a burden of proof, it would not make sense to describe a party *without* the burden of proof on an issue as benefiting from a presumption. *Id.* at 139. Defendants in sexual harassment cases do not carry the burden of proving welcomeness; therefore, no presumption of welcomeness exists.

64 Radford, *supra* note 50, at 526. See also *id.* at 505 (contending that the element of welcomeness "perpetuates the myth that most people are not offended by attention of a sexual nature in the workplace"). In a footnote, Professor Radford also acknowledged that it could be counterproductive to eliminate the element of welcomeness altogether, as it "might imply the extremist notion that women *never* welcome sexual attention or interaction at work and thus must be protected from all advances made by their colleagues." *Id.* at 541 n.250.

65 Estrich, *supra* note 49, at 829.

not men's conduct.⁶⁶ If sexual harassment law denies some women a remedy, it does not do so because these women are base, undeserving of human decency, or unworthy of respect.⁶⁷ It does not do so because some women deserve in any way to be harassed. Properly applied, it should deny a remedy only if women's conduct is counterproductive to the goal of improving the status of women in the workplace.

One of the reasons the current crisis of sexual misconduct in the military has been so intractable is because incidents of sexual harassment and assault have taken place against a startling backdrop of undisciplined consensual misconduct by both military men and military women. Although the result is often unfair to unconsenting victims, the reality is that it is enormously difficult to select out a smaller number of instances of nonconsensual misconduct from a much larger number of instances of consensual misconduct.

The Army's investigation into sexual assaults committed at its Aberdeen Proving Ground training installation provides an illustration. The military's current scandal of sexual misconduct began there, with drill sergeants accused of a series of sexual offenses against women in Army technical-training programs.⁶⁸ In the process of investigating

66 Self-defense claims on the part of women who kill their abusive partners raise similar definitional issues of responsibility. For example, Elizabeth Schneider critiques the state of self-defense law for women in the following way: "Many commentators have noted the troubling result of the focus on why the woman does not leave. Asking this question places responsibility on the woman, and puts her conduct under scrutiny, rather than placing the responsibility on the battering man." Schneider, *Particularity and Generality*, *supra* note 1, at 558. See also Mahoney, *supra* note 1, at 1300 (arguing that question "why didn't she leave?" "directs attention away from the batterer's quest for power and control, shifting inquiry to the legitimacy of *response* in the person who was harmed") (emphasis added).

This criticism, however, raises two completely different issues of responsibility, one for men and one for women, which are not directly comparable. The battering male has already failed in his responsibility not to commit violence upon his partner. The battered female, in contrast, has the responsibility to respond to violence in a lawful manner. Legal scrutiny of non-violent options available to her does not relieve her male partner of responsibility for his conduct; scrutiny of her options does not make her responsible for his violence. The battered female, however, is still responsible for her own choices in response to violence. Expert testimony is critical for the fact-finder's understanding of whether those choices were realistic.

67 See Estrich, *supra* note 49, at 833.

68 See Elaine Sciolino, *Sergeant Convicted of 18 Counts of Raping Female Subordinates: Verdict Sends Signal Throughout Armed Forces*, N.Y. TIMES, Apr. 30, 1997, at A1. There is a common misunderstanding that because the defendant sergeants in the Aberdeen cases were described as "drill sergeants," these assaults were committed against the Army's newest recruits during basic training. Aberdeen Proving Ground is a technical-training installation, devoted to teaching the specific skills required for different

the charges, the Army discovered a level of consensual misconduct that was completely out of control. "[A] parade of former trainees, all women, . . . testified that drill sergeants and trainees alike routinely initiated consensual sexual relations—a violation of military law" ⁶⁹

One after the other, the female witnesses also described a free-wheeling, libidinous atmosphere in which sexual activity between superiors and subordinates and adultery were rampant, drill sergeants competed to have sex with as many female trainees as they could and trainees found endless ways around the rules.

Soldiers had sexual intercourse in a public game-and-television room and in the backs of buses, and it was common to find empty liquor bottles and used condoms in the trainees' barracks and storage rooms in the mornings ⁷⁰

The problem that consensual sexual misconduct introduces in controlling nonconsensual behavior is not limited to situations in which military men outrank military women. During the Tailhook free-for-all of 1991, some female officers contributed, along with their male colleagues, to an atmosphere that fostered sexual assault. ⁷¹

military career specialties. Soldiers are not assigned to these training schools until after they have successfully completed basic training. *See id.* Technical-training schools serve as a bridge to regular military life; the unrelenting degree of supervision and discipline characteristic of basic training is reduced to encourage independent responsibility and self-sufficiency. By this time servicemembers have also received an initial program of orientation about how the military *should* work, and they presumably have been educated about appropriate and inappropriate forms of sexual conduct.

69 Elaine Sciolino, *Rape Witnesses Tell of Base Out of Control*, N.Y. TIMES, Apr. 15, 1997, at A8. In the civilian context, Martha Chamallas has raised the question whether lower-status individuals (students or employees, for example) should also be sanctioned for engaging in inappropriate but consensual relationships with superiors. *See Chamallas, supra* note 50, at 847, 860. She recognized that excusing the lower-status individual from responsible behavior will, in practice, leave the impression that "women must be protected against sex, even against their own wishes." *Id.* at 860. In the end, Professor Chamallas concluded that reinforcement of women's diminished agency is the lesser evil. "[T]he alternative—punishing both parties to the relationship—is even less appealing." *Id. But cf. Young, supra* note 1, at 294 ("Unfortunately, once sexual harassment policies were in place, some of the policy creators expanded the 'victim' class to include students engaged in consensual relationships with professors.").

70 Sciolino, *supra* note 68, at A12.

71 *See* JEAN ZIMMERMAN, *TAILSPIN: WOMEN AT WAR IN THE WAKE OF TAILHOOK* 4 (1995) (noting the participation of female Naval officers in public "leg-shaving" at the Tailhook convention); *see also* GREGORY L. VISTICA, *FALL FROM GLORY: THE MEN WHO SANK THE U.S. NAVY* (1995) (reporting that one female Naval officer—a lawyer—served drinks while topless at an earlier Tailhook convention). Gregory Vistica was

I am not suggesting in any way that the Aberdeen and Tailhook men who sexually assaulted or harassed women, or who otherwise engaged in inappropriate sexual behavior while representing the military, should not have been held accountable. I am suggesting that we must consider whether it is constructive to assume, with respect to the element of welcomeness, that women are incapable of contributing to a sexualized environment. We must similarly consider whether it is constructive to assume, with respect to sexual harassment, that women are incapable of responding to inappropriate conduct in a responsible manner. It is possible that an expectation of diminished capacity ultimately works more to the detriment than to the benefit of all women.

C. *The Tentativeness and Timidity of Partial Agency*

The scholarship of Kathryn Abrams has been the most courageous, by far, in attributing to women the capacity for responsibility in the context of sexual oppression. She has resisted categorical representations of women as diminished in agency, explaining that "it is strategically advantageous for feminist scholars, in communicating with even vaguely receptive audiences, to avoid presenting women's powers of self-determination as largely or completely compromised where they are only partially compromised."⁷²

Professor Abrams' work discourages reliance on the "polar imagery" commonly associated with women's claims for relief.⁷³ These overstated characterizations can be used in an effort to protect women not only from oppression but also from the consequences of factual complexity, choice, and responsibility. Exaggerated descriptions of women's diminished capacity for agency paint "an imbalanced portrait of women's lives that discourages them from noticing or availing themselves of a resource that is crucial to their resistance."⁷⁴ That resource, in my view, is women's capacity for constructive response.

The theory of partial agency confronts strategic assumptions with facts and specificity. It searches out specific "incidents of self-direc-

the reporter who first publicized the Tailhook incident in 1991. See *id.* at 332-35. Vistica noted that much of the Tailhook reporting was factually selective. "It was an easy story for the press to trumpet: drunken military men sexually assaulting innocent female victims. The networks, CNN, and the major newspaper dailies easily latched on to that theme and avoided the more complex issues of women as aggressors and men as victims." *Id.* at 347.

⁷² Abrams, *Ideology and Women's Choices*, *supra* note 1, at 779 n.54.

⁷³ Abrams, *Sex Wars Redux*, *supra* note 1, at 361. See also *id.* at 375 ("[A]ctual human lives are not confined to the dichotomous poles that they characteristically occupy in law").

⁷⁴ *Id.* at 343 n.153.

tion”⁷⁵—acts of agency—“highlighting the ways in which many oppressed women express resistance.”⁷⁶ In identifying particular acts of agency that women choose under oppressive circumstances, the approach of partial agency concedes, even celebrates, that some capacity for choice exists. Women are characterized as “neither wholly empowered, nor wholly incapacitated, in those contexts where they are targets of sexualized conduct.”⁷⁷ Partial agency therefore runs counter to the impulse of pure dominance theorists to conceal facts demonstrating that agency exists and therefore avoid judgment on whether it was exercised reasonably.⁷⁸

Partial agency’s emphasis on factual context rather than generality can only be a positive for women. It opens discussion of what—exactly what—is reasonable to expect from women functioning under oppressive circumstances. It also forces an examination of the relationship between reasonableness and constructiveness, which is another way of describing responsibility. Even if a legal standard accurately measures what is reasonable, or prevalent, or expected in the behavior of women, we should then ask whether what is reasonable is also constructive. “Reasonable” conduct that is counterproductive to the goal of improving the status of women may not be responsible conduct if we treat responsibility not as blame but as the ability to respond.

With sexual harassment, the fundamental agency question is whether it is reasonable to expect women to express unwelcomeness directly by either objecting to offensive conduct or by reporting conduct they cannot control to higher authority. The issue directly affects the outcome of sexual harassment litigation, as courts may require, or at least consider, evidence of verbal confrontation in deciding whether workplace conduct was welcome.⁷⁹

Even Professor Abrams seems ambivalent about whether we should expect women to register an objection to inappropriate workplace conduct. On the one hand, she wants to believe that women do have the capacity to object. “When feminist theorists say that we should permit women recourse to law without requiring them to address offenders on their own, they are not necessarily saying that wo-

⁷⁵ *Id.* at 344.

⁷⁶ *Id.* at 361.

⁷⁷ *Id.* at 362.

⁷⁸ See Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 66 (1994) (reviewing cases involving battered-woman defense to homicide and concluding that facts are often selectively reported and “tailored to exploit the same assumptions that earned women leniency under the marital coercion excuse”).

⁷⁹ See Abrams, *Sex Wars Redux*, *supra* note 1, at 364–65.

men are intrinsically unable to resist acquaintance rape or speak straightforwardly to sexual harassers."⁸⁰ She notes that university training programs on sexual harassment suggest that "many women will be able to communicate their disapproval of harassing behavior with energy and resolve."⁸¹

On the other hand, there is a concern of unfairness; given the way women are socialized, some women would not feel comfortable objecting to sexual harassment in a direct manner.⁸² On balance, Professor Abrams concludes that women are better served by discarding any legal expectation of direct objection; the better result is to recognize the ways in which women customarily respond to sexual harassment as legally sufficient to show unwelcomeness. "[F]eminists should make visible the subtle, unnoticed instances of resistance that characterize women's lives and prevent the imposition of legal rules that either obscure or undermine such resistance."⁸³

[W]omen make many efforts to resist and extricate themselves from harassing environments, few of which involve direct objection. Women confronted with workplace harassment most commonly try to short-circuit or extricate themselves from the behavior through jocularity, changes in subject, or efforts to avoid the perpetrator. That such efforts are not always successful in curtailing the harassing conduct . . . should not . . . make them irrelevant to the issue of unwelcomeness.⁸⁴

Women's reasonableness, therefore, is equated with commonality. If most women do not respond to inappropriate workplace behavior by confronting their harassers and telling them to stop, or by reporting the behavior to higher authority,⁸⁵ and if most women do respond to sexual harassment with avoidance or passive toleration,⁸⁶ then this prevailing response constitutes the "reasonable woman's" perspective on the issue of welcomeness.⁸⁷ The scope of reasonableness is limited only by the range of frequently observed behavior. One writer's list of women's behaviors still considered to be reasonably consistent with unwelcomeness extends much further.

[T]he following actions (or, for some, "non-actions") would not be affirmative evidence of solicitation or consent: silence; a polite "no;"

80 Abrams, *Songs of Innocence*, *supra* note 1, at 1552.

81 *Id.* at 1544.

82 *See id.* at 1547-48.

83 Abrams, *Sex Wars Redux*, *supra* note 1, at 361.

84 *Id.* at 365.

85 *See* Radford, *supra* note 50, at 527.

86 *See id.* at 524.

87 *See* Abrams, *Sex Wars Redux*, *supra* note 1, at 365 n.243.

evasive behavior; laughing, smiling, or otherwise attempting to make light of the advance; backing away or withdrawing one's hands but not physically leaving the harasser's presence; maintaining eye contact; changing the subject; accepting a kiss on the cheek or a quick hug; the failure to complain.⁸⁸

This is the point at which partial agency in the sexual harassment context becomes too timid and tentative. Has women's agency—women's capacity to respond—been limited to a degree that precludes progress? Does the law of sexual harassment work uphill if it validates passive, subservient, and obsequious behavior that may only reinforce workplace inequality?⁸⁹ If women's instances of resistance are "subtle" and "unnoticed,"⁹⁰ then they accomplish nothing in changing the status of women in the workplace. Recognition of subtle and unnoticed instances of resistance by courts will benefit only that microscopic percentage of women whose claims are litigated. If resistance cannot be heard in the workplace, it will have no meaningful effect.

Even the potential benefit of counteracting stark, agency-diminished images of women fails. Professor Abrams suggests that emphasis on women's indirect acts of agency "might also help to mitigate the cultural assumption that sexual harassment victims who do not directly confront their harassers do nothing to halt, interrupt, or indicate their displeasure with the offensive conduct."⁹¹ These indirect acts of agency may show that women "do something," but unless women who face sexual harassment "do something worthwhile," nothing will change.

There is such a reluctance to leave anyone behind; if *any* woman might be incapable of responding in a constructive manner, then the law should expect *no* woman to respond in a constructive manner. Even the most timid form of partial agency is considered a risk because some women may not be able to summon that level of constrained resistance.⁹² Each time the law reduces its expectation for constructive response, however, we lose an opportunity to rectify inequality.

88 Radford, *supra* note 50, at 532.

89 See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 613 (1990) (recognizing that feminism's embrace of women's shared victimization plays into men's sexist ideology).

90 See Abrams, *Sex Wars Redux*, *supra* note 1, at 361.

91 *Id.* at 366.

92 See *id.* at 366, see also Abrams, *Social Construction*, *supra* note 10, at 1039 (proposing evaluation of workplace conduct from the perspective of the "most vulnerable woman" rather than the "reasonable woman").

Partial agency comes very close to providing a productive framework for crediting women's conduct under restrictive circumstances. The theory recognizes that fact-specific accounts of women's capacity to respond can create socially constructive images, and it "challenges feminist reformers to see the many ways in which a legal rule or claim may influence norms regarding gender."⁹³ The challenge remains unmet, however, if the legal standard validates or ratifies a response that increases the incidence of the original wrong.

Law has the potential to be "a system of incentives for encouraging socially optimal behavior."⁹⁴ It can balance short-term expedience with long-term benefit and encourage conduct—even if it is not the easiest, most risk-free choice at the time—that ultimately works to reduce the need for legal intervention.⁹⁵ There is a justifiable reluctance to expect more from women under oppressive circumstances, and the suggestion that women should respond more constructively can turn into "blaming the victim" in an instant. But we do women no favors if we are afraid to encourage the behavior necessary to achieve workplace equality.

I strongly disagree with the assumption that individual confrontation of sexual harassment does little to reduce its frequency.⁹⁶ It may be easier to assume that women's agency is ineffective than to accept the consequences of its effectiveness. But in the long term, we cannot continue to work at cross-purposes by excusing women from exercising responsibility in response to sexual oppression. Women can, and should, take responsibility—defined not as blame, but as the ability to respond—in controlling inappropriate behavior in the workplace.

III. A NEW STANDARD OF RESPONSIBILITY

How should the law measure what is a responsible, rather than a merely reasonable, response to sexually oppressive behavior? The first mistake would be to assume that the answer would be the same for all women, under all circumstances. This was the promise of partial agency; it could have highlighted specific factual circumstances that

93 Abrams, *Sex Wars Redux*, *supra* note 1, at 353.

94 Abrams, *Songs of Innocence*, *supra* note 1, at 1555 n.83.

95 Discipline by lawsuit is an imperfect solution. It leads to hostility, ostracization, and resentment in the workplace, and may be the least effective way of achieving permanent change. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1215–16 (1989) [hereinafter Abrams, *Gender Discrimination*].

96 See Abrams, *Songs of Innocence*, *supra* note 1, at 1548 (concluding that confrontation "would only address the coercive behavior in the individual case; it would do little to mitigate the broader social problem").

increased or decreased capacity for agency. Rather than risking judgment of some women, however, partial agency ultimately assigned a similarly limited agency to all women.

There seems to be an unresolvable conflict between the fear of essentializing the experiences of women and the fear of *not* essentializing them. On the one hand, it is inappropriate to assume that all women can be described in the same way—that a “unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience”⁹⁷—just because they are all women. On the other hand, failing to essentialize women may be an even riskier proposition. If women are not all the same, then we risk having to deal with the suggestion of greater and lesser, better and worse, or superior and inferior.

This may have been the major stumbling block for the application of partial agency theory to women’s responses to sexual oppression. If certain groups or categories of women were thought to have a greater capacity for agency, given their advantages or other supportive circumstances, then these women would have a correspondingly greater responsibility to confront sexual misconduct by men. Furthermore, the characterization of some women as stronger and less limited in their agency inevitably leaves some women weaker in comparison. As a result, the question of essentialization balances on a very thin edge. It is admirable to recognize the problems of essentialism, but it is not admirable to speculate too specifically on what those problems might be.⁹⁸ Partial agency, however, should find its greatest strength in its willingness to be specific and not succumb to the easy temptation of overstatement. Factual accuracy is not bad for women; only factual inaccuracy is a danger.

A. *Anti-Essentialism and Agency*

If women differ in their capacity for agency with respect to sexual misconduct by men, how should the difference be measured or described? Writers who assume that women do in fact differ also assume that they differ along the usual familiar lines of legal distinction. “By arguing that the social meanings ascribed to gender affect most wo-

97 Harris, *supra* note 89, at 585.

98 Katherine Franke seems to wryly recognize this dilemma. See Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L.J. 2661, 2675–76 (1997) (“The disclaimer provided at the end of the introduction reiterates, in a now familiar fashion, what has come to be the familiar footnote to Kim Crenshaw’s ‘intersectionality’ article in almost every article written on feminist jurisprudence by a white woman.”).

men in the same (strong) ways, ideological determination arguments neglect the crucially diversifying influences of race, class and sexual orientation."⁹⁹

But what does that mean in any specific sense? How exactly do we envision that these different groups of women differ in their responses to sexual misconduct? If "particular constraints may be specific to the circumstances of a group,"¹⁰⁰ what kinds of constraints are we looking for? What kinds of groups are we looking for? Except with respect to race and ethnicity, the idea of anti-essentialism has remained almost entirely free of any specific factual content.

Angela Harris has suggested that black women can help feminism move beyond its "fascination with essentialism"¹⁰¹ through factual accounts demonstrating that women are not inevitably and uniformly disadvantaged by diminished agency. "At the individual level, black women have had to learn to construct themselves in a society that denied them full selves."¹⁰² Factual specificity is once again the key, just as it should have been for the most profitable application of partial agency.¹⁰³ "[N]arratives and stories, accounts of the particular, the different, and the hitherto silenced"¹⁰⁴—and the more detail the better—can confront the enforced generality that tends to limit all women equally.

In contrast, there has been only the most tentative effort to describe an anti-essentialist viewpoint on how factors of class might affect women's ability to respond constructively to sexual oppression. For example, the question was raised anecdotally following the Anita Hill-Clarence Thomas congressional hearings. Some writers have noted that working-class women tended to disbelieve Anita Hill; they saw in her behavior a reluctance to directly confront Thomas and just tell

99 Abrams, *Ideology and Women's Choices*, *supra* note 1, at 768; accord Abrams, *Social Construction*, *supra* note 10, at 1035 (same distinctions). Compare Abrams, *Ideology and Women's Choices*, *supra* note 1, at 799 (adding "family background" and "other individual factors"), with Schneider, *Particularity and Generality*, *supra* note 1, at 531 (adding factors of ethnicity, age, and "other dimensions" in the context of battered women), and Linda C. McClain, "Irresponsible" *Reproduction*, 47 HASTINGS L.J. 339, 435 (1996) (adding factors of ethnicity, age, and cultural and religious beliefs, in the context of reproductive choice).

100 Abrams, *Songs of Innocence*, *supra* note 1, at 1557.

101 Harris, *supra* note 89, at 612.

102 *Id.* at 613.

103 See Abrams, *Ideology and Women's Choices*, *supra* note 1, at 796–800 (advocating complex, multi-causal explanations and narrative accounts).

104 Harris, *supra* note 89, at 615. See also *id.* at 585 ("contemporary legal theory needs less abstraction and not simply a different sort of abstraction").

him to “knock it off.” This curious failure, in their view, to respond effectively made her story suspect.¹⁰⁵

It is counterintuitive to suggest that the standard “essentialist” woman—one privileged in class—should be classified as having relatively diminished agency in response to sexual oppression. To the extent that class-privileged women enjoy greater economic security, they should also have an enhanced ability to challenge inappropriate behavior in the workplace. Sometimes the privileged woman is even characterized as “domineering” and “aggressive,” subject to “a stereotype that afflicts white, upper-middle-class professional women.”¹⁰⁶ More commonly, however, professional women are characterized as relatively diminished in agency; the workplace’s “most vulnerable woman” is not necessarily its least privileged.¹⁰⁷

Feminists have expressed concern that the “reasonable woman” standard may be built on the skewed experiences of white, straight, class-privileged professional women. The worry is that this essentialist picture erases the perspectives of those who fail to fit the mold,¹⁰⁸ but the danger in the agency context may be something greater. If characterizations of diminished agency are written to fit a narrow slice of professional women who see themselves as having a particularly limited capacity to respond constructively to sexual misconduct, then the bulk of women may be disadvantaged as a result. Not only are the specific facts that make their perspectives distinctive eliminated, but the generalities substituted for them are at odds with the agency they are otherwise expected to exercise.

The picture of elite women as diminished in agency may be more than just a picture; it may accurately reflect that elite women are in fact disproportionately limited by a self-concept of diminished agency. The well-known study of women law students at the University of Pennsylvania Law School, *Becoming Gentlemen: Women’s Experiences at*

105 See Schneider, *Particularity and Generality*, *supra* note 1, at 566–67 n.193; Abrams, *Social Construction*, *supra* note 10, at 1036.

106 Abrams, *Social Construction*, *supra* note 10, at 1037.

107 See *id.* at 1039; see also Abrams, *Complex Claimants*, *supra* note 1, at 349 (noting that white, middle-class, heterosexual women are assumed to have little agency, while women who are poor, non-white, or sexually nonconforming are assumed to have full—and culpable—agency).

108 See Abrams, *Social Construction*, *supra* note 10, at 1036 (“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.”).

One Ivy League Law School,¹⁰⁹ serves as a potential illustration. Interestingly, it may also address another factor—sexual orientation—thought to affect the degree of agency that it is reasonable to expect women to exercise.

The authors did not intend *Becoming Gentlemen* to be a commentary on women's agency; instead, they used the study's results to show that women experienced law school in a way very different from their male peers. The article, however, has much to say about women's agency in the context of elite academic institutions and in the elite profession of lawyering. Running through the article is example after example of how incapacitated women students became in the face of what they saw as sexually harassing comments from male students. Many responded to men's inappropriate talk by deciding never again to participate in classroom discussion,¹¹⁰ even though that choice would limit the quality of their legal education, and one woman almost dropped out of law school immediately.¹¹¹

What goes unmentioned in *Becoming Gentlemen*, however, is that the results can be explained more by homophobia and limited agency than by any effect of sexual harassment. Almost without exception, the women who withdrew from full participation in law school because of perceived sexual harassment had done so because a male student had called them a lesbian.¹¹² To these elite, presumably straight women, being called a lesbian by a childish classmate was a worse fate than leaving law school with a subpar education; being called a lesbian might justify giving up plans for a legal career. Apparently there is an astonishing level of homophobia among the largely privileged students at Penn, both men and women. Some men have discovered that they can eliminate women as serious colleagues by using women's own homophobia against them, and those women let them do it.

The diminished capacity of these women to respond constructively to even minor forms of sexually harassing verbal behavior is frightening.¹¹³ In a footnote, but only in a footnote, the authors ob-

109 Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994).

110 See *id.* at 43, 51–52.

111 See *id.* at 51 n.128.

112 See *id.* at 43 (“man-hating lesbian”), 51 n.128 (“man-hating lesbian”; “feminazi dyke”), 52 (“feminazi dyke”). The specific words chosen by the male students are important because they show just how ridiculous their behavior was. These were not even statements seriously alleging that certain women were gay, for whatever that would be worth; they were nothing but juvenile, immature, attention-getting displays.

113 Imagine if, as a future lawyer, one of these students was representing a female client who was either thought to be gay or who was, in fact, actually gay. If someone

serve that this limited agency may not be pertinent to the law school education of nonelite women:

Note, however, the differences in the performance of working-class and poor women who made it to law school. . . . These working-class women had grown accustomed to challenging societally prescribed roles during their struggle to gain admission to law school. Once they were in law school, they were not about to give up. In other words, these women had socialized themselves to be successful, active participants who took charge of their education as they had taken charge of the course of their lives and careers.¹¹⁴

How can this be too much to ask of women of privilege? Feminism, after all, "means never saying that women are, as a class, idiots."¹¹⁵

B. Reconciling Women's Different Agencies

For the most part, anti-essentialism has failed to move beyond the most superficial assertions of relevant difference. Factual complexity is hidden rather than explored; we concede that "of course, women differ from one another," but then retreat from any analysis of how that difference might make some legal standards counterproductive for some or even most women. A greater attention to the factual complexity of life experience would help to fill out the standard anti-essentialist distinctions of race, class, and sexual orientation.

With respect to class distinctions, for example, would military women be disadvantaged by agency assumptions written to compensate for the more limited capacity of elite women to constructively confront the misconduct of men? Would women law students at nonelite

speculated that because she chose to represent this client, she might be gay also, would she have to withdraw from representation?

114 Guinier et al., *supra* note 109, at 33-34 n.86. My own observations of women law students as a teaching fellow at the University of Chicago Law School, an elite institution, and as a junior professor at the University of Florida College of Law, a non-elite institution, are consistent with this description of class differences.

One possible solution is greater diversity among the faculty, not in the more common race-based manner, but in economic background and educational pedigree. See Jeffrey L. Harrison, *Confess'n the Blues: Some Thoughts on Class Bias in Law School Hiring*, 42 J. LEGAL EDUC. 119 (1992).

115 Young, *supra* note 1, at 292 (capitalization deleted). Professor Young's criticism of descriptions of women as limited in agency was motivated by her admiration for the distinctly non-agency-limited women who attended law school at Ohio Northern University. See *id.* at 271 ("By far, the most important influence on my views is the respect I have developed over the years for the extraordinary women who come to my university to study law."). Not coincidentally, in my view, some of those extraordinary women were military veterans. See *id.*

institutions be disadvantaged by agency assumptions written to compensate for the difficulty that female students at the University of Pennsylvania Law School had in constructively confronting juvenile behavior from young men? *Becoming Gentlemen* notes that this "peer policing" by men deters women from actively participating in their legal education;¹¹⁶ we could, hypothetically, choose to address women's limited agency in this area by no longer requiring active participation. Proposed solutions for sexual misconduct in the military are analogous; we could choose to no longer expect women to object to or report inappropriate conduct in the workplace. The question that goes unasked is whether these choices contribute to, or alleviate, women's inequality.

These approaches to limited agency are right in that they maintain a primary focus on men, who are currently the primary source of misconduct in either example. These approaches to limited agency, however, are wrong in that they isolate a limited area of agency for disparate treatment—women's agency with respect to the sexual misconduct of men. This disparate treatment can be seen from two perspectives. First, women are assumed to exercise a generally full and independent agency with respect to public-sphere activities and responsibilities, but not with respect to sexual activities and responsibilities.¹¹⁷ Second, women are assumed to exercise a generally full and independent agency even under conditions of inequality, but not under conditions of inequality between women and men.¹¹⁸ Taken together, the central assumption of limited agency is that women have

116 Guinier et al., *supra* note 109, at 82–83.

117 We no longer assume, for example, that women lack capacity to contract. See *supra* note 37 and accompanying text.

118 Anne Coughlin has drawn a close comparison between the "battered woman" defense to homicide and the historical "marital coercion" defense raised on behalf of women involved in criminal activity with their husbands. In both instances, the defense "reinforces the understanding that women cannot overcome barriers to lawful conduct, barriers that men can and do surmount." Coughlin, *supra* note 78, at 53. The marital coercion defense excuses women's misconduct "on the ground that they cannot be expected to, and, indeed, should not, resist the influence exerted by their husbands." *Id.* at 5. She noted that no similar defense was afforded to others who lived or worked under subordinating conditions. "[W]e notice that other subordinated actors, such as children, servants, and soldiers, who were legally and socially bound to obey the commands of their superiors, were not afforded a similar excuse from punishment." *Id.* at 37 (emphasis added) (footnote omitted).

Furthermore, other circumstances of inequality offer no excuse from responsibility under the law, such as economic or social disadvantage. "Life occurs under conditions of inequality." Young, *supra* note 1, at 270.

a diminished capacity to advance their own interests in interactions with men when the subject is related to sex.

That extremely particularized view of women's limited agency might be seen as positive because it avoids a more comprehensive incapacity that would apply to women more generally. In the long term, however, reliance on this singular limitation may lead to the same result. The law of sexual harassment is intended to guard against sexualization¹¹⁹ of women at work: the creation of an environment in which women's sexuality becomes their most conspicuous characteristic.¹²⁰ Respect for women is undermined, and equality is diminished, when circumstances "suggest[] to women that their sexuality is their most salient feature even in the workplace."¹²¹

We at least have to be alert to the possibility that we inadvertently contribute to sexualization of the workplace when we identify women as having a singular disability with respect to sexual agency. Partial agency has selected out one specific capacity for responsible, constructive conduct from all other capacities that women have for responsible, constructive conduct, deeming it uniformly diminished for all women despite their individual circumstances. When partial agency is tied to women *as women* rather than to factual circumstances that diminish or enhance the exercise of agency, women are disadvantaged.

But it would be just as inaccurate to assume that women enjoy unrestricted agency—obviously we have yet to reach the day in which women exercise equal influence and control, particularly in historically male-dominated institutions. The task, then, is to devise a standard that realistically reflects the agency that women *do* have, without unnecessarily diminishing that agency in a way that is counterproductive to women's advancement. The best solution would not measure agency simply by sex—men have more, women have less—or by subject matter—if it relates to sexual interaction, men have more, women have less. The most productive approach would take into account the surrounding factual context and attempt to make consistent the different agencies that women exercise; it would never validate behavior that contributes to women's inequality in the long term.

Recall that responsibility is best viewed not as blame, but as the ability to respond in a constructive manner—with constructiveness measured by benefit to the actor who takes responsibility for her own conduct, not the conduct of others. Ability to respond to workplace

119 See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 18–23 (1979) (pioneering use of the term to describe women's workplace roles).

120 See Chamallas, *supra* note 39, at 116.

121 Abrams, *Gender Discrimination*, *supra* note 95, at 1211.

misconduct of any variety is usually restricted by one's status or authority in the workplace, and so any fair standard concerning sexual misconduct would take into account that status and authority. To the extent that a legal standard required that a woman's behavior in response to sexual misconduct be in some respect reasonable, reasonableness would be evaluated in the context of a woman's general workplace duty and authority.

Proof of welcomeness issues in sexual harassment cases can serve as an illustration. Rather than excusing all women from demonstrating unwelcomeness by direct objection or report because some women may not feel comfortable doing so, a court would inquire into the plaintiff's general workplace duty and authority. Does the plaintiff, for example, have as a part of her duties a particular responsibility to control and educate others concerning inappropriate sexual conduct in the workplace? Does her general authority give her the latitude to confront misconduct and mistakes concerning work-related tasks? If a plaintiff has neither the duty nor the authority to ever confront, for any reason, a particular colleague or superior, then it may be reasonable under the law to expect her to respond to sexual misconduct in an indirect or ineffective way.

Returning to the earlier detailed description of the professional responsibilities of Air Force missile launch officers, it would be counterproductive to excuse women missileers from responding constructively—responsibly—to inappropriate sexual conduct in the workplace. The Air Force expects and requires direct confrontation by its missileers when the stakes are much more significant; it would be inconsistent to assume that women lose that capacity to confront when the improper behavior is sexual misconduct. Furthermore, military officers (and enlisted supervisors as well) have a duty to control and educate others concerning sexual misconduct, not only for their own benefit but also for the benefit of the women they command and supervise. It would undermine the status of these military women to excuse them from responsible behavior that the military would otherwise expect without question.

In one sense, this reworked standard of reasonableness is similar to the original intent of partial agency. It characterizes women as neither wholly unrestricted or wholly incapacitated; it identifies circumstances under which women can effectively exercise agency against sexual oppression. Where this new conception of reasonableness differs is in its elimination of generalized assumptions of incapacity that are solely based on sex. It replaces those assumptions with the expectation that women can, and must, constructively respond to in-

appropriate behavior in the workplace, to the extent of their duty and authority.

Other writers have considered whether it is reasonable to expect women to directly confront inappropriate sexual behavior by men, but only in the context of explaining why it is almost always unreasonable. Some of that suspicion is directed toward the concept of women's agency itself—the fundamental concern that if women are portrayed as having the capacity of choice, then some women will inevitably make poor choices. But even under circumstances in which women might fairly be viewed as exercising sufficient agency, there is a reluctance to encourage constructive confrontation by women. Not because more direct ways of responding to sexual harassment are ineffective means of controlling sexual harassment—the opposite is likely true—but because a woman who directly confronts misconduct “acts like a man,” and that in itself is objectionable.

*C. Why the Feminist Accusation of “Acting Like a Man” Is
Always Counterproductive*

There may be no more counterproductive feminist criticism than the charge that there is something wrong with a woman's behavior that is perfectly feasible, responsible, and constructive, simply because she is “acting like man.”¹²² The following criticism of the hypothetical woman who responds directly and effectively to sexual harassment is a typical example: “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.”¹²³

What is surprising about much of this commentary is how it seemingly seeks to freeze traditional sex-role behaviors as they are, failing to recognize that not all behavior more typical of women is good and,

122 Joan Williams long ago identified this distinctly unhelpful way of criticizing women who fail to conform. Her observations would be particularly accurate in the context of military women:

[S]ome relational feminists explicitly police the stereotype of women they advocate by calling “male-identified” any feminist who disagrees with their characterization of women. . . . This kind of gender-policing epithet, parallel to the Victorian use of the word “unladylike,” makes explicit the assumption that women who do not speak in “women's voice” are somehow not “real” women. Note also that part of the power of the modern epithet “male-identified” is its assertion that a woman without “women's voice” is a man.

Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 813 n.61 (1989).

123 Estrich, *supra* note 49, at 846.

correspondingly, not all behavior more typical of men is bad.¹²⁴ Stereotypical extremes of female-identified and male-identified behaviors are presented as the only options available for women to adopt, setting the stage for criticism of courts who would withhold a remedy for either choice. Consider the situation in which a woman responds to sexually offensive behavior in the workplace by behaving in a sexually offensive manner herself:

Moreover, even in cases where the working environment is regarded as abusive from an objective standpoint, evidence that *the plaintiff's actions contributed to the sexually offensive atmosphere* is likely to disqualify the plaintiff. . . . In one case, the court discounted an entry in the plaintiff's diary indicating that she was offended by her co-worker's sexually abusive behavior towards her. Because *the plaintiff herself had behaved abusively on occasion*, she was deemed to have "welcomed" similar behavior. This "clean hands" approach means that a plaintiff who belatedly realizes that she cannot safely behave like "one of the boys" is likely to have no legal recourse for subsequent harassment.¹²⁵

Rather than designating the plaintiff's conduct as "behaving like one of the boys," it would be more constructive to designate it as "behaving inappropriately," "behaving unprofessionally," or "behaving offensively." The plaintiff loses a remedy not because she is being punished for trying to act like a man, but because she contributed to a sexually offensive working environment through her own behavior. She loses a remedy not because those who behave in "masculine" ways "cannot be harmed by sexually abusive remarks,"¹²⁶ but because plaintiffs who behave in immature and offensive ways cannot recover damages for harm to which they contributed.

But what if a woman merely seeks to "fit in" by joining in sexually offensive behavior in the workplace?¹²⁷ That is certainly a choice that could be made; however, there are potential consequences to that choice. Women who engage in sexually inappropriate conduct in the workplace, even for the best of purposes, contribute to an atmosphere

124 See SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* 131 (1993) ("[F]lesh-and-blood women and men aren't all as good and evil, respectively, nor as homogeneous, as the woman-centered discourse seems to imply.").

125 Chamallas, *supra* note 50, at 809 (emphasis added) (footnotes omitted).

126 Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 93 (1995).

127 See Radford, *supra* note 50, at 538-39.

that fosters continuing and escalating harassment against women.¹²⁸ It is, sadly, the lazy way of gaining favor in a male-dominated environment, one which does nothing to educate men and ultimately harms women. As with the standard of reasonableness, the law should not validate behavior that, in the long term, contributes to the subordination of women.

The other choice that plaintiffs purportedly have in this polarized world is, not surprisingly, to "act like a woman." The complaint is that these women fare no better under the law, even though they have complied with sex-role expectations. But when one looks more closely at what it means to act like a woman, one finds behavior that is either ineffective or dysfunctional in responding to sexual harassment. "Milder and more passive behaviors (those typically associated with women) are likely to be viewed by courts as 'ambiguous' and thus not always positive evidence on the issue of unwelcomeness."¹²⁹

The choices presented to women, therefore, are only two: behave in an extreme and stereotypically masculine fashion (offensively or unprofessionally) or behave in an extreme and stereotypically feminine fashion (ineffectively or dysfunctionally). Both may tend to result in findings of welcomeness, but they are unrepresentative of the range of choices available. Behaving like a woman, unfortunately, never seems to include behaving constructively, even when constructive behavior may be an option. For a woman to directly express an objection to a man's conduct, for example, is considered a "[Clint] Eastwood-style response" and not "socially plausible."¹³⁰ An expectation of "blunt objection" by women is dismissed as "stark" only because the behavior is more characteristic of men.¹³¹

There has recently been an uncomfortable trend in feminist legal writing which advocates legal protection for conduct considered "feminine"—behavior traditionally more characteristic of women than of

128 *But see* Chamallas, *supra* note 50, at 810 (criticizing the "no participation [in wrongdoing] requirement" because "recovery will be limited to women who resist and who are willing to risk escalation of harassment either by complaining or by refusing to conform to the community norm"). It is unlikely that women reduce the risk of escalation of sexual harassment by making their own additional contribution of sexually offensive behavior to the workplace.

129 Radford, *supra* note 50, at 524. *See also* Estrich, *supra* note 49, at 829 (arguing that sexual harassment law "penalizes the woman who does not act like a man," but describing a plaintiff who behaved dysfunctionally at every turn by not objecting to, complaining about, or declining involvement in an ongoing relationship); *id.* at 830-31 (describing plaintiffs "who act like most women—who act 'friendly,' or dress stylishly, or keep silent" in response to sexual harassment).

130 Abrams, *Songs of Innocence*, *supra* note 1, at 1548.

131 Abrams, *Sex Wars Redux*, *supra* note 1, at 363.

men. These writers see a "danger of substituting for prohibited sex discrimination a still acceptable gender discrimination, that is to say, discrimination against the stereotypically feminine, especially when manifested by men, but also when manifested by women."¹³² Under this viewpoint, employers could not, as a general rule, make employment decisions that disadvantaged women who behaved in a stereotypically feminine manner; this would constitute sex discrimination as much as a policy that excluded women on the basis of their biological sex. "Discrimination against the feminine is likely to have a disparate impact on women, who are disproportionately likely to be feminine and not masculine; it should be permitted only if job-related and justified by business necessity."¹³³

What is missing from this analysis, however, is the recognition that not all traditional characteristics historically associated with women will be productive or functional in a given setting. Some traditionally feminine behaviors may be distinctly dysfunctional under some circumstances, yet these writers recommend that the law protect these behaviors simply because women are more likely to engage in them. It is true that a standard which favors a traditionally masculine characteristic will disproportionately exclude women, at least for the present. If that masculine characteristic, however, is a positive and functional trait under the circumstances, it is counterproductive for the law to discourage women from adopting it only because it is more common in men.

We must get beyond the feminist assumption that anything that is traditionally male is inappropriate for women or that anything traditionally female is worth protecting under the law.¹³⁴ Almost twenty-

132 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, 3 (1995). See also Franke, *supra* note 126, at 95 ("Any adverse action in the workplace on account of a person's gender should be cognizable under Title VII, regardless of the body parts of the plaintiff or the defendant.").

These works build on the earlier "acceptance" model of equality theory advanced by Christine Littleton. "On this view, the function of equality is to make gender differences, perceived or actual, costless relative to one another, so that anyone may follow a male, female, or androgynous lifestyle according to their natural inclination or choice without being punished for following a female lifestyle or rewarded for following a male one." Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1297 (1987).

133 Case, *supra* note 132, at 4.

134 Kathryn Abrams has recognized that traditionally feminine traits are not uniformly beneficial for women: "I readily acknowledge that some of these socially constructed characteristics, such as deference or passivity, are qualities that are unproductive for women, and that women might never have chosen for themselves

five years ago, the psychological research of Sandra Bem¹³⁵ demonstrated that "androgynous" women and men—people with strengths in both feminine and masculine domains—had the greatest range of abilities to respond effectively under changing circumstances. For example, the androgynously gifted might be similarly skilled at standing firm against an opposing group or at nurturing children and others in need.¹³⁶ "Androgyny provides both a vision of utopia and a model of mental health that does not require the individual to banish from the self whatever attributes and behaviors the culture may have stereotypically defined as inappropriate for his or her sex."¹³⁷

had they been able to construct the social order." Abrams, *Gender Discrimination*, *supra* note 95, at 1194 n.47. She put off for another time, though, the question of whether feminist theory might unintentionally, but counterproductively, reward such dysfunctional behavior in women. "Learning to identify and advance these [positive] values, without embracing those that are less desirable is no doubt a perilous task." *Id.*

135 Professor Bem developed the Bem Sex-Role Inventory (BSRI), a paper-and-pencil test that measures a subject's self-description of traditionally feminine and traditionally masculine qualities. Subjects rate themselves along a Likert scale ranging from one ("never or almost never true") to seven ("always or almost always true") on 60 personality traits, one-third considered more desirable in women (the "Femininity scale"), one-third considered more desirable in men (the "Masculinity scale"), and one-third considered gender-neutral. See Sandra L. Bem, *The Measurement of Psychological Androgyny*, 42 J. CONSULTING & CLINICAL PSYCHOL. 155, 156-59 (1974).

Bem was one of the first to recognize that traditional masculinity and femininity were not either-or concepts. Although most of her subjects were "sex-typed," with a gender either primarily masculine or feminine (but not necessarily in the expected direction), a substantial minority scored as "androgynous," with relatively little difference in their self-descriptions of masculine and feminine traits. See *id.* at 161 tbl.7.

136 See BEM, *supra* note 124, at 156-57.

137 *Id.* at 124. Not surprisingly, Professor Bem's work has drawn criticism from those invested in preserving more protected roles for women. See, e.g., Jill M. Dahmann, Book Review, 92 MICH. L. REV. 1929, 1929 (1994) (reviewing BEM, *supra* note 124) (describing some of Bem's commentary as "unoriginal" and "outdated"). Some have objected to the concept of androgyny because it disregards existing gender inequality and makes no effort to increase the value of female-identified traits or decrease the value of male-identified traits. See BEM, *supra* note 124, at 123. There is nothing inherent in being female- or male-identified, however, that warrants value in and of itself. For example, some of the personality characteristics rated in the BSRI Femininity scale are dysfunctional in adults: "childlike," "flatterable," and "gullible." All the Masculinity scale characteristics, however, are functional under at least some, if not most, circumstances. Cf. Case, *supra* note 132, at 22-23 and fig.2 (criticizing "acceptable androgyny" as being more masculine than feminine). Some examples of the BSRI masculine characteristics that would be most constructive in responding to sexual harassment, for example, are "assertive," "defends own beliefs," "independent," or "willing to take a stand." See Bem, *supra* note 135, at 156 tbl.1. Nonetheless, critics assert that "androgyny is theorized at too private and too personal a level to be of any value politically." BEM, *supra* note 124, at 123. This theme is familiar in the way it

Tenacious policing by feminists of what it means to be a "real woman" has, ironically, reinforced the same categorical, frozen-in-time portrayals of women that feminists once worked to eliminate.

For all of its emphasis on a woman's unique ability to transcend the artificial polarities that men are said to invent, the woman-centered perspective has so completely polarized women and men, along with what it defines as the male and female modes of relating to reality, that for all practical purposes, both men and women are as limited by homogenized visions of themselves as ever before.¹³⁸

This restrictive mindset is particularly counterproductive in any examination of the role of military women. Military service has traditionally embraced characteristics that are also traditionally identified with men. Some of these male-identified traits are dysfunctional in the modern, sex-integrated military, to be sure, but many are functional and, indeed, necessary for effective performance. To suggest that feminine, but dysfunctional, behavioral counterparts should be equated with productive, but masculine, traits in order that gender characteristics be treated alike only guarantees that military women will be second-class servicemembers.

An example helps illustrate the problem. All young officers, men and women alike, are taught the importance of developing what is called "command presence." Command presence is an overall bearing or demeanor that speaks of influence, persuasiveness, trust, knowledge, and responsibility. It is that ability to arrest the attention of subordinates, to have them believe you know what you are doing, and to motivate them to perform their duties in the best way they can. Command presence comes across in voice, in posture, and in word choice, but not necessarily in size or maleness.

Some are suspicious of characteristics like command presence, believing them to be surrogates for more obvious ways of excluding women from certain fields.¹³⁹ A theory advocating equal acceptance of gendered traits would conclude, for example, that women who adopt a higher-than-biologically-necessary pitch to their voice should not be disadvantaged for a choice that women will make more often

discourages women's potential. Direct objection to sexual harassment is also devalued under the unfortunate assumption that the responses of individual women are ineffective in remedying the problem. See Abrams, *Songs of Innocence*, *supra* note 1, at 1548.

138 BEM, *supra* note 124, at 130-31.

139 See Abrams, *Gender Discrimination*, *supra* note 95, at 1189 ("These [male] norms shape intangibles such as the 'appropriate' professional demeanor: the tone of voice, air of command . . ."); see also Case, *supra* note 132, at 92 (describing "officer bearing" as a masculine criterion for the selection of civilian police officers).

than men. Women are more likely than men to adopt a deferential or subservient tone of speaking voice; therefore, to require a use of voice that is deep within a woman's or a man's biological range, is steady and not rushed, and has volume rather than softness, would disproportionately exclude women and be impermissible.¹⁴⁰

Legal protection of stereotypically feminine and deferential voices, however, would work to the detriment of military women who must capture the attention and trust of others. Women lawyers face similar issues. Lawyers whose voices trail off into uncertainty, whose sentences end on their highest note, or whose statements squeak in nervousness, will not be as persuasive or effective.¹⁴¹ Insisting that gendered ways of speaking be accorded equal status in the courtroom would be a wasted exercise that fails to advance the status of women; a dysfunctional trait does not become a functional one by theoretical fiat.

As with the theory of partial agency, women are best served by analyses that are factually complex and not superficially extreme. We should identify and legally defend substantive,¹⁴² productive strengths

140 See Case, *supra* note 132, at 28–30 (analyzing the gendered, rather than biological, aspects of voice as a subject of sex discrimination).

141 In my observation, female law students are disproportionately more likely to have certain types of problems with professional demeanor in classroom participation; male law students are disproportionately more likely to have different types of demeanor issues. Students who giggle in nervousness, for example, are almost always women; students who turn into the class clown when they are nervous are almost always men. It is important to help modify the behavior of both.

142 Equal-acceptance theories may be especially harmful to women when they emphasize legal protection for the most superficial of stereotypically feminine traits. See, e.g., Case, *supra* note 132, at 3, 68–70 (advocating equal protection for instances of superficial femininity such as the wearing of “frilly pink dresses,” jewelry, and makeup). See Katharine Bartlett’s analysis of workplace dress and appearance standards recognized that stereotypically feminine dress may itself contribute to the subordination of women. Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2555–56 (1994).

It is a sign of the pervasiveness of gender coding in the symbolic system of dress and appearance that few female-associated dress or appearance conventions exist that are not linked with stereotypes about women that emerged from or have been interwoven with their historically inferior status. Courts should find all such conventions discriminatory “on the basis of sex,” unless narrowly tailored to sex differences in ways that do not perpetuate this historically inferior status.

Id. at 2570. An interesting comparison results: if an employer mandates stereotypically feminine dress for its female employees, the requirement should be struck down because it contributes to the subordination of women, but if women choose to dress in a stereotypically feminine manner, their choices should be favored over an em-

that are traditionally female-identified without unnecessarily excusing women from also adopting male-identified productive qualities. Mary Anne Case has described how the Los Angeles Police Department discovered that female officers were disproportionately more likely to have "interpersonal skills, sensitivity, politeness, and the ability to communicate," and that systematic underevaluation of these very effective policing skills resulted in unfairly low performance ratings for women.¹⁴³

It overstates an extremely good point, however, to then question whether "aggressiveness is a useful quality in a police officer" or conclude "how much more effective feminine qualities are than masculine qualities in the work of the police."¹⁴⁴ It is not an either-or proposition. Police officers—or military servicemembers¹⁴⁵—with the broadest range of productive skills will always be the most valuable, and it is counterproductive to condescendingly shield women from requirements that will encourage them to incorporate those skills—even the skills that are considered traditionally masculine.

It is much more productive to first determine which traits, behaviors, or strengths should be valued in a given circumstance—regardless of gender association—and then make certain that the law defends individuals—regardless of sex—who have achieved those

ployer's desire for a more neutral appearance, *even though* their dress contributes to the subordination of women.

Women's dress is a curiously sensitive issue. There is an uncomfortableness with women in traditionally male clothing that parallels feminists' uncomfortableness with women who display traditionally male strengths. "A female marine who considers herself a professional will seem frivolous, decorative, and flighty if she wears a dress or skirt, but when she wears the male uniform she may be perceived as dressing up like a man and thus either silly or sexy." *Id.* at 2550. This view of military women baffles me. Whether she wears a uniform combination that includes a skirt or a pair of pants, as long as the uniform style is appropriate for the duty performed, a military woman's appearance is never frivolous or silly—except if one views the idea of a woman in the military by itself as frivolous or silly. I cannot think of a single circumstance in which requiring women to wear a pair of pants on the job would be considered "stigmatizing" for women. *See id.* at 2572. During World War II, there was a similar anxiety about masculine—and functional—work attire for women that lead to a preoccupation with issues of superficial femininity: the skirt-pants dilemma, hairstyles, and fashion accessories to uniforms. *See MEYER, supra* note 15, at 152–56.

143 *See Case, supra* note 132, at 85–94.

144 *Id.* at 88.

145 Professor Case cites with approval the LAPD recommendation to discontinue recruitment of police officers at military bases in favor of locales with higher percentages of women, such as day-care centers. *See id.* at 90 & n.315. This recommendation, however, ignores the likelihood that women suited to police work in the now-preferred androgynous style would be hugely over-represented among military women.

characteristics. Joan Williams describes this as "sex neutrality" rather than "gender neutrality," an approach that "refus[es] to reinforce the traditional assumption that adherence to gender roles flows 'naturally' from biological sex."¹⁴⁶ It provides room to question whether the norms of certain occupations should be re-examined to remove ineffective, gendered expectations that achieve little but the exclusion of women, but it will not excuse women from expectations simply because they were once associated with men.

CONCLUSION

Catharine MacKinnon has been the most prominent advocate of the "anti-subordination" approach to equal treatment for women under the law.¹⁴⁷ This approach eliminates the sometimes wasteful legal exercise of determining whether women are truly different from men in some relevant way, or whether that difference justifies different treatment under the law, all in an effort to decide whether a particular legal distinction constitutes sex discrimination. Professor MacKinnon's anti-subordination analysis cuts effectively right to the heart of the matter. No matter how rational, justified, or explainable a policy or practice might be, the only appropriate question to ask is whether it "contributes to the maintenance of an underclass or a deprived position because of gender status."¹⁴⁸ If the law in its effect will contribute to the subordination of women, it should constitute sex discrimination. In other words, the ends are much more important than the means; the result is much more important than the justification.

We should follow the same guidelines in evaluating feminist legal theory. This is where the weakness of partial agency lies, in its disregard for the effect of the theory as applied. Partial agency's justification has become more important than its result; its short-term benefit more important than its long-term consequence. Every time the law reduces its expectations for constructive, responsible behavior from women, we may take small steps forward by winning a few lawsuits but still take large steps back from equality. The only question to be asked, then, is whether intentional descriptions of women as agency-

146 Williams, *supra* note 122, at 839.

147 See MACKINNON, *supra* note 119, at 116-18; CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-45 (1987).

148 MACKINNON, *supra* note 119, at 117. See also *id.* ("The social problem addressed is not the failure to ignore woman's essential sameness with man, but the recognition of womanhood to women's comparative disadvantage.").

diminished will ultimately contribute to the subordination of women. With respect to military women, it will, and we should reconsider the effect it will have for women in general.

