

## SYMPOSIUM ISSUE

### UNDERSTANDING SEXUAL HARASSMENT LAW IN ACTION: WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT

#### FOURTH ANNUAL RUTH BADER GINSBURG LECTURE

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#### INTRODUCTION

Over the past few years, I have spent a good deal of time writing and thinking about sexual harassment law. In 2003, I published an article in the Yale Law Journal entitled *The Sanitized Workplace*.<sup>1</sup> The article provoked a great deal of academic commentary, including some criticism. One strand of criticism goes something like this: “What’s a nice feminist like me doing in the company of the libertarian critics of sexual harassment law?”<sup>2</sup> In this essay, I would like to lay out my basic

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\* Copyright Vicki Schultz 2006. Ford Foundation Professor of Law and the Social Sciences, Yale Law School. This Article was first presented as the Ruth Bader Ginsburg Lecture at the Thomas Jefferson School of Law. I would like to thank the Thomas Jefferson School of Law, especially Professors Susan Bisom-Rapp and Julie Greenberg, for inviting me to give the lecture and for showing me such hospitality during my visit. I would also like to thank the distinguished scholars and lawyers who presented comments on my lecture: Rubin J. Garcia, Barbara A. Lawless, M. Isabel Medina, Richard A. Paul, and Christine Williams. I am deeply grateful for the benefit of their insights. Portions of this lecture are derived from Articles previously published in The Yale Law Journal. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

1. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

2. For examples of work in the vein of libertarian criticism of sexual harassment law, see JEFFREY ROSEN, *THE UNWANTED GAZE* 78-127 (2000) (arguing that sexual harassment law leads to the invasion of employee privacy and prevents employees from having private space for expression); CATHY

position on sexual harassment law and to distinguish my position from that of the libertarians. In the course of the essay, I will integrate insights from my earlier and more recent work into a general analysis of how sexual harassment law has played out within courts and companies over the past two decades.

To preview my argument, I do agree with the libertarians' claim that, in the name of implementing sexual harassment law, many companies are going too far to suppress the sexual conduct and speech of their employees; anyone who has ever worked in a large corporation or government agency knows the perils of fooling around and talking about sex. But I disagree with the libertarians about why this sexual sanitization is happening, and with what should be done about it. In contrast to their explanation, I develop a sociological account of where the courts and companies have gone wrong and what steps should be taken to get back on track.

Unlike the libertarians, my critique is not focused on "big government" or the forces of political correctness; I am more concerned about the excesses of corporate managers. Unlike the libertarians, I do not argue in favor of abolishing or deregulating sexual harassment law; instead, I argue for reforming it. Nor do I encourage dealing with harassment as an invasion of privacy or other species of tort as opposed to a problem of employment discrimination. I claim that, when properly understood, sexual harassment is inextricably linked to the most classical manifestation of employment discrimination, the sex-segregation of jobs (and accompanying sex-based disparities in pay, responsibilities, and promotional opportunities).

There is no doubt we still need a robust sexual harassment law. But, in my view, we also need a paradigm shift. We should move away from the focus on eliminating sexual expression, and

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YOUNG, CEASEFIRE! WHY WOMEN AND MEN MUST JOIN FORCES TO ACHIEVE TRUE EQUALITY 173 (1999) (stressing that current sexual harassment law "abridges freedom of speech"); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 *UCLA L. REV.* 1791, 1819-43, 1846 (1992) (arguing that current sexual harassment law constrains protected speech in a content- and viewpoint-based manner); and Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 *OHIO ST. L.J.* 481, 491-510 (1991) (arguing that Title VII hostile work environment liability leads to prohibitions on verbal harassment that amount to unconstitutional viewpoint-based restrictions on expression).

concentrate instead on eliminating the overarching patterns of sex segregation and inequality in which harassment flourishes. Thus, unlike the libertarians, I do not argue for *narrowing* the legal definition of sexual harassment. Instead, I argue for *broadening* it to include any type of conduct that is used to discriminate—regardless of whether it is sexual or nonsexual in content or design. I also propose to reform the law to give employers an incentive to create sex-integrated jobs and gender-egalitarian workplaces as a way to prevent and remedy harassment.

The libertarian critics and I also see the harms of sexual sanitization differently. They view sexuality that occurs at work as an individual and private matter, whereas I see it as an outgrowth and expression of a public workplace culture. As a result, the libertarians stress the intrusion on individual privacy, while I am more concerned about the threat of group-based biases against stigmatized sexual and racial minorities, and the backlash against women that occurs when management uses sexual harassment law to justify punishing employees for sexual conduct that doesn't threaten gender equality. Although the libertarians and I are equally concerned about the potential threat to freedom of expression posed by sanitization, they want to protect this freedom as an individual right, while I am more concerned with the role of open expression in promoting employees' shared sense of solidarity, intimacy, and humanity.

My basic argument is that the fundamental focus on sexual advances and other overtly sexual conduct in sexual harassment law has made the American system of regulation simultaneously overinclusive and underinclusive. It is underinclusive because the focus on sexual conduct has led courts and companies—as well as the larger culture—to overlook many forms of sexism and harassment that do not resemble sexual advances or abuse. Yet, the system is also overinclusive because the emphasis on sexual conduct is also leading companies to prohibit or discourage many forms of sexual expression and interaction that don't always amount to discrimination or threaten gender equality.

To lay the groundwork for my theory of why managers have embarked on a renewed campaign of sexual sanitization, one must first understand how the concept of sexual harassment has been defined by the courts and the larger society. I begin by

examining the definition of sexual harassment that has prevailed in the legal system and in popular culture and show how this model has developed within the federal courts. Part I discusses the “sexual” model for sexual harassment and explains that the prevailing conception of harassment defines it as an abuse of women’s sexuality. I trace how this understanding of harassment emerged from the reasoning of early *quid pro quo* sexual harassment cases, the EEOC guidelines, and the arguments of some early feminists. Part II discusses application of the sexual model to hostile work environment cases and shows how courts have been less likely to perceive nonsexual forms of mistreatment directed at women as genuine sexual harassment. Part III analyzes several problems with the law under the sexual model, including the relative neglect of nonsexual forms of harassment and discrimination against women, the failure to understand the gender dynamics that often accompany male-on-male harassment, and a tendency toward sexual paternalism that protects some women at the expense of others and for the wrong reasons.

The second half of the Article analyzes what has happened in American workplaces in the wake of sexual harassment law. Part IV shows how the legal system’s emphasis on the potential harm of sexual conduct has helped spark and justify a renewed campaign by managers to punish employees’ sexual expression and interaction. Part V discusses the harms of this sanitization campaign to women, to sexual and racial minorities, and to employees in general. Part VI lays out a new vision for sexual harassment regulation and discusses some of the legal and organizational reforms needed to realize that vision. In my view, there is no reason why our system of regulation cannot protect people from both discriminatory harassment and managerial overreaching at the same time—but we don’t have such a system yet.

## I. THE SEXUAL MODEL OF SEXUAL HARASSMENT

### *A. The Popular Conception of Sexual Harassment*

When you hear the words sexual harassment, what images come to mind? Perhaps you picture the former Chair of the Equal Employment Opportunity Commission, now a Supreme Court Justice, Clarence Thomas, pressuring the young attorney

Anita Hill to go out with him, or regaling her with accounts of pornographic films.<sup>3</sup> Or perhaps you recall the Navy's Tailhook convention, where seventy pilots pushed a dozen women down a gauntlet where the men shouted suggestive remarks and ripped at the women's clothes.<sup>4</sup> Almost certainly, you think of former President Bill Clinton's troubles, from the Paula Jones lawsuit to the Monica Lewinsky affair.

In the United States, even though sexual harassment is defined as a form of workplace sex discrimination, the prevailing conception of harassment defines it first and foremost as an abuse of women's sexuality. In this view, the quintessential form of harassment involves a male supervisor who uses his position at work to force unwanted sexual advances on a less powerful female subordinate. Sometimes it is said that his motivation is sexual desire: he wants her, and he uses his position of power to get her. Sometimes it is said to be a desire to subordinate: he wants to make sure she remains below him in the workplace hierarchy, and he uses sex to reinforce his position. It doesn't really matter which it is, for in the popular view, heterosexual desire and male dominance are inextricably linked: men use their positions of power to get sex from women, and getting sex from women ensures their dominance. Harassment is a way for men to use work to satisfy their sexual needs. I call this the sexual model for understanding sex-based harassment.

### *B. Early Developments of the Sexual Model*

#### *1. The Logic of Early Quid Pro Quo Cases*

Where did this understanding of sexual harassment come from? In the United States there is no federal legislation that specifically prohibits sexual harassment. Instead, such harassment is forbidden by Title VII of the Civil Rights Act of 1964, the federal law that bans sex discrimination in employment.<sup>5</sup>

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3. See JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 95-97 (1994).

4. See John Lancaster, *Navy 'Gauntlet' Probed; Sex Harassment Alleged at Fliers' Convention*, WASH. POST, Oct. 30, 1991, at A1; H.G. Reza, *Women Accuse Navy Pilots of Harassment*, L.A. TIMES, Oct. 30, 1991, at B1.

5. 42 U.S.C. § 2000e-2(a) (2000). Title VII reads in relevant part:  
It shall be an unlawful employment practice for an employer . . . to fail

In the early 1970's, feminist lawyers and activists pressed to have the courts declare sexual harassment in the workplace a form of sex discrimination that violates Title VII. Some of the earliest sexual harassment cases involved what American lawyers call *quid pro quo* sexual harassment. Typically, these cases involve male supervisors who fire or otherwise penalize women who work under their supervision because the women refuse to have sex with them. In the federal courts, women lost some of the first *quid pro quo* cases. When they complained, some lower courts held that they were not fired because they were women—or “because of [their] sex,” within the meaning of the statute—but rather because they had refused to have sex with their bosses.<sup>6</sup> In other words, the courts said there was no sex discrimination involved.

The appellate courts soon reversed, concluding that what had happened to the women *was* sex discrimination.<sup>7</sup> The cases required the appellate courts to pinpoint precisely what it is about the familiar “sleep-with-me-or-you're-fired” fact pattern that amounts to sex discrimination. Remarkably, the courts pointed to the supervisors' sexual desire for the subordinates as the source of sex bias. Judges reasoned that a heterosexual male boss's sexual advances occurred “because of sex” within the

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or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual employee of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

6. *See, e.g., Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974) (concluding the “substance of plaintiff's complaint” that her position was abolished when she refused to have sexual relations with her supervisor “is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor”); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (characterizing the verbal and physical sexual advances of plaintiffs' supervisors as “nothing more than a personal proclivity, peculiarity or mannerism” and an attempt at “satisfying a personal urge”), *vacated*, 562 F.2d 55 (9th Cir. 1977).

7. *See, e.g., Barnes*, 561 F.2d 983; *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977).

meaning of Title VII because those advances were driven by *sexual attraction or desire* that the heterosexual male supervisor felt for the subordinate as a woman, whereas he would not have felt the same sexual desire for a man.

The first federal appellate court decision to recognize sexual harassment as a form of sex discrimination (the D.C. Circuit's 1977 decision in *Barnes v. Costle*) illustrates this reasoning. Paulette Barnes was fired by her male supervisor because she would not go to bed with him. The court concluded Barnes was fired "because of sex" within the meaning of Title VII, because her "job was conditioned upon submission to sexual relations—an exaction which the supervisor would not have sought from any male."<sup>8</sup> Judge Robinson claimed that the conclusion Barnes' firing was based on her sex "stemmed not from the fact that what [her boss] demanded was *sexual activity*—which of itself is immaterial," but solely from the fact that "but for her gender she would not have been importuned."<sup>9</sup> Yet, the Judge justified the conclusion that the advances were sex-based by the observation that "there is no suggestion that [the] allegedly amorous supervisor is other than heterosexual."<sup>10</sup> In other words, the boss wouldn't have been *attracted* to her if she were a male.

Thus, Judge Robinson's analysis circled back to where it began: he claimed the fact that the boss's conduct was *sexual* in nature was irrelevant, because the relevant inquiry is whether it was based on sex in the sense of being aimed at one sex but not the other. Yet, the only basis for inferring that what happened to Barnes would *not* have happened to a man was precisely that the conduct consisted of sexual advances, which the court reduced to heterosexual desire. If the boss had physically assaulted Barnes or insulted her intelligence, the court would have had a difficult time finding such abuse to be sex-based. Thus, in spite of Judge Robinson's own perception that his analysis was based on sex rather than on sexuality, the decision squarely grounded the sex discrimination in the sexual desire allegedly underlying the acts. In a sense, what the court held to be discriminatory was heterosexual (or homosexual) desire

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8. *Barnes*, 561 F.2d. at 989.

9. *Id.* at 989 n.49.

10. *Id.*

itself.<sup>11</sup>

## 2. *The EEOC Guidelines*

These quid pro quo cases reached the right result, but their reasoning was flawed. By locating the source of sex discrimination in the *sexual* nature of the advances, rather than in the sexist workplace dynamics of which they were a part, the decisions threatened to equate sex-based harassment with sexual advances (which were presumed to be motivated by sexual desire). The 1980 EEOC guidelines on sex harassment helped consolidate this reasoning. By defining harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,”<sup>12</sup> these

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11. That Judge Robinson’s finding of sex discrimination was grounded in the presumed presence of sexual desire is supported by an additional passage. Robinson stated that sexual advances made by a homosexual supervisor toward a same-sex subordinate *would* constitute discrimination “because of sex” within the meaning of Title VII, because the supervisor would not have directed such advances toward a person of the opposite sex, while advances made by a bisexual supervisor toward men and women alike would not. *See id.* at 990 n.55. A number of commentators have criticized the court for suggesting that a bisexual supervisor who directs sexual advances toward both men and women would escape Title VII liability. *See, e.g.,* Sandra Levitsky, Note, *Footnote 55: Closing the “Bisexual Defense” Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013 (1996); Deborah N. McFarland, Note, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Litigation*, 65 FORDHAM L. REV. 493, 521 (1996). While I share the intuition that bisexual harassers should not escape responsibility simply because they are bisexual, my take on the issue is different from that of most commentators. Rather than criticizing the court for permitting sexual overtures by a bisexual supervisor to go unpunished, my analysis suggests the focus on harassment as sexual overtures is the source of the problem. Once such a focus is abandoned and harassment is understood more broadly to include any kind of conduct directed at someone because of gender, it becomes clear the sexual orientation of the harasser is irrelevant. Indeed, if harassment is grounded in a drive to maintain the masculine composition and image of the job (and those who do it), there is little reason to suppose bisexual men would be less likely than men of any other sexual orientation to engage in such harassment.

12. EEOC Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,676, 74,677 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11(a) (2001)). The guidelines define actionable harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct

guidelines could be read to limit harassment to sexual conduct (and they were so read by many courts, as I explain below). Whether or not they were read in such a limiting fashion, the guidelines helped consolidate the notion that sexual harassment refers to overtly *sexual* forms of misconduct.

### 3. *Early Feminist Thought*

Some strands of early feminist thought supported this definition. In the 1960s and early 1970s, some feminists (who have since become known as radical feminists) theorized that heterosexual sexual relations were fraught with power dynamics through which men subordinated women. This critique of compulsory heterosexuality was an important, indeed essential, part of the critique of sex roles made by early feminists.<sup>13</sup> But by the mid-1970's, as a number of analysts have shown,<sup>14</sup> some radical feminists had moved toward a reductionist view that isolated sexuality from other social relations and treated it as the primary mechanism of women's inequality.<sup>15</sup> Rape became the

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has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

13. Early feminists developed a thorough critique of socially prescribed sex/gender roles for men and women, including but not limited to sexual norms that rendered men as active sexual subjects while relegating women to the position of passive sexual objects. See KATE MILLET, *SEXUAL POLITICS* (1978). Feminists have also criticized the sexual division of labor that consigned women to household work and sex-segregated jobs and excluded them from the higher paid, often more rewarding occupations held by men. See Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex*, 1 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 206-47 (1976). These feminists referred to the normative expectations placed on women, as opposed to men, as sex roles.

14. My analysis here draws on Ellen Willis, *Radical Feminism and Feminist Radicalism*, in NO MORE NICE GIRLS: COUNTERCULTURAL ESSAYS 117 (1992). For other descriptions of the early radical feminist critique of heterosexual sexual relations, see ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 1967-75 passim* (1989); JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 308 (1988).

15. See, for example, Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 531-33 (1982), in which MacKinnon argued: "Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality." See also, KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 164-65 (1979) ("*Sex is power* is the foundation of patriarchy. . . . Institutionalized sexism and misogyny—from

central metaphor for women's disadvantage, and "all sexist behavior an extension of the paradigmatic act of rape."<sup>16</sup> From this perspective, it was a short step to the proposition that sex in the workplace—or at least sexual interactions between men and women in unequal jobs—is suspect.

#### 4. *The News Media*

Because sex sells, this sexualized view of harassment has played well in the news media. Indeed, it's the only view that gets much play. As Anita Hill has noted, the press has covered everything from allegations of forcible rape (in the Sergeant Eugene McKinney trial) to consensual sex (in the Clinton-Lewinsky affair) under the common label "sexual harassment,"<sup>17</sup> while devoting little attention to the power dynamics that separate these incidents, or to the many nonsexual forms of harassment and discrimination that disadvantage women. Extensive media coverage of salacious cases has helped diffuse into popular consciousness the idea of sexual harassment as sexual advances. Before the recent wave of scholarship critically examining sexual harassment law and policy began,<sup>18</sup> the sexual model had become so taken for granted in American society that almost everyone simply assumed that sexual harassment referred exclusively to sexual advances.

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discrimination in employment, to exploitation through the welfare system, to dehumanization in pornography—stem from the primary sexual domination of women in one-to-one situations."); ANDREA DWORKIN, *INTERCOURSE* 126 (1987) ("Intercourse as an act often expresses the power men have over women. Without being what the society recognizes as rape, it is what the society—when pushed to admit it—recognizes as dominance.").

16. Willis, *supra* note 14, at 144.

17. See Anita Hill, *A Matter of Definition*, N.Y. TIMES, Mar. 19, 1998, at A21.

18. For examples of feminist scholarship rethinking sexual harassment, see MARGARET A. CROUCH, *THINKING ABOUT SEXUAL HARASSMENT: A GUIDE FOR THE PERPLEXED* (2001); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1219-20 (1998); Katherine Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Christine L. Williams, *Sexual Harassment in Organizations: A Critique of Current Research and Policy*, 1 SEXUALITY & CULTURE 19 (1997). For articles criticizing sexual harassment from a more libertarian perspective, see sources cited *supra*, note 2.

## II. CONSOLIDATION OF THE SEXUAL MODEL IN THE FEDERAL COURTS

Over time, the image of sexual harassment as top-down, male-female sexual advances, which emanated from the early quid pro quo harassment cases, spread to hostile work environment harassment cases and constrained judges' views of what counts as actionable harassment. Over the years, I have read hundreds of sex harassment cases decided by the lower federal courts and have discovered an astonishing pattern. Although the Supreme Court has never held that hostile work environment harassment is limited to sexual conduct,<sup>19</sup> and although some early courts of appeals decisions expressly stated that harassment need not be sexual in nature,<sup>20</sup> lower court decisions have tended to conceptualize hostile work environment harassment in terms of sexual conduct.<sup>21</sup> As a result, many judges have exonerated even serious sex-based misconduct if it does not involve something that resembles a sexual overture.

### A. *Dismissing Cases Involving Nonsexual Conduct*

Some courts have simply dismissed cases that do not allege sexual conduct. In *Turley v. Union Carbide*, for example, a court dismissed the harassment claim of a woman who complained that her foreman "pick[ed] on [her] all the time" and treated her much worse than the male employees.<sup>22</sup> "[T]here are no facts which would support a finding of sexual harassment as that term has come to be used in employment discrimination

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19. Indeed, in 1998 the Supreme Court disavowed this proposition. In *Oncale v. Sundowner Offshore Drilling Servs., Inc.*, the Supreme Court expressly stated, for the first time, that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." 523 U.S. 75, 80 (1998).

20. The first court of appeals decision to explicitly recognize this principle was *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (concluding that harassment need not take the form of "sexual advances or of other incidents with clearly sexual overtones").

21. For an extended analysis of this issue, see Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1706-38 (documenting lower court trends and decisions that place priority on sexual advances and other sexual conduct in analyzing hostile work environment claims).

22. *Turley v. Union Carbide*, 618 F. Supp. 1438, 1442 (S.D.W. Va. 1985).

law,” said the judge.<sup>23</sup> “Plaintiff was not subjected to harassment of a sexual nature. The foreman did not demand sexual relations, he did not touch her or make sexual jokes.”<sup>24</sup> Although they were not controlling, the court cited the EEOC guidelines, which define harassment as “[u]nwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature.”<sup>25</sup> According to the court,

the guidelines provide insight into the nature of a sexual harassment theory. The theory rests upon conduct which can be characterized as sexual. “Sex” in this instance does not mean gender. Rather, it is used pursuant to its more popular meaning. Thus, while the harassment may be directed at a member of the female sex, it is a harassment which plays upon the stereotypical role of the female as a sexual object.<sup>26</sup>

To buttress its conclusion, the court cited Professor MacKinnon as an authority for the idea that sexual harassment refers to “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.”<sup>27</sup>

### *B. Disaggregating Sexual and Nonsexual Conduct*

In other cases, instead of dismissing plaintiffs’ claims outright, courts have disaggregated the evidence and examined the sexual conduct exclusively in connection with the harassment claim while relegating the nonsexual conduct to a separate disparate treatment claim.

This process of disaggregation works against plaintiffs on both the sexual harassment claim and the accompanying disparate treatment claims. *Harris v. Forklift Systems*,<sup>28</sup> a case that culminated in a 1993 Supreme Court decision, illustrates the problem. Theresa Harris was one of two female managers in a

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23. *Id.*

24. *Id.*

25. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1983), quoted in *Turley*, 618 F. Supp. at 1441. The plaintiff’s claim was brought under the state employment discrimination statute, rather than under Title VII; “therefore, the Guidelines [were] not expressly applicable.” *Turley*, 618 F. Supp. at 1441.

26. *Turley*, 618 F. Supp. at 1441-42.

27. *Id.* at 1441 (quoting CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979)).

28. 60 Empl. Prac. Dec. (CCH) ¶ 42,070 (M. D. Tenn. 1991), *aff’d*, 976 F.2d 733 (6th Cir. 1992) (per curiam), *rev’d on other grounds*, 510 U. S. 17 (1993).

company that rented heavy equipment; the other woman was the owner Charles Hardy's daughter. Harris alleged that Charles Hardy had subjected her to various nonsexual actions that undermined her authority as a manager, such as denying her an office, forcing her to bring coffee into meetings, denying her a car or car allowance, and refusing to give her more than a cursory annual review. In fact, Hardy made it plain that he considered women inadequate as managers, denigrating the plaintiff in front of other employees with such remarks as, "You're a woman, what do you know?"; and "We need a man as the rental manager."<sup>29</sup> Hardy made other, more sexually-oriented comments that demeaned Harris as a professional, suggesting, for example, that the two of them go to the Holiday Inn to negotiate her raise, and intimating that she must have promised sex to a client in order to obtain an account.<sup>30</sup> Hardy also denigrated Ms. Harris as a manager by subjecting her to sophomoric, sexually-oriented conduct that he did not direct at male employees, such as asking her and the female office workers to retrieve coins from his front pocket and making suggestive comments about their clothing.<sup>31</sup>

Despite Hardy's conduct, the district court adopted the magistrate's conclusion that the harassment did not rise to the level of a hostile work environment.<sup>32</sup> The Sixth Circuit affirmed. Harris's appeal to the Supreme Court emphasized only one aspect of the case: that the lower court had erred in requiring her to prove that the harassment had caused her serious psychological injury. The Supreme Court rejected this narrow subjective psychological harm requirement and held that a plaintiff need only show that a reasonable person would have perceived, as she did, that the harassment was sufficiently severe or pervasive to create a hostile or abusive work environment.<sup>33</sup>

But the real problem was that the lower court had viewed the facts from the overly narrow perspective of the sexual model. The court began by implicitly separating the sexual and nonsexual conduct into separate claims. Relying on an earlier

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29. *Id.* at 74, 247.

30. *Id.*

31. *Id.*

32. *Id.* at 74, 249.

33. *See Harris*, 510 U.S. at 22.

Sixth Circuit case, the court cited as an element of a hostile work environment claim the requirement that the plaintiff be “subjected to unwelcomed sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature.”<sup>34</sup> The court held that this element was satisfied because Hardy “did not deny that he made the sexually crude comments complained of by plaintiff.”<sup>35</sup> After limiting the analysis to these comments, the judge trivialized them by emphasizing that they didn’t look like a genuine sexual advance. The Holiday Inn comment, for instance, was bad humor, “but it was not a sexual proposition.”<sup>36</sup> The court stressed that winning cases “involved sexual harassment... in the form of *requests for sexual relations or actual offensive touching*.”<sup>37</sup> Here, the court emphasized again that Hardy “was vulgar and crude, but the sexual conduct was not in the form of sexual propositions or physical touching.”<sup>38</sup>

The court not only excluded the allegedly discriminatory nonsexual acts from the hostile work environment claim; for purposes of the disparate treatment claim, the court also examined each act, one by one, and asked whether it was motivated by sex discrimination, rather than asking that question of all the alleged incidents, taken as a whole.<sup>39</sup> Once severed from the more sexualized incidents (let alone from each other), however, the nonsexual acts ceased to look gender-related. Thus, the lower court concluded that none of the alleged incidents of disparate treatment—such as denying Harris an office or car allowance or a full annual review—had occurred because of her sex within the meaning of Title VII.<sup>40</sup> That

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34. *Harris*, 60 Empl.Prac. Dec. (CCH), at 72, 249.

35. *Id.* at 74, 249. Although the Court justified this conclusion by referring to “Hardy’s sexually crude comments,” *id.*, the judge did consider as part of the hostile work environment claim Hardy’s “dumb ass woman” and “you’re a woman, what do you know?” comments, which are arguably nonsexual. *Id.* at 74, 250. The court even states that these comments are “more objectionable” than the Holiday Inn comment. Nonetheless, the court does not refer to these objectionable comments when analyzing whether the harassment was sufficiently harmful to be actionable. *Id.*

36. *Id.* at 74, 250.

37. *Id.* (emphasis added).

38. *Id.* (citing *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986)).

39. *See id.* at 74,251.

40. *Id.*

Charles Hardy asked Harris to bring coffee into meetings, which the court conceded Hardy never asked the men to do,<sup>41</sup> simply dropped out of the legal analyses altogether.

The lower court's method of analysis arguably skewed the results. Had the judge considered *all* the conduct Harris complained about—including the “sexual” conduct reducing her to a sexual object as she struggled to fulfill her managerial role; the nonsexual but gender-biased comments and actions that denigrated her capacity to serve as a manager; and the facially gender-neutral conduct she claimed denied her the perks, privileges, and respect she needed to do her job well—and asked whether the entire pattern of conduct undermined Harris's status and authority as a manager on the basis of her sex, the answer might well have been yes. Yet due to the taken-for-granted nature of the sexual model, Harris did not even appeal these aspects of her case. Neither the Supreme Court, the Sixth Circuit, nor Harris's counsel<sup>42</sup> saw the lower court's obsession with sexual advances as problematic.

### *C. Assigning Different Evidentiary Weight to Sexual and Nonsexual Conduct*

Other trends in hostile work environment cases confirm the logic of the disaggregation cases and the ingrained status of the sexual model. Following the reasoning of the early quid pro quo decisions, courts typically presume sexually-motivated conduct is based on sex within the meaning of Title VII. Yet even in highly sex-segregated job settings in which sexual harassment is known to occur frequently, judges often fail to perceive nonsexual forms of mistreatment directed at women as sex-based. Elsewhere, I have referred to this pattern of assigning different weight to the

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41. *Id.*

42. In fact, Harris's lawyers argued from *within* the sexual model, emphasizing the sexually explicit nature of some of Hardy's conduct. *See* Brief for Petitioner at 33, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (No. 92-1168). This strategy, of course, invited counsel for Forklift Systems to stress that much of the conduct was *not* sexual in nature and that nonsexual conduct rarely rises to the level of affecting the terms and conditions of employment. *See* Brief for Respondent at 28. Only in the reply brief did Harris's counsel even argue that Hardy's denigration of Harris's competence was “especially demeaning to a person in a managerial position.” *See* Reply Brief for Petitioner at 9.

two types of evidence as “the two tier structure of causation.”<sup>43</sup>

Furthermore, even judges who acknowledge that nonsexual actions can contribute to a hostile work environment tend to want to see, and to highlight the harm of, overtly sexual conduct in ruling on whether the alleged harassment is sufficiently severe or pervasive to be actionable. It can be difficult to satisfy this element without some sort of sexual touching and/or overt sexual propositioning.<sup>44</sup>

Consciously or unconsciously, the courts tend to regard such sexual conduct as “real” sexual harassment. Consequently, judges often overlook or trivialize the discriminatory character and harmful quality of sex-based harassment and hostility that is not sexual in nature. This general pattern of differential treatment of cases involving sexual as opposed to nonsexual conduct was confirmed in a systematic study by Professors Ann Juliano and Stewart Schwab, who analyzed every federal sex harassment case decided between 1986 and 1996—nearly 650 opinions in all.<sup>45</sup> Juliano and Schwab found that “[p]laintiffs alleging ‘harassment as sexualized behavior’ have significantly higher win rates than other sexual harassment plaintiffs.”<sup>46</sup> “Further,” they reported, “harassment claims premised upon physical contact of a sexual nature met greater success than

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43. See Schultz, *supra* note 21, at 1739 and cases cited therein at 1740-44.

44. See *id.* at 1718-20 and cases cited therein. I believe the Supreme Court’s unwillingness to impose the usual Title VII standard of vicarious employer liability for supervisor harassment in hostile work environment cases also reflects the problematic influence of the sexual model. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). It is beyond the scope of this article to elaborate on the issue fully here. But the basic insight is that like their colleagues on the lower courts, the Justices implicitly assume the paradigmatic act of hostile work environment harassment is a supervisor’s act of making sexual advances behind closed doors. Only such an image of hostile work environment harassment can explain why the Court has concluded that, unlike other discriminatory actions, sexual harassment does not ordinarily fall within the scope of a supervisor’s employment, but instead typically constitutes “a frolic of his own.” See *id.* at 758-59. Under a more expansive understanding of sexual harassment, it would be difficult to distinguish a supervisor’s acquiescence or participation in hostile behaviors toward women that undermine the women’s professional standing from other forms of disparate treatment for which supervisors are held vicariously liable.

45. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548 (2001).

46. *Id.* at 580

physical conduct of a nonsexual nature [like hitting].”<sup>47</sup>

There are some recent signs of potential change. In 1998, the Supreme Court pronounced in *Oncale v. Sundowner Offshore Services* that hostile work environment harassment need not be motivated by sexual desire to be actionable under Title VII.<sup>48</sup> Since then, some appellate decisions have explicitly rejected disaggregation and reiterated that nonsexual forms of sex-based harassment can constitute hostile work environment harassment.<sup>49</sup> Despite these developments, however, an

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47. *Id.* at 581.

48. In *Oncale v. Sundowner Offshore Drilling Services, Inc.*, the Supreme Court expressly stated, for the first time, that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.” 523 U.S. 75, 80 (1998). At the same time, however, the Court reiterated that it would remain easier to win cases involving conduct motivated by sexual desire, because such conduct would be presumed to occur because of sex within the meaning of Title VII:

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. *Id.* at 80.

By contrast, although the Court did not foreclose such a result, the Justices did not expressly approve the same inference of causation with respect to other conduct that is likely to occur because of sex, such as hostility directed at women who are severely underrepresented in traditionally male-dominated fields. In this sense, *Oncale* does nothing to disturb the two-tiered structure of causation that makes it easier to prove a harassment claim based on sexually motivated conduct that I discussed in an earlier work. See Schultz, *supra* note 21, at 1739-44.

49. See, e.g., *O’Rourke v. City of Providence*, 235 F.3d 713, 729-30 (1st Cir. 2001) (holding that “sex-based harassment that is not overtly sexual is . . . actionable under Title VII,” and emphasizing that “[c]ourts should avoid disaggregating a hostile work environment claim . . . into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct”); *Durham Life Ins. Co., v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999) (rejecting argument that district court erred in aggregating “events [that] were apparently triggered by sexual desire, some [that] were sexually hostile, some [that] were non-sexual but gender-based, and others [that] were sexually neutral,” and holding that the district court properly analyzed whether the entire pattern of conduct, taken together, was based on the plaintiff’s sex); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999) (concluding that the district court erred in reasoning that harassment must consist of conduct that is sexual in nature and holding that “harassing behavior that is not sexually explicit but is directed at women and motivated by

examination of post-*Oncale* cases reveals that old habits die hard. For example, some courts of appeals still require sexual conduct as an element of a hostile work environment claim,<sup>50</sup> and many judges continue to privilege sexual forms of harassment at the expense of nonsexual forms in deciding whether the complained-of conduct satisfies the causation and severity elements of hostile work environment harassment under Title VII.<sup>51</sup>

### III. PROBLEMS WITH THE LAW UNDER THE SEXUAL MODEL

#### *A. Neglect of Nonsexual Forms of Harassment and Discrimination*

The problems with disaggregation and the sexual model should be obvious by now. Disaggregating the so-called sexual

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discriminatory animus against women satisfies the ‘based on sex’ requirement”).

50. *See, e.g.*, Freitag v. Ayers, 463 F.3d 838, at 849 (9th Cir., Sept. 13, 2006) (stating that to establish a hostile work environment, “a plaintiff must prove that . . . she was subjected to verbal or physical conduct of a sexual nature”); Romaniszak-Sanchez v. Int’l Union of Operating Engineers, 121 Fed. Appx. 140, 144 (7th Cir. 2005) (stating that a hostile work environment plaintiff must prove “that she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature”).

51. *See, e.g.*, Romaniszak-Sanchez, 121 Fed. Appx. at 144 (affirming district court’s conclusion that the harassment was not severe and pervasive because “[t]he bulk of [the] complaints . . . did not involve specific sexual comments, but more generalized complaints of rampant profanity”); Starnes v. Barrett & McNagny, LLP, No. 1: 04-CV-192, 2005 U.S. Dist. LEXIS 8391, at \*8-\*9 (N.D. Ind. May 5, 2005) (finding persuasive, in granting summary judgment against plaintiff who alleged a pattern of offensive and frightening comments by co-worker, that “only two of [the harasser’s] comments were explicitly sexual” and thus “a reasonable person . . . would not [have found the work environment] ‘hostile and abusive’”); Buttron v. Sheehan, No. 00C4451, 2003 U.S. Dist. LEXIS 13496, at \*47 (Aug. 4, 2003) (finding persuasive, in granting summary judgment against corrections department workers who alleged a broad pattern of incidents excluding and undermining them on the job by their supervisors and coworkers, that “[n]one of the [complained of] conduct . . . was sexual in nature” and thus the conduct was not gender-related and not objectively hostile). *Cf.*, Rene v. MGM Grand, 305 F.3d 1061, 1065, 1068 (9th Cir. 2002) (concluding that harassment of openly gay hotel butler by his male supervisor and coworkers was actionable because it was physical conduct “of a sexual nature,” which has a “sexual meaning,” and suggesting that physical assaults against gay men that are not similarly “sexual” would not violate Title VII).

and nonsexual forms of misconduct can obscure a full understanding of the conditions of the workplace and make both the hostile work environment and accompanying disparate treatment claims look trivial. When considered apart from the larger workplace context of discriminatory hiring, assignments, training, evaluation, or pay that are associated with job segregation by sex, the complained-about sexual conduct often appears too minor to be actionable. Indeed, it can appear as though prudish women are simply trying to curb the men's sexual speech, just as some of the libertarians suspect, when this doesn't represent the whole picture.

By the same token, when women work in sexist and exclusionary environments that make it difficult for them to obtain the information, training, and assignments necessary to succeed, the women can easily appear (or actually become) less than fully proficient at their jobs. This lack of proficiency then becomes the justification that makes their firing or other differential treatment look gender-neutral. "She got fired because she wasn't performing," or, "we didn't give her the good assignments because she couldn't handle them" is the justification, when the truth is that harassment and discrimination prevented her successful performance.

Equally disturbing, some seemingly nonsexual forms of harassment that do not rise to the level of tangible employment decisions may escape legal scrutiny altogether. In contrast to a supervisor's formal decision to fire someone or not promote her, supervisors and coworkers may get away with less formal acts of exclusion—such as failing to invite a woman to informal events where crucial job information is shared or refusing to mentor her equally—because such acts are not sufficiently "sexual" to count as hostile work environment harassment and yet seem too remote from a material change in work status to count as disparate treatment.

In general, then, the legal system's historic emphasis on sexual advances is underinclusive; it obscures equally debilitating forms of sex-based harassment and discrimination that are not primarily "sexual" in content or design.<sup>52</sup> According to some studies, these nonsexual forms of harassment are even more

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52. See Schultz, *supra* note 21, at 1683.

prevalent than explicitly sexual forms.<sup>53</sup> Every day, in workplaces all over the country, women who enter jobs traditionally done by men are met with sexism and harassment aimed to drive them away or convey the message they are different or out of place. Even in traditionally female fields, women are often subjected to sexist forms of authority that mark them as subordinate. Often, the harassment doesn't involve sexual advances, but consists of sex-based acts of denigration, exclusion, isolation, work sabotage, and other micro-level interactions designed to undermine a woman's perceived competence.

The case logs are filled with decisions describing this sort of sex-based harassment. The Philadelphia Police Department welcomed the first female entrants by stealing their case files and placing lime in their uniforms that burned their skin.<sup>54</sup> Electricians at the Atlantic City Convention Center greeted a female subforeman by refusing to work for her and standing around laughing while she unloaded heavy boxes by herself.<sup>55</sup> A road construction company supervisor humiliated one of only two female truck drivers by repeatedly calling her "dumb" in front of other truck drivers, yelling at her to "get your ass back in the truck and don't you get out of it until I tell you"<sup>56</sup> and,

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53. See, e.g., Phyllis L. Carr et al., *Faculty Perceptions of Gender Discrimination and Sexual Harassment in Academic Medicine*, 132 ANN. INTERN. MED. 889, 893 (2000) (reporting that, in a sample of 3332 full-time medical school faculty, 48% reported encountering sexist remarks and behavior, while 30% reported unwelcome sexual advances and other coercive sexual behaviors); Erika Frank et al., *Health-Related Behaviors of Women Physicians vs Other Women in the United States*, 158 ARCH. INTERN. MED. 342-43, 344 tbl. 1 (1998) (reporting that in a 1998 large national sample of female physicians, around 36.9% had experienced harassment that was sexual in nature, but 47.7% had experienced "gender-based harassment with no sexual component" that was "simply related to their being female in a traditionally male environment"); Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 160 tbl.1, 166 tbl.2 (1988) (revealing that, in a large sample of university faculty, graduate and undergraduate students, administrators, clerical staff, and other employees, women in all groups were much more likely to experience forms of nonsexual gender harassment—including being "treated differently due to gender" or being subjected to "sexist remarks about career options"—than sexual forms of harassment).

54. *Andrews v. City of Phila.*, 895 F.2d 1469, 1473-74 (3d Cir. 1990).

55. *Reynolds v. Atl. City Convention Ctr.*, 53 Fair Empl. Prac. Cas. (BNA) 1852, 1857 (D.N.J. 1990), *aff'd*, 925 F.2d 419 (3d Cir. 1991).

56. *Gross v. Burgraff Const. Co.*, 53 F.3d 1531, 1543 (10th Cir. 1995).

broadcasting to a coworker when he could not locate her on the company radio, “sometimes, don’t you just want to smash a woman in the face?”<sup>57</sup>

The claim for hostile work environment harassment should cover *all* these actions, regardless of whether they are sexual in nature. The very concept of a hostile work environment was meant to include any and all actions contributing to a discriminatory atmosphere in which it is more difficult for some people to pursue their work because of their sex (or race, religion, or national origin). Indeed, the concept was first crafted by the federal courts in the context of race discrimination, where judges soon realized efforts to dismantle systems of racial segregation would falter unless the legal system cracked down on informal actions designed to make racial and ethnic minorities feel unwelcome and inferior in workplaces and jobs formerly reserved for whites.<sup>58</sup> Both Congress and the Supreme Court have emphasized that sex discrimination is to be treated with the same seriousness as race discrimination,<sup>59</sup> and the Court has stressed that a hostile work environment is to be

57. *Id.* at 1536.

58. The first hostile work environment case was *Rogers v. EEOC*, in which the Fifth Circuit held that a Hispanic worker’s allegation that her optometrist employers had discriminated against her on the basis of national origin by segregating patients along ethnic lines stated a Title VII violation sufficient to support an EEOC investigation. 454 F.2d 234 (5th Cir. 1971). In a passage that laid the conceptual foundation for a hostile work environment harassment claim, the Court recognized that “employees’ psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase ‘terms, conditions, or privileges of employment’ [in Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.” *Id.* at 238 (quoting 42 U.S.C. § 2000e-2(a)(1)).

59. For example, when Congress amended Title VII in 1972, both the House and the Senate made clear that they considered sex segregation to be the primary evil the statute was designed to address. *See* H.R. REP. NO. 92-238, 92d Cong., 1st Sess. 4-5, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2140 (“[W]omen are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone. Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964.”); S. REP. NO. 415, 92nd Cong., 1st Sess. 7 (1971) (including similar statements). The Supreme Court, in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986), explained that “[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited [just as is a hostile work environment based on discriminatory racial harassment].”

evaluated by looking at the totality of the facts and circumstances.<sup>60</sup> As long as the pattern of harassment occurs because of sex, it should be prohibited by Title VII.

*B. The Need for A Broader Understanding of Sex Harassment*

There *is* a way to conceive of harassment that puts all the sexual and nonsexual forms of misconduct together and brings the broader picture of sex inequality into view. Research suggests most harassment is not designed to achieve sexual gratification. Instead, it is used to preserve the sex segregation of jobs by claiming the most highly rewarded forms of work as masculine in composition and content. Even when male workers engage in sexualized forms of harassment, the motive often is not to secure a sexual or romantic liaison, but rather to guard the masculine image of their work and identity.

Some of the motivation is material: by holding on to higher-paying jobs, some men can retain economic superiority over women. Such an advantage ensures greater power in various spheres of life other than the workplace, such as politics, culture, and the family. But some of the motivation is more subtle. At least since the era of industrialization, paid work has been a central source of identity for Americans, especially for men. Earning enough income to head a family, and achieving mastery over one's work, is central to the mainstream understanding of manhood.<sup>61</sup> So, it isn't surprising that numerous studies confirm

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60. See, e.g., *Harris v. Forklift Sys's, Inc.*, 510 U.S. 17, 23 (1993) (“[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.”); see also *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 103 (2002) (“Determining whether an actionable hostile environment claim exists requires an examination of all the circumstances.”).

61. For analyses of the importance to men of earning a family wage, see ALICE KESSLER-HARRIS, *A WOMAN'S WAGE: HISTORIES, MEANINGS AND SOCIAL CONSEQUENCES* 19-20, 67-71 (1990); Martha May, *The Historical Problem of the Family Wage: The Ford Motor Company and the Five Dollar Day*, 8 *FEMINIST STUD.* 399, 401 (1982). For historical examples of the importance of work and masculine competence to masculine identity, see ARTHUR BRITTAN, *MASCULINITY AND POWER* (1989); Ava Baron, *An “Other” Side of Gender Antagonism at Work: Men, Boys, and the Remasculinization of Printers' Work, 1830-1920*, in *WORK ENGENDERED: TOWARD A NEW HISTORY OF AMERICAN LABOR* 47 (Ava Baron ed., 1991); and Michael Grossberg, *Institutionalizing Masculinity: The Law as a Masculine Profession*, in *MEANINGS FOR MANHOOD: CONSTRUCTIONS OF MASCULINITY IN VICTORIAN AMERICA* 133-45 (Mark C. Carnes & Clyde Griffen eds., 1990).

that most men define themselves in terms of their status as workers. Being a breadwinner and a possessor of masculine competence is central to how most American men think of themselves as men.

Employment discrimination law is aimed at disrupting this link between work and gender by guaranteeing women an equal right to participate in all the most highly valued forms of work in our society. But achieving such equality has proven to be elusive, because even when employers eliminate the formal barriers, male supervisors and workers who resent the presence of women can still act informally to prevent women from entering or succeeding in “their” jobs. A successful campaign of harassment doesn’t require all or even most of the men to be actively involved. It takes only a few, along with the acquiescence of the other workers and supervisors.

Research confirms that women who work in male-dominated settings are more likely than other women to report gender-based hostility and harassment at work.<sup>62</sup> The evidence suggests that for these women, and for many who do not work in male-dominated settings, neither sexual desire nor sexual advances are the core of the problem. Even where sexual misconduct occurs, it is typically part of a much broader pattern of conduct designed to reinforce gender difference and to claim work competence as a masculine preserve.<sup>63</sup> By warning away

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62. See, e.g., U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT* 18 (1988); U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?* 51-52 (1981); Louise F. Fitzgerald et al., *Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model*, 82 J. APPLIED PSYCHOL. 578, 584 (1997); Barbara A. Gutek & Bruce Morasch, *Sex Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work*, 38 J. SOC. ISSUES 67-68 (1982); Susan Ehrlich Martin, *Sexual Harassment: The Link Joining Gender Stratification, Sexuality, and Women’s Economic Status*, in *WOMEN: A FEMINIST PERSPECTIVE* 22, 61 (Jo Freeman ed., 5th ed. 1995); Sandy Welsh, *Gender and Sexual Harassment*, 25 ANN. REV. SOC. 169, 178-80 (1999). Note that with the exception of Fitzgerald’s, none of these studies attempts to capture nonsexual forms of sex-based harassment.

63. For some particularly illuminating sources, see MOLLY MARTIN, *HARD-HATTED WOMEN: STORIES OF STRUGGLE AND SUCCESS IN THE TRADES* 10 (1988) (“[I]n addition to sexual advances, women in the trades also face another pervasive and sinister kind of harassment which is gender-based, but may have nothing to do with sex. It is harassment aimed at us simply because we are women in a ‘man’s’ job, and its function is to discourage us from staying in our trades.”); JEAN SCHROEDEL, *ALONE IN A CROWD: WOMEN IN THE*

women who enter or by labeling them as inferior workers, men can maintain the masculine composition and image of their jobs. As one female pipe fitter explained:

For a long time I wasn't allowed to do certain types of jobs.... Some of the men would take the tools out of my hands. You see it is just very hard for them to work with me because they're really into proving their masculinity and being tough. And when a woman comes on a job that can work, get something done as fast and efficiently, as well, as they can, it really affects them. Somehow if a woman can do it, [it's not] that masculine, not that tough.<sup>64</sup>

If this statement makes this sort of harassment sound like purely a blue-collar phenomenon, research shows it is not. A 1998 large national sample of female physicians found that around one-third had experienced harassment that was sexual in nature, but one-half had experienced “gender-based harassment with no sexual component” that was “simply related to their being female in a traditionally male environment.”<sup>65</sup> Another study reports similar results in a white-collar university setting.<sup>66</sup>

Sexual harassment of this type occurs in all different socioeconomic contexts, though its form varies with the occupational setting. Sometimes the harassment takes the form of belittling a woman's physical prowess, as in firefighting or corrections; sometimes it takes the form of undermining her technical competence, as in the trades or the sciences; sometimes it takes the form of questioning her capacity for adequate aggressiveness, as in police work or sales; sometimes it takes the form of characterizing her as overly aggressive or abrasive, as in accounting or law; sometimes it takes the form of refusing to

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TRADES TELL THEIR STORIES xiv-xv (1985) (documenting the same theme); FRANCES K. CONLEY, WALKING OUT ON THE BOYS (1999) (same).

64. SCHROEDEL, *supra* note 63, at 20-21.

65. See Frank, et al., *supra* note 53, at 343-44 tbl.1. See also Carr et al., *supra* note 53 at 893 (reporting that, in a sample of 3332 full-time medical school faculty, 48% reported encountering sexist remarks and behavior, while 30% reported unwelcome sexual advances and other coercive sexual behaviors).

66. Fitzgerald et al., *supra* note 53, at 160 tbl.1, 166 tbl.2 (1988) (revealing that female university faculty members and female graduate and undergraduate students were much more likely to experience forms of nonsexual gender harassment—including being “treated differently due to gender” or being subjected to “sexist remarks about career options”—than sexual forms of harassment).

submit to a woman's authority, even though she is one's supervisor; sometimes it takes the form of denigrating her intellectual achievement, as in the academy;<sup>67</sup> and sometimes it takes the form of treating a woman as if she were a child or other dependent, rather than a fully competent adult worker.<sup>68</sup> Hostile work environment harassment is both a cause and consequence of sex segregation on the job.

### *C. Normalization of Male-on-Male Harassment*

The sexual model also obscures some pernicious on-the-job harassment experienced by men. Once we abandon the notion that harassment isn't always about sexual gratification, it becomes easier to understand why some men may subject others to gender-based harassment on the job. It is important for some men to maintain the illusion that their jobs demand a certain type of masculine competence; if a job is to confer a sense of masculinity, it must be held by those who project the desired image. If you close your eyes and picture the media image of a male firefighter, you'll undoubtedly see the image of a strong, benevolent protector: a man strong enough to carry heavy equipment up vast heights, yet sensitive enough to risk his life for a sleeping child.

It isn't only women who can detract from such an image; men can also. The desired persona varies with the type of work involved: professional boxers, no doubt, see the manly qualities of their calling differently than research scientists. In some jobs, men are threatened by the presence of a man they perceive to be gay, for homosexuality is equated with "weakness" in some occupational cultures and seen as a sign of gender deviance. The same can be true of other men who are perceived to lack the manly competence considered suitable for a member of the trade or profession. The literature is filled with examples of

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67. For cases supporting these propositions, see Schultz, *supra* note 21, at 1763 nn.417-21.

68. See, e.g., Delgado v. Lehman, 665 F. Supp. 460, 464 (E.D. Va. 1987) (involving women office workers who were subjected to a naval official's pronouncement that he had "dumb females working for him who couldn't read or write"); Cline v. Gen. Elec. Credit Auto Lease, 757 F. Supp. 923, 925-26 (N.D. Ill. 1990) (involving female collections agents whose boss belittled their dress and appearance, slapped and hit them, and confiscated one of their personal credit cards).

harassment against men who aren't married, women who are perceived as weak or slow, and men who are openly supportive of women, even young men or boys.

Courts have been slow to perceive these situations as sex-based harassment because they do not fit the top-down, male-female, sexual come-on image of harassment. In *Goluszek v. Smith*,<sup>69</sup> for example, the court ruled against an electronic maintenance mechanic who was disparaged and driven out of his job. The other men taunted him for not having a wife, saying a man had to be married to be a machinist. They used gender-based images to assault his work competence, telling him that if he couldn't fix a machine, they'd send in his "daddy"—the supervisor—to do it. They made other comments that linked their assaults on his work competence to attacks on his virility. Eventually, they drove jeeps at him and threatened to knock him off his ladder.<sup>70</sup> He was later transferred to a different shift where the machinists accused him of being gay or bisexual and made crude sexual overtures toward him.<sup>71</sup> When he filed a grievance, his supervisor fired him. Not only did the court dismiss his claim, the judge simply couldn't conceive that what happened to him was sex harassment. "The 'sexual harassment' that is actionable under Title VII 'is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person,'" wrote the judge.<sup>72</sup>

#### *D. Sexual Paternalism*

The sexual model also encourages courts to extend protection to women for the wrong reasons. Rather than emphasizing the use of harassment law to promote women's empowerment and equality as workers, the sexual dominance paradigm subtly appeals to judges to protect women's sexual virtue or sensibilities.

This sexual paternalism is deeply conservative. Its benefits are limited to women imagined to possess the sexual purity to

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

70. *Id.*

71. *Id.* at 1454.

72. *Id.* at 1456 (quoting Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984) (footnotes omitted)).

render them “deserving” of protection. Historically, such protection has been reserved for white, middle-class, heterosexual women who would not dare upset the settled gender order by abandoning their home for wage work or politics. Contemporary caselaw reproduces this legacy by requiring plaintiffs to conform to class- and race-biased images of the “good victim” in order to receive legal protection.

The courts’ application of the “unwelcomeness” requirement illustrates this problem. *Reed v. Sheppard*,<sup>73</sup> for example, involved a woman who worked as a civilian jailer. Her position was carved out of the male-only deputy sheriff position a few years after Title VII took effect, allegedly for the purpose of conserving funds. Reed alleged she was the victim of hostile work environment harassment. The harassment claim was part of a larger complaint of being discriminated against in pay, promotion, and benefits, denied locker and restroom facilities, and being “required to perform onerous duties in addition to those tasks related to the management of the jail.”<sup>74</sup> But the court consigned the latter allegations to a separate disparate treatment claim. For purposes of the hostile work environment claim, the Seventh Circuit focused on the antics of Reed’s male coworkers, describing them as follows:

Plaintiff contends that she was handcuffed to the drunk tank and sally port doors, that she was subjected to suggestive remarks... , that conversations often centered around oral sex, that she was physically hit and punched in the kidneys, that her head was grabbed and forcefully placed in members laps, and that she was the subject of lewd jokes and remarks. She testified that she had chairs pulled out from under her, a cattle prod with an electrical shock was placed between her legs, and that they frequently tickled her. She was placed in a laundry basket, handcuffed inside an elevator, handcuffed to the toilet and her face pushed into the water, and maced.<sup>75</sup>

The Seventh Circuit’s analysis simultaneously professed its own horror at Reed’s coworkers’ activities and placed Reed herself outside the community of women deemed capable of being harmed by such horrific treatment. “By any objective

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73. *Reed v. Sheppard*, 939 F.2d 484 (7th Cir. 1991).

74. *Id.* at 486.

75. *Id.*

standard, the behavior of the male deputies and jailers toward Reed... was... repulsive. But apparently not to Reed.”<sup>76</sup> The court reached this startling conclusion based on evidence Reed used profanity, told off-color jokes, engaged in sexual horseplay and flirting, and failed to wear a bra underneath her T-shirt.<sup>77</sup>

The court could only have concluded that Reed’s behavior justified her coworkers’ harassment by viewing the case through the lens of sexual paternalism. Even if Reed had displayed a bawdy sexuality—or, even if she had indeed willingly participated in some sexual horseplay with her coworkers—this in no way implied she had invited nonsexual violent physical assaults, such as being hit and punched in the kidneys, shocked with a cattle prod, or pushed facedown into the toilet—let alone the entire pattern of mistreatment she appears to have suffered as a woman in a traditionally male job setting. In the court’s eyes, however, Reed’s sexually bawdy conduct had branded her as a “bad girl” outside the bounds of legal protection. Indeed, the court stressed that, “other female employees testified that the male jail employees did not behave in this manner around women who asked them not to.”<sup>78</sup> (Score one for the good girls.)

#### IV. DEVELOPMENTS WITHIN AMERICAN WORKPLACES

Unfortunately, the same overemphasis on sexual conduct that has led courts to ignore larger patterns of sex harassment and discrimination also seems to be leading companies to overreach and prohibit sexual conduct even when it doesn’t undermine sex equality on the job. Over the past few years, I have reviewed hundreds of sex harassment policies, read the human resource and law practice literatures on sex harassment, studied the more theoretical sociological and management literature on the subject, researched newspaper coverage and ethnographic accounts of what is happening in actual workplaces, attended conferences on the subject, and interviewed major consultants in the field. I have also analyzed scores of court cases and reviewed all the empirical work that is available on sexual harassment and workplace romance. As I

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76. *Id.*

77. *Id.* at 486-87.

78. *Id.* at 492.

explain below, the emerging picture of what organizations are doing in the name of sexual harassment law is disturbing.

### A. Contemporary Trends

My reading of the literature has convinced me that the libertarian critics of harassment law are partly right: many employers are overreaching and prohibiting a broad range of sexual conduct that does not necessarily meet the legal definition of sexual harassment or threaten gender equality in the workplace. There are four major trends.<sup>79</sup>

1. Companies *are* placing prohibitions on some forms of sexual conduct—including sexual joking and conversation—that rarely meet the legal definition of sex harassment, let alone sex discrimination. Although we lack precise empirical data showing how many companies prohibit conduct beyond the legal definition, recent survey evidence suggests the problem is widespread.

The overwhelming majority of American companies have sexual harassment policies.<sup>80</sup> These policies almost universally define sexual harassment, with the vast majority adopting the definition contained in the EEOC guidelines (“unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature”).<sup>81</sup> Most policies elaborate on this definition by enumerating examples of sexual harassment that include such things as telling sexual jokes or making sexual

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79. For a complete discussion of these trends, *see* Schultz, *supra* note 1, at 2090-131.

80. *See, e.g.*, AM. MGMT. ASSN, SEXUAL HARASSMENT: POLICIES AND PROCEDURES 1 (1996) (reporting that 89% of firms surveyed had formal sexual harassment policies and 65% had training programs); SOC'Y FOR HUMAN RES. MGMT., SEXUAL HARASSMENT SURVEY [SHRM 1999 Sexual Harassment Survey] 6, 8, 10 (1999) (reporting that 97% of the 496 members that responded to a faxed survey indicated they had written sexual harassment policies and 62% indicated they had training programs, where 53% of the respondents had only between 1 and 250 employees); Frank Dobbin & Erin Kelly, A Tale of Two Sectors: The Spread of Anti-Harassment Remedies Among Public and Private Employers, (2002) (unpublished article, on file with Princeton University and current revision under review at AM. J. OF SOCIOLOGY) (reporting that in a sample of 389 employers contacted in 1997, 95% had adopted sexual harassment grievance procedures and more than 70% had training programs).

81. BUREAU OF NAT'L AFFAIRS, PERSONNEL POLICIES FORUM SURVEY NO. 144, SEXUAL HARASSMENT: EMPLOYER POLICIES AND PROBLEMS 4 (1987).

innuendoes. In fact, surveys show that the majority of sexual harassment complaints concern sexual remarks and joking—37% of all complaints from women and 14% of those from men in the 1994 Merit Systems Protection Board study,<sup>82</sup> for example, and 48% of all complaints in the 1999 Society for Human Resource Management survey.<sup>83</sup>

2. In the name of preventing sexual harassment liability, some firms are even prohibiting or strongly discouraging dating or other intimate relationships between employees. Although there has not been much systematic research on this issue, the available research suggests that between 27% and 39% of the organizations surveyed have written policies or clear organizational norms on workplace romance, and that, of those who do, the vast majority of companies prohibit or discourage it.<sup>84</sup> Although it appears that only a minority of companies currently are prohibiting workplace romance, human resource (HR) managers and labor and employment lawyers believe this

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82. U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES*, at 14 (1994) [MSPB 1994 Study].

83. SHRM 1999 *SEXUAL HARASSMENT SURVEY*, *supra* note 80, at 6.

84. The most widely cited estimates come from the Society for Human Resource Management's 2001 survey. Among the 558 human resource managers who responded, 22% said their organizations had policies on workplace romance (15% had a written policy, 5% had a verbal policy, and 2% were in the process of drafting a policy). SOC'Y FOR HUMAN RES. MGMT., *WORKPLACE ROMANCE SURVEY 12* (2001) [SHRM 2001 *WORKPLACE ROMANCE SURVEY*], at 2, 4 chart 1. These professionals reported that, among companies with policies, 64% discouraged workplace romances and another 8% prohibited them altogether. *Id.* at 4. These figures are similar to the results of the Society's 1998 survey, in which 27% of the 617 human resource professionals surveyed said their organizations had policies on workplace romance (13% had a written policy, while 14% had clear unwritten understandings). SOC'Y FOR HUMAN RES. MGMT., *WORKPLACE ROMANCE SURVEY 3* (1998) [SHRM 1998 *Workplace Romance Survey*]. In the 1998 survey, the share of company policies that HR professionals said discouraged or prohibited romance was lower: 55% discouraged workplace romances while another 7% prohibited them, for a total of 62%. *Id.* Compare that to the 72% figure the professionals reported in the 2001 survey. SHRM 2001 *WORKPLACE ROMANCE SURVEY*, at 4. In another widely cited study of 175 white-collar employees, employees reported that 39% of their organizations had policies or understandings about employee relationships—with the overwhelming majority (82%) of those 39% banning or discouraging them. Carolyn I. Anderson & Phillip L. Hunsaker, *Why There's Romancing at the Office and Why It's Everybody's Problem*, PERSONNEL, Feb. 1985, at 59, 61.

is a growing trend<sup>85</sup>—and these experts are encouraging it. The experts are warning companies they must clamp down on supervisor-subordinate relationships; and to avoid liability for sexual harassment, some even warn against peer relationships. Of the firms that have already adopted restrictions, the overwhelming majority said they did so out of fear of sexual harassment liability.<sup>86</sup>

3. Many companies are backing up their policies with discipline. According to a large national 1999 survey by the Society of Human Resource Management, 60% of all sexual harassment complaints resulted in some form of disciplinary action against or compelled training for the alleged harasser.<sup>87</sup> That most accused harassers are subjected to discipline or training seems remarkable when we recall that, in the majority of sexual harassment complaints documented in large-scale surveys, sexual remarks and joking were the primary types of harassment alleged. Furthermore, the vast majority of the complaints are filed against coworkers, not supervisors.<sup>88</sup>

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85. Both a 1987 study, Andrea Warfield et al., *Co-Worker Romances: Impact on the Work Group and on Career-Oriented Women*, PERSONNEL, May 1987, at 22, 28, and a 1994 study, Am. Mgmt. Ass'n, Office Romance: Summary of Findings (1994) (on file with author), indicated that only 6% of companies surveyed had formal written policies on employee dating. More recent surveys put the number higher, see SHRM 1998 WORKPLACE ROMANCE SURVEY., *supra* note 84, at 3 (finding that 13% of workplaces surveyed in 1998 had formal written policies on employee dating), and suggest it may be rising, see SHRM 2001 WORKPLACE ROMANCE SURVEY, *supra* note 84, at 4 (finding that 15% of workplaces surveyed in 2001 had formal written policies on employee dating). See also SOC'Y FOR HUMAN RES. MGMT., *supra* note 84, at 9 (reporting that, in 2001, 22% of HR professionals reported that their organizations conducted training on how to manage workplace romance, while in 1998, only 12% did so); SHRM 1998 WORKPLACE ROMANCE SURVEY, *supra* note 84, at 3. Of course, one must use caution in interpreting and comparing these studies, as they all used different methodologies.

86. In the Society for Human Resource Management's 2001 Workplace Romance survey, 95% of HR professionals cited a "[p]otential for claims of sexual harassment" as a reason to ban or discourage workplace romances. By comparison, the second most widely cited rationale, "[c]oncerns about lowered productivity by those involved in the romance," was cited by only 46%. SHRM 2001 WORKPLACE ROMANCE SURVEY, *supra* note 84, at 5.

87. See SHRM 1999 SEXUAL HARASSMENT SURVEY, at 6 tbl.3 (reporting that 29% of alleged harassers were given a warning, 6% were put on probation, 4% were suspended, 9% were sent to training or counseling, and 12% were fired).

88. In the SHRM survey, 51% of all sexual harassment complaints involved employees accusing coworkers, and 29% involved employees accusing

4. It would be one thing if companies were punishing only clear acts of sex discrimination. But many employers are punishing people without inquiring into whether the alleged harassment was linked to sex discrimination in purpose or effect. Few, if any companies, have incorporated their sex harassment policies into broader policies against sex discrimination or more comprehensive plans for achieving diversity or integration. Indeed, many of the experts don't even see sexual harassment as being linked to larger patterns of inequality. Instead, they see harassment as a problem of individual bad men or culturally insensitive ones who must be punished and, if they don't change their ways, purged from the organization.<sup>89</sup> In some of the cases I have encountered, men were punished for alleged misconduct even when there were no "victims" complaining.

Thus, sexual harassment policies have been pressed into the service of managerial discipline and diverted from the larger goals of employment discrimination law. The resulting pattern of surveillance is casting a pall over how people relate to each other in the workplace<sup>90</sup>—which is precisely what it's intended to do. From the available evidence, it seems the libertarian critics who claim that managers are using sexual harassment law in the service of suppressing sexual expression and interaction are at

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supervisors or executive/senior management. *Id.* at 6 tbl.2. Similarly, in the 1994 MSPB survey, 77% of women and 79% of men who reported being harassed said they were harassed by a coworker or other employee, while only 28% of women and 14% of men reported being harassed by supervisors. MSPB 1994 STUDY, *supra* note 82, at 19 tbl.5.

89. For a more complete discussion of themes, see Schultz, *supra* note 1, at 2099-03, 2132-34.

90. When employees have to fear they can be accused of sexual harassment on the basis of something minor they may say or do, no matter how harmless (or even affectionate) their intentions, working relationships can become mistrustful or even exclusionary rather than collegial, just as some survey research suggests may be occurring. MSPB 1994 Survey, *supra* note 82, at 9. In the 1994 Merit Systems Protection Board survey of federal employees, "63 percent of the men and half of the women [respondents stated that] some people are too quick to take offense when someone expresses a personal interest in them through looks or remarks." Fully one-third of the respondents said they believe "normal attraction between people is, to a moderate or great extent, misinterpreted as sexual harassment." *Id.* See also Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1177-78 (2000) (showing that male employees sometimes use the fear of being falsely accused of sexual harassment as a justification for excluding women).

least partly right.

### *B. Explaining the Trends*

The libertarian critics are also partly wrong, because this overreaching is *not* an inevitable consequence of sex harassment or sex discrimination law. Title VII may well set up incentives for companies to prohibit (in advance) individual instances of conduct that managers fear a court may find, after the fact, combined with other conduct to create a hostile work environment. But that threat alone does not explain why managers are curtailing *sexual* conduct at the expense of other forms of discriminatory harassment. Only the fact that the lower courts have defined *sexual* conduct as the essence of sex-based harassment helps explain current developments. The sexual model provides the justification for sexual sanitization.

Yet, simply because the decisional law creates pressure to curb sexual conduct doesn't explain why employers have responded to this pressure so enthusiastically. As we all know, companies often resist other legal pressures, rather than complying readily, particularly when it comes to labor and employment mandates. Why, then, have so many companies been more willing to take aggressive measures to stamp out *sexual* conduct than they have to deal with other discriminatory forms of harassment and discrimination on the job? The answer is that, unlike such other legal mandates, sexual harassment law resonates with traditional managerial goals.

#### *1. Productivity and Passion*

Modern organizational men took the lead in fashioning the ethic of asexuality in the workplace. The founding fathers of organizational theory imagined firms as spheres of "passionless" rationality:<sup>91</sup> men like Frederick Winslow Taylor, whose theory of scientific management envisioned managers as rational "heads" who would control the unruly "hands" and irrational "hearts" of workers.<sup>92</sup> Just as the proper use of the assembly line

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91. I borrow from Rosabeth Moss Kanter the wonderful description of Max Weber's conception of the organization as "passionless." ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 22 (1993).

92. See ROBERT KANIGEL, *THE ONE BEST WAY: FREDERICK WINSLOW TAYLOR AND THE ENIGMA OF EFFICIENCY* 1-19 (1997).

and time motion studies could help management harness workers' bodily capacities to the ends of production, so too could proper organizational structure suppress the personal elements of people's lives that threatened the smooth functioning of the firm. Workplaces were to be organized as hierarchies of "jobs" or "slots" to be filled by generic "workers," who would suspend their human qualities and train their energies solely on production while they were at work. According to Max Weber, this depersonalization was the very essence of bureaucracy. In his words:

[T]he more the bureaucracy is "de-humanized," the more completely it succeeds in elimination from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation. This is the specific nature of bureaucracy, and... its special virtue.<sup>93</sup>

Classical management theorists didn't speak to sexuality explicitly, but the implications of their analysis are clear. In western culture, sexuality is seen as "part of an animal nature—biologically or psychodynamically driven, irrational, innate"<sup>94</sup>—the very antithesis of the passionless logic that is supposed to rule organizational life. For this reason, it is not surprising that modern organizations have sought to purge and control sexuality. As Gibson Burrell put it, "the suppression of sexuality is one of the first tasks the bureaucracy sets itself."<sup>95</sup>

## 2. *Sexuality and Sexism*

Because women are frequently viewed as the bearers of passion and sexuality, this conception of the workplace presented early Second Wave feminists with a difficult choice: challenge the notion that the workplace is (or should be) asexual, or embrace the asexual imperative. For the most part,

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93. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 216 (H.H. Gerth & C. Wright Mills eds. & trans., Routledge 1991) (1948).

94. JAMES D. WOODS & JAY H. LUCAS, THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA 33 (1993). The foundational source here is SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 50-52 (James Strachey ed. & trans., W.W. Norton & Co. 1961) (1930). *See also* JEFFREY WEEKS, SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS & MODERN SEXUALITIES 80-81 (1985).

95. Gibson Burrell, *Sex and Organizational Analysis*, 5 ORG. STUD. 97, 98 (1984).

the wing of the women's movement that was most influential on this issue in the 1970s pursued the latter strategy. In defining workplace sexual advances as a form of sex discrimination, these feminists implicitly affirmed the traditional managerial emphasis on asexuality and demanded its contemporary realization. Men's sexual advances subverted gender equality, they claimed, because women would never be respected as competent professionals so long as they were regarded as sexual objects.

Not only did leading feminists argue that workplace sexuality threatened women's interests, they also emphasized that it undermined productivity and the smooth functioning of the workplace. Sociologist Abigail Saguy interviewed the leaders of the American feminist movement against sexual harassment and their French counterparts. While the French focused on eliminating sexual extortion as a currency of illegitimate hierarchy, the Americans focused on eliminating sexual conduct as an interference with productivity. As Catherine MacKinnon put it, "somebody ought to be worried about the fact that no work is getting done."<sup>96</sup> Another American feminist leader, when probed about the risk that overzealous employers might stamp out playful harmless flirtation in the workplace, said: "Really, [people] don't have to have everyday seduction and flirtation in the workplace. Has it been proven that that helps productivity?"<sup>97</sup> Even Camille Paglia—who has made a career out of attacking Catherine MacKinnon's stance on most sexual issues—agreed that middle managers should not "sexualize their jobs" because to do so would be "unprofessional."<sup>98</sup> Over time, more mainstream feminists joined the bandwagon. From Margaret Mead<sup>99</sup> to Susan

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96. Abigail Cope Saguy, *Sexual Harassment in France and the United States: Activists and Public Figures Defend Their Definitions*, in *RETHINKING COMPARATIVE CULTURAL SOCIOLOGY* 56, 66 (Michèle Lamont & Laurent Thévenot eds., 2000) (quoting Catharine MacKinnon).

97. *Id.*

98. *Id.* at 68.

99. See Margaret Mead, *A Proposal: We Need Taboos on Sex at Work*, *REDBOOK*, Apr. 1978, at 31, 33 (proposing as a taboo: "You don't make passes at or sleep with people you work with"). Interestingly, Mead felt no compulsion to observe this taboo in her own life. She conducted substantial research with Reo Fortune, her second husband. She met and fell in love with her third husband, Gregory Bateson, while all three were doing fieldwork in New Guinea. After Mead married Bateson, the couple did fieldwork together

Estrich,<sup>100</sup> early American feminist leaders embraced a traditional managerial logic that says sex has no place in the workplace.

The fact that feminists were making these arguments, and the fact that the legal system also emphasized the potential harm of sexual conduct, created a climate in which it seemed natural and progressive for managers to implement broad prohibitions on sexual conduct in the name of protecting women from sexual harassment. In making this observation, I do not mean to indict feminist reformers. In an attempt to advance women's interests, early feminists understandably (and perhaps strategically) drew on a set of widely shared social discourses about sexuality and productivity. Nor do I fault the courts. By insisting that, in order to be legally actionable, harassment must be "unwelcome" and "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,"<sup>101</sup> judges tried to ensure the law would prohibit and punish only serious harassment about which women and men had rightfully complained.

But these attempted legal limits were no match for the managerial and cultural logics the law helped unleash. As research in law and society tradition has revealed, the law as it is realized "in action" often fails to comport with the law "on the books" as it is written by legislatures and courts. Once sexual harassment law was in the hands of organizational actors, managers had their own motives and tactics for how to shape the law to serve organizational ends. By adopting sexual harassment

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and collaborated on a number of projects. See MARY CATHERINE BATESON, *WITH A DAUGHTER'S EYE* 19 (1984).

100. See Susan Estrich, *Sex at Work*, 43 *STAN. L. REV.* 813, 860 (1991) (stating that she would have no objection to a rule banning all sexual interaction between men and women at work, at least where they are in a direct reporting relationship, in order to protect women as a group from oppression and indignity associated with sexual conduct).

101. Title VII prohibits only (1) unwelcome conduct that (2) occurs because of sex within the meaning of Title VII, see *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998); and (3) is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'" *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). In addition, the employer must be legally responsible for the conduct. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

policies that prohibit a broad range of sexual conduct in advance, employers hope to avoid disruptive complaints and time-consuming inquiries into whether particular instances of conduct were unwelcome or harmful after they had occurred. Managers suppress sexual conduct partly to avoid legal liability, but also to convey a message that sexual conduct is “unprofessional” and to foster what they see as the smooth functioning of the workplace. Promoting such overly broad sexual harassment policies serves managers’ and HR professionals’ self-interest, of course, because doing so creates a demand for their services; yet many of them sincerely believe such policies promote justice and equality. Over time, a new generation of managers and employees has internalized the age-old message that sex is out of place in the workplace and encoded it into new sexual harassment policies and programs.

## V. THE HARMS OF SANITIZATION

In my reading, sex harassment law now provides both an added incentive, and an increased legitimacy, for managerial initiatives to control employees’ sexual expression. If managers were prohibiting and punishing only sexual interactions that are discriminatory, sanitization would not be worrisome. But the project of controlling workers’ sexuality has taken on a life of its own and now serves managerial ends that stand apart from, and may ultimately detract from, the goal of achieving equality and inclusion for all.

### *A. Managerial Discipline*

In some of the cases I have encountered, organizations appear to be seizing upon accusations of sexual harassment as a pretext to cover up less benign motives for firing employees—including age discrimination or the desire to cheat an employee out of an accrued pension or bonus. In one case, a police officer was fired for wearing a T-shirt with the logo from a bar called “Booby Trap” to a sexual harassment training session.<sup>102</sup> The arbitrator concluded the Police Chief had already decided to fire the officer in advance and had seized upon the T-shirt incident as a violation of the sexual harassment policy as a pretext for

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102. In re City of Hollywood, 112 Lab. Arb. Rep. (BNA) 88, 89 (1999) (Miller, Arb.).

firing him. No one had complained about his wearing the T-shirt—in fact, the woman who conducted the sexual harassment training session didn't even notice it.<sup>103</sup>

In another case, the Monterey, California, Office of Education discharged a man who had worked for the school district for twenty-three years and who was transferred to the district's Head Start program to work as a financial secretary late in his career.<sup>104</sup> The man's troubles began when the program hired a new director, Ricardo Tellez, who treated him poorly. Eventually, Tellez fired him, saying he had violated the sexual harassment policy. What were his transgressions? On one occasion, the man had brought cookies to a female kitchen employee, Anita Colinga, blown kisses at her, and said, "hi sweetie."<sup>105</sup> Although the lead cook had complained, Colinga herself said the grievant's behavior was not a problem. On another occasion, the man held up a copy of *Maxim* magazine to display the cover photo of a popular actress to a different female coworker. When she told him she felt uncomfortable with it, he put the magazine away, and, according to her own account, he never did anything like that again.<sup>106</sup>

In defense of firing the man, Tellez testified his main "concerns were with the behavior of [the grievant] toward female employees and the frequent complaints from female employees.... [H]e [simply] could not allow female employees to be subjected to that kind of behavior."<sup>107</sup> But when the man filed a grievance to protest his firing, the arbitrator found that, to the contrary, "there was nothing in the evidence record showing that *any* female employee filed a personal complaint regarding any inappropriate personal or verbal conduct towards them."<sup>108</sup> As this example shows, employers sometimes punish employees for alleged sexual harassment violations even when no one has complained about the harassment. Thus, contrary to the claim of some commentators,<sup>109</sup> the law's requirement that sexual

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103. *Id.* at 92-93.

104. *In re* Monterey County Office of Educ., 115 Lab. Arb. Rep. (BNA) 909, 911 (2001) (Pool, Arb.).

105. *Id.* at 914.

106. *Id.*

107. *Id.*

108. *Id.* (emphasis added).

109. *See, e.g.*, Robin West, *Law's Nobility*, 17 YALE J. L. FEMINISM 385, 443

harassment must be “unwelcome” does not prevent overreaching.

Even in the absence of pretextual motives, an accusation of sexual harassment provides an acceptable, even progressive justification for managers to discipline employees who might otherwise garner sympathy. The same fact pattern appears in the arbitration cases over and over again. A no-longer-young male employee tells a couple of sexual jokes or spends too much time flirting or fraternizing with female employees. Sometimes a woman complains, sometimes no one does. The company fires him or demotes him, citing his “inappropriate” behavior or sexual harassment. Instead of having to justify firing some harmless older man who has given the best years of his life to the firm, the company can feel respectable, even righteous, about ridding the workplace of a sexist cretin who stood in the way of women’s progress. As one arbitrator put it, in a case involving a night-shift grocery store stocker who made sexual comments to coworkers:

The Grievant does not appear to be a mean or physically intimidating individual, but his behavior is wrong, and cannot be tolerated in the modern work environment.... The Grievant must understand that he is a dinosaur in the modern workplace, and like a dinosaur (i.e., sexual harasser), he will either change or be extinct in the near future.<sup>110</sup>

### *B. Employee Reaction*

It isn’t only managers who are affected by sexual harassment law and rhetoric, employees can also be affected. That companies treat sexual harassment more seriously than other forms of workplace discrimination and abuse encourages employees to frame, and perhaps even to experience, broader workplace harms in sexual terms. A female office administrator complains about sexually oriented cards and jokes, when her real concern may be with larger patterns of sexism and disregard.<sup>111</sup>

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(2005) (arguing that sexual harassment law’s requirement of “unwelcomeness” prevents employers from targeting merely unconventional forms of sexual conduct that are not unwelcome, while ignoring the evidence that many managers actually do prohibit such conduct).

110. In re Safeway, Inc., 109 Lab. Arb. Rep. (BNA) 768, 773-74 (1997) (DiFalco, Arb.).

111. In one case, a female office administrator, Debbie Kennedy, accused

A teenage grocery store employee characterizes a boss's order to stick out her tongue to make sure she isn't wearing a tongue ring as "sexual harassment," when she may really be incensed that he would humiliate her by forcing her to prove she isn't lying about wearing the ring or else risk losing her job.<sup>112</sup> In these examples, the fact that the company takes sexual harassment more seriously encourages the employee to discuss the problem in the idiom of "sexual harassment," rather than frame it as part of a larger problem of managerial sexism or abuse.

Not only does the tendency to articulate such workplace harms in terms of sexual harassment obscure larger workplace problems, the preferred status of sexual harassment can also lend legitimacy to claims of sexual harassment that are grounded in bigotry or ignorance. Some research suggests, for example, that white women who enjoy sexual banter and flirtation with their white male coworkers may experience the same conduct as harassment when it comes from men of color, especially when they hold a lower occupational status.<sup>113</sup> Heterosexual men who

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her boss, Tom Pierce, of sexual harassment after the two of them engaged in an exchange of joking, sexually oriented cards. See *Pierce v. Commonwealth Life Ins. Co.*, 825 F. Supp. 783 (E.D. Ky. 1993), *aff'd*, 40 F.3d 796 (6th Cir. 1994). Kennedy's complaint against Pierce also protested her most recent job evaluation. *Id.* at 784-85. Yet, the company apparently only investigated the allegation that Pierce had sent Kennedy the "sexual" cards, ignoring the more conventional charge Kennedy had made. The company relied on the sexually oriented character of the cards to demote Pierce, at a significant pay loss, and transfer him to another office. *Id.* at 785. Indeed, in an amazing bit of reasoning that conflates all forms of sexual interaction—from rape to racy talk—one of Pierce's superiors allegedly told him that he might as well have been a "murderer, rapist or child molester, that it wouldn't be any worse." *Id.* Under the company's reasoning, sending the cards alone pegged Pierce as a sex abuser—regardless of whether other signs of sexism or managerial abuse were present. It is little wonder, then, that Kennedy complained about the cards.

112. *In re Albertson's, Inc.*, 115 Lab. Arb. Rep. (BNA) 886, 888-89 (2000) (Gangle, Arb.).

113. See Patti A. Giuffre & Christine L. Williams, *Boundary Lines: Labeling Sexual Harassment in Restaurants*, 8 GENDER & SOC'Y 378, 388-89 (1994) (reporting that white waitresses who willingly engaged in sexual horseplay with white waiters were quick to label similar conduct sexual harassment when it came from Mexican kitchen staff). Although the white women's reactions to the advances by the kitchen staff may confound racial difference and lower occupational status, a second study by Patti Giuffre provides examples of situations in which white nurses reacted negatively to the race or ethnicity of men of color who were doctors and occupied a higher occupational status. Patti A. Giuffre, *Labeling Sexual Harassment in Hospitals: A Case Study of Doctors and Nurses* 13 (1997) (unpublished

willingly engage in sexual horseplay with men whom they regard as heterosexual may be quicker to label the same overtures “sexual harassment” when they come from openly gay men.<sup>114</sup> Indeed, for gay and lesbian employees, merely talking about their personal lives can be coded as a form of sexual harassment. For as James Woods and Jay Lucas have eloquently explained, gays are often stigmatized as the walking embodiments of sexuality:

Gay men... attract a particular kind of attention. Because it is sexuality that distinguishes a gay man from his heterosexual peers, it is his sexuality that attracts their notice.... Prevailing stereotypes about gay men (that they are hypersexual, promiscuous, indiscriminate) further emphasize the sexual aspects of their lives. The result is a tendency to hypersexualize gay men, to allow their sexuality to eclipse all else about them, even to see sexual motives or intentions where there are none.<sup>115</sup>

Such research does not necessarily imply that sexual harassment complainants are biased. Rather, it confirms the insight, explored more fully below, that workplace sexuality always derives meaning and characterization from the organizational context. Given that many organizations are stratified along lines of race, gender, and sexual orientation, it is not surprising the same sexual conduct would be interpreted differently by even many well-meaning employees depending on the social and occupational status of the group who had engaged in it.

Contrary to the claims of some critics,<sup>116</sup> then, the implication I draw from such research is not that we should not

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manuscript) (on file with author). One of the nurses stopped the touching by “walk[ing] off,” but the other began to find the doctor’s touches (back rubbing) less offensive, over time, when she got to know the doctor and realized that he “really likes the nurses and believes in the nurses.” *Id.*

114. Giuffre & Williams, *supra* note 113, at 393; *cf.* Giuffre, *supra* note 113, at 15 (reporting an interview with a heterosexual male nurse who said he had felt threatened when a gay male nurse asked him out, but who felt flattered when female nurses blew kisses at him and came on to him, even though he didn’t want to go out with them).

115. WOODS & LUCAS, *supra* note 94, at 65.

116. *See* West, *supra* note 109, at 428, 431-33, 441-42 (mistakenly characterizing my work as promoting skepticism toward women’s complaints of sexual harassment).

believe sexual harassment complainants or fail to take their complaints seriously. Instead, I believe the research suggests our one-size-fits-all, across-the-board prohibitions of sexual conduct need to be carefully examined. Upon closer analysis, we may find such an approach gives management too much power to condemn some groups' sexual expression in the name of pursuing a gender equality that has been all but abandoned. That stigmatized sexual and racial minorities may be disproportionately targeted deserves greater attention.

## VI. TOWARD A NEW VISION

By now it should be obvious I do not think the path we have taken is the "one best way"<sup>117</sup> to treat workplace sexuality. I believe we should allow employers to reject the sanitizing impulse and encourage them, instead, to create cultures in which people are allowed to become more fully human through their work. Work isn't just a way to make a living; it is a way to create something of value, to struggle against our limits, to make friends and form communities, to know ourselves and others in the way that humans can only be known through struggle and (sometimes) success.<sup>118</sup> Rather than trying to drive sexuality and intimacy out of organizational life, why not encourage employers to create workplaces in which women as well as men, sexual minorities as well as sexual traditionalists, can be perceived as competent workers and sexual beings at the same time?

What bothers me the most is that the sanitization campaign is being carried out in the name of feminism and employment discrimination law, when it is a distortion of what both are meant to achieve. We can formulate an alternative approach that advances gender equality and promotes sexual openness and toleration at the same time, as I explain below.

### *A. Placing Sexuality in Context*

Title VII's prohibition on employment discrimination wasn't meant to police sexuality; the law's purpose was to

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117. See KANIGEL, *supra* note 92, at 7 (explaining that Taylor's "scientific management" approach to labor management involved finding and enforcing the "one best way" to approach any task through time and motion studies).

118. For a more complete exploration of this theme, see Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-92 (2000).

dismantle sex segregation and guarantee women and men equal work roles.<sup>119</sup> Yet in the drive to eliminate sexuality from the workplace, organizations have been diverted from this important goal. Managers don't inquire into whether the conduct they characterize as sexual harassment is motivated by, or linked to, sex discrimination. Sexual harassment policies simply assume conduct with sexual content is discriminatory. Not only does this reasoning potentially punish benign sexual expression, it can lead to overly simplistic, segregationist policies that turn Title VII on its head.

Consider, for example, the now-standard advice to male managers not to meet with female employees behind closed doors—advice that has become known as the open-door policy, in an ironic twist on the old meaning of the term, which referred to a policy of allowing all employees access to higher-ups on an open basis. Or consider that, in the hundreds of sexual harassment policies I have reviewed and HR professionals I have interviewed or whose advice I have read, not one urged treating a sexual harassment policy as a part of a larger strategy to integrate the workplace and make sure women and men held equal positions of responsibility and authority throughout the organization.

Instead, many HR managers view sexual harassment as a problem caused by individual bad actors who either want to intimidate women or are insensitive to them. From this perspective, the goal of sexual harassment policies and sensitivity training sessions is to prohibit sexually offensive conduct, to punish and ultimately purge individual violators from the organization, and to police the workplace culture more generally of “locker room” talk, which is perceived as offensive to female sensibilities.<sup>120</sup> Because they do not see sex harassment as linked to larger problems of sex segregation and inequality, it does not occur to most employers to try to address and prevent sex harassment by integrating their workforces and making sure men and women are treated equally. Indeed, if one

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119. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of the Lack of Interest Argument in Title VII Cases Challenging Sex Segregation on the Job*, 103 HARV. L. REV. 1749, 1777-78, 1788-89 (1990).

120. For a more complete discussion of the idea that sexual harassment is caused by bad or boorish men, see Schultz, *supra* note 1, at 2093-03.

can believe the press accounts, some firms have even begun to segregate men and women—by segregating basic training in the military for example, or by discouraging men and women from traveling together in the business world—in an attempt to prevent sex harassment.

As I have tried to make clear, I think this is just the reverse of what we should be doing. Sex segregation is not a *solution* to sex harassment, it is a *cause*. In fact, the degree of sex segregation in the relevant job category and in all the supervisory positions above it—in other words, the degree of horizontal and vertical sex segregation—are crucial components of the larger workplace context in which the presence and meaning of sexual conduct are formed. Research suggests that the very same sexual behaviors are understood and experienced by employees differently depending on whether the behaviors occur in a job setting that is sex-segregated, or whether the behaviors occur in a more integrated setting.

The relationship between sex segregation and sexual harassment is clear. Although there are many potential markers of gender inequality, the consignment of women to lower-paying, lower-mobility jobs, and men to higher-paying, more upwardly mobile jobs, is one of the most crucial indicators of past and present sex discrimination.<sup>121</sup> In these settings, as discussed above, some incumbent male workers often close ranks against newcomer women and exaggerate gender difference.<sup>122</sup> By marking nontraditionally employed women

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121. See Schultz, *supra* note 119, at 1840.

122. There is voluminous social science literature showing the link between a group's numerical representation (or "token" status) in an occupation or job setting and the incidence of stereotyping, discrimination, and harassment that the group experiences from the dominant group. This research began with sociologist Rosabeth Moss Kanter's work theorizing the importance of skewed sex ratios in her classic book, *Men and Women of the Corporation*. See KANTER, *supra* note 91, at 206-42. Kanter hypothesized that, when a group is severely underrepresented in a job setting, "[t]he numerically dominant types also control the group and its culture in enough ways to be labeled 'dominants.' The few of another type in a skewed group can appropriately be called 'tokens,' for . . . they are often treated as representatives of their category, as symbols rather than individuals." *Id.* at 208. Since Kanter's work, a large body of literature has explored the ramifications of, and confirmed the link between, numerical scarcity and discriminatory treatment. For summaries of this literature, see Brief for Amicus Curiae American Psychological Association in Support of Respondent, *Price Waterhouse v. Hopkins*, 490 U.S.

workers as exceptions to their gender—yet still women and therefore never quite as competent or as committed as men—harassment enables men to continue to define their work (and themselves) in masculine terms. Thus, it should not be surprising that in jobs in which women are greatly outnumbered, women frequently do object to sexual conduct, because some of their male coworkers are *using* sexuality as a weapon to intimidate them or label them “different” and inferior.<sup>123</sup> Think of the cases in which men hurl sexual taunts or ridicule at women, expose themselves to them, grab and forcibly kiss them, or place pornography or condoms in their workspaces as a way to remind them that they are still women in a man’s job.

But as horrifying as these examples are, workplace sexuality is not always discriminatory or threatening to women. Just as segregation and inequality can make sexuality threatening, a body of research suggests that, in more gender-balanced and egalitarian settings, women often willingly participate and

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228 (1989) (No. 87-1167) (summarizing psychological research and finding that women who work in settings in which they comprise less than fifteen percent of the population are more likely than others to experience sex discrimination, that the discrimination is more intense, and that such “women are likely to be penalized”); Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter’s Legacy*, 25 LAW & SOC. INQUIRY 41, 43-48, 61-63 (2000) (reviewing literature testing Kanter’s thesis and finding it applies in elite law firms); Susan Fiske & Peter Glick, *Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change*, 51 J. SOC. ISSUES 97, 103-10 (1995) (discussing how sex stereotyping operates in employment settings that are sex-segregated); and Welsh, *supra* note 62, at 179-80 (summarizing sociological literature). *But see* Janice D. Yoder, *Rethinking Tokenism: Looking Beyond Numbers*, 5 GENDER & SOC’Y 178, 180-83 (1991) (suggesting that this literature does not necessarily imply, in gender-neutral fashion, that men who occupy token status in female-dominated jobs will experience comparable levels of harassment and discrimination because asymmetrical incentives apply).

123. *See* Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1159 (2000) (finding that in a case study of how women respond to hostile work environment harassment, including sexual forms of humor, “the specific organizational context did not prove as salient to an understanding of the particular tactics analyzed as the gender composition of the workplace context”); Nancy DiTomaso, *Sexuality in the Workplace: Discrimination and Harassment*, in *THE SEXUALITY OF ORGANIZATION*, at 71, 89 (speculating that many men may resort to nonconforming sexuality as a means of harassment because, for women, in our culture, sexuality is supposed to remain a private matter, so by calling attention to a woman’s sexuality or threatening to make it public, men can powerfully restrain women’s ability to fight back).

sometimes even take pleasure in sexualized interactions. Perhaps this is, in part, because their numbers give them the power to shape the uses to which sexual conduct is put and to set limits on acceptable behavior. In fact, sexuality is often used by male and female workers alike for purposes much more banal (but no less important) than bedding or putting each other down. The literature contains numerous illustrations: surgeons who use sexuality to relieve stress, flirting in the face of death;<sup>124</sup> editors at a feminist magazine who use frank talk about sex and physical intimacy to create solidarity by ensuring people see the work as more than just a job;<sup>125</sup> male and female waiters who shamelessly proposition and pinch each other;<sup>126</sup> and Mexican factory workers who spontaneously break into flirting and salsa dancing, thus enlivening what would otherwise be a deadening job.<sup>127</sup>

There are two reasons why dismantling job segregation may reduce women's perception of sexual conduct as discriminatory or threatening in the workplace. In addition to the fact that increasing women's numbers gives them more power and influence in their work groups, eliminating segregation also helps reduce the sex stereotyping that tokenism and underrepresentation exacerbate. Thus, in Barbara Gutek's path-breaking study, women who worked in integrated job settings

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124. Patti A. Giuffre, *Labeling Sexual Harassment in Hospitals: A Case Study of Doctors and Nurses* 6 (1997) (unpublished manuscript, on file with author) quotes a female urologist:

Sexual banter happens partly because of the high stress situations. In the operating room, it's even more stressful. . . . You all go in and put on these scrubs . . . . It removes social . . . and sexual boundaries . . . . [There's] [t]easing and joking and pinching and elbowing. It's fun. That's one reason people like being in that arena . . . . That's part of the camaraderie . . . . I think it's been limited somewhat by all of the sexual harassment cases . . . . [I]t's sad that if someone who I'm working with nudges up to me and elbows me, and I say, "I'm glad I wore my metal bra today to protect myself from your elbow," it's sad that you can't say that in peace anymore.

125. See Kirsten Dellinger & Christine Williams, *The Locker Room and the Dorm Room: Workplace Norms and the Boundaries of Sexual Harassment in Magazine Editing*, 49 *SOC. PROBS.* 242 (2000).

126. Patti A. Giuffre & Christine L. Williams, *Boundary Lines: Labeling Sexual Harassment in Restaurants*, 8 *GENDER & SOC'Y* 378, 382 (1994).

127. Leslie Salzinger, *From High Heels to Swathed Bodies: Gendered Meanings Under Production in Mexico's Export-Processing Industry*, 23 *FEMINIST STUD.* 549, 563-64 (1997).

experienced the same degree of sexual talk and joking as women in male-dominated settings, but they did not experience these behaviors as harassment. In these sex-integrated occupations and jobs, sex harassment virtually ceased to be a problem.<sup>128</sup> Here, it bears emphasizing that the degree of vertical, as well as horizontal, segregation matters. In another important study, Harvard Business School professor Robin Ely found that female associates who worked in law firms with less than fifteen percent women partners were more likely to stereotype and undercut each other and more likely to trade on their sexuality as a way to appeal to the firm's male partners. By contrast, perhaps because they were alleviated from the need to compete for a scarce "woman's slot," female associates who worked in firms with more than fifteen percent female partners felt less pressure to compete with each other in destructive ways, less pressured to cater to the men's sexual needs, and freer to express their own gender and sexuality as they saw fit.<sup>129</sup>

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128. In Gutek's study, 28.4% of women who worked in male-dominated occupations and jobs said their workplaces are characterized by "frequent sexual talk and joking," and a virtually identical 28.2% of women in integrated occupations and jobs did also. BARBARA A. GUTEK, *SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN AND ORGANIZATIONS* 143 tbl.2. (1985). Yet, the women who worked in integrated employment were less likely than other women to report harmful forms of sexual conduct (including insulting comments, looks or gestures, sexual touching, or required dating or sex in their jobs). *Id.* at 141 tbl. 1. Moreover, virtually none of the women who worked in integrated settings said sexual harassment was a major problem at work, but 9.0% of the women in male-dominated occupations and jobs, and 5.1% of the women in female-dominated occupations and jobs whose larger work group was mostly male, said it was a major problem. *Id.* at 143 tbl.2.

129. Harvard Business School Professor Robin Ely studied law firms in which women were 40% of the associates. She compared peer relationships among women associates who worked in firms with highly male-dominated partnerships (those with less than 5% women) to peer relationships among those who worked in firms with somewhat more-integrated partnerships (15% women). She found that the women who worked in the more-segregated firms were more likely to see other women in negative, sex-stereotyped terms and to experience their relationships with each other as competitive in ways that inhibited their ability to work together. See Robin J. Ely, *The Effects of Organizational Demographics and Social Identity on Relationships Among Professional Women*, 39 ADMIN. SCI. Q. 203 (1994); see also C.L. Ridgeway, *Gender Differences in Task Groups: A Status and Legitimacy Account*, in STATUS GENERALIZATION: NEW THEORY AND RESEARCH 188 (Murray Webster & Martha Foschi eds., 1988). The women in more-integrated firms were less likely to hold rigid gender stereotypes about themselves and other women, and were more confident that expressing their individuality would

### *B. Reforming the Law*

In light of this important body of research, sexual harassment law and policy should not presume women will always find sexual conduct offensive. Instead, regulation should encourage employers to ensure women are fully integrated into all jobs and work roles (including male-dominated ones) at all levels of authority (including upper-level management), and that they have equal pay, status, and responsibility within those roles. In other words, the law should promote structural equality, which will reduce sex stereotyping and give women the power and resources to decide for themselves—and to influence their supervisors and coworkers about—how best to deal with sexual expression.

To achieve this end, sexual harassment law must give employers greater incentives to achieve desegregation and equality in their workplaces. I propose to do so by tying the employer's level of risk of liability for sexual harassment to the degree to which the employer has achieved integration and other measures of equality in the relevant positions. The basic idea behind my approach is simple. For firms that succeed in achieving full integration and equality throughout the organization, the law would offer the proverbial "carrot" of a lower risk of liability for sexual harassment claims. But for organizations that remain significantly segregated, the law would use the "stick" of imposing an even higher risk of liability for sexual harassment claims than firms currently face. For organizations in the middle, the current liability rules would continue to apply. Under this approach, employers would have the option to desegregate, rather than desexualize, as a way to reduce sex harassment liability.<sup>130</sup> This shift would make sex

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contribute to their success. In addition, they felt less need to behave seductively to curry favor with senior men and less pressure to highlight their sexuality generally. See Robin J. Ely, *The Power in Demography: Women's Social Constructions of Gender Identity at Work*, 38 *ACAD. MGMT. J.* 589, 617-18 (1995).

130. One important issue is the degree of sex segregation that would subject an organization to the less favorable liability rules and the degree of integration required to claim the more favorable rules. Rosabeth Moss Kanter's work provides a clear set of parameters for this analysis for my proposed approach: if a plaintiff were part of a "skewed group" (i.e., one that comprised less than 15% of the relevant positions), the defendant would be subject to the less favorable liability rules that apply to significantly segregated

harassment law parallel to disparate impact law, which provides employers the option of hiring a racially integrated workforce or validating selection procedures that can be shown to cause imbalance.

For people who work in significantly segregated or unequal job settings, it would become easier to prove a hostile work environment claim. If an employer could not prove the firm had fully desegregated the relevant positions and eliminated the attendant sex-based disparities in pay and promotion, courts would apply a rebuttable presumption that *any* form of harassment—whether sexual or nonsexual—directed at the plaintiffs has occurred because of their sex within the meaning of Title VII. This change would extend to nonsexual forms of harassment, such as physical violence and hazing, a presumption akin to the one courts typically apply to more overtly sexual conduct, such as sexual advances and touching.<sup>131</sup> In addition, judges could consider creating a parallel presumption that the employer, in failing to integrate the jobs in question, failed to take adequate steps to prevent or remedy harassment for purposes of avoiding vicarious liability. Under such an approach, for example, when women who work in the highly segregated skilled trades or mines have knives drawn on them, rats placed in their lunchboxes, or sexual taunts and ridicule hurled at them, courts would presume such patterns of conduct

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organizations. If a balanced group (i.e., one that constituted 40-50% of the relevant positions), more favorable liability rules would apply. In between these extremes, if a plaintiff were part of a tilted group, one that constituted between 15% and 39% of the relevant positions, the current liability rules would continue to apply. The potential availability of such clear parameters simplifies the reform process. Organizations would find it easy to predict where they stood in relation to legal requirements. In addition, an organization would have incentive to continue to integrate more and more fully because the organization would continue to receive a benefit with the transition to each new category. Finally, the new approach would be easy to codify. The EEOC could urge the necessary changes through memos or guidelines, and courts could implement them as a matter of judicial interpretation. No legislative action would be required. *See* ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1993).

131. *See supra* note 48 and accompanying text (citing Schultz, *supra* note 21, at 1740-43, and cases cited therein, to demonstrate how courts have created a two-tier structure of causation in which judges typically presume sexual conduct has occurred because of sex, while they insist on evidence that nonsexual forms of harassment have occurred because of sex and often have great difficulty finding to that effect).

are sex-based and would hold their employers liable for failing to prevent the harassment by hiring more equal numbers of women.

At the other end of the spectrum, for people who work in settings fully integrated and free from discrimination, it would become somewhat more difficult to win hostile work environment claims than it is now. Because, by definition, the pressures toward sex harassment associated with sex segregation and skewed sex ratios would have been alleviated in such settings, we would no longer expect sex-based patterns of harassment to occur routinely; nor would we expect sexual conversation and behavior to be almost inevitably part of a larger pattern of sex discrimination.

In proposing such an approach, I do not mean to suggest discriminatory harassment will never occur in sex-integrated, structurally egalitarian settings. Even in these settings, some individuals might still engage in harassment, and some individuals might still be singled out for it because of their sex, from time to time. The law would, of course, still need to protect people from such relatively isolated instances of sexual harassment. Yet, courts could appropriately require individuals in these circumstances to meet a slightly higher standard of proof than they do under current sexual harassment law, which typically presumes conduct of a sexual nature is discriminatory within the meaning of Title VII. Where a job setting is significantly segregated and unequal, such a presumption is reasonable, for reasons I have explained above. But where the job setting is fully integrated and free from discrimination, there is no longer good reason to presume sexual conduct is discriminatory. Thus, under the new approach, judges should consider dropping the presumption that sexual conduct has occurred because of sex, and instead require some evidence of causation (for example, proof that the complained-of conduct was directed at women but not men), just as courts do in disparate treatment cases involving nonsexual conduct.

## CONCLUSION

By now, the key points of convergence and divergence between my approach and that of the libertarian critics of sexual harassment law should be clear. The libertarians and I both

subscribe to a descriptive claim that, in the name of sexual harassment law, many employers are prohibiting sexual conduct and expression that does not meet the legal definition of sexual harassment; I have shown that this claim is backed up by the available empirical evidence.<sup>132</sup> The libertarians and I also share a normative conviction that this trend toward sexual sanitization threatens some important societal interests, including employees' rights to sexual expression; I have emphasized other potential harms, including the threat to women and to stigmatized sexual and racial minorities.

Beyond these basic propositions, however, my analysis departs from that of the libertarians in crucial ways. Methodologically and normatively, the libertarians are more committed to *laissez faire* principles and to an abstract form of individualism; many seem skeptical of the need for federal government regulation of the workplace. Some libertarians are convinced that important features of hostile work environment harassment law (such as vicarious employer liability and the aggregation of individual instances of harassment) create incentives for employers to prohibit sexual expression when they would not otherwise do so. Combined with the concern for individual employees' freedom of expression, these stances have led many libertarians to urge cutting back on the scope of Title VII regulation and turning instead to private law to address sexual harassment.

My own work, by contrast, has been informed by empirical research documenting the persistence of patterns of discrimination and inequality in the workplace, including the sex-segregation of jobs and related patterns of sex-based harassment. Thus, in contrast to many libertarians, I am persuaded that we still need Title VII law—indeed, a more robust body of law than we have now—to regulate sex harassment. But we must clarify that the law's fundamental focus is to eliminate sex discrimination, not to regulate sexuality. To that end, I have proposed reforms aimed at covering the full range of sex-based harassment (not just the sexual forms) and dismantling the patterns of sex segregation and inequality that foster harassment. This is not an approach the libertarians have

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132. See Schultz, *supra* note 1, at 2109-36.

advocated.

Ultimately, perhaps the most important difference between my approach and that of the libertarians lies in how we see the law's relationship to other social forces. Drawing on a sociological perspective, my analysis emphasizes the ways in which social actors *outside* the legal system have shaped the content and meaning of sexual harassment law and crafted the uses to which it has been put. Although the libertarians discuss the incentives toward sanitization they believe the law creates for employers, they miss the fact that managers responded to these incentives because the law tapped into, and legitimized, a preexisting set of managerial beliefs about sexuality. As a result, the libertarians sound an anti-court theme focusing almost entirely on legal change, whereas my analysis also stresses the need for conceptual and organizational changes that will encourage managers and feminists to explore alternatives to sanitization.

Indeed, ultimately, if I derive any lessons from all the work I've done on sex harassment, it is that what the statutes, the federal enforcement agencies, the lower courts, and even the Supreme Court say about the law is not definitive, because the law always derives meaning and content from larger social and cultural forces that affect the way it is understood and translated into day-to-day practices.

When it comes to sexual harassment law, managers have been the major players in this translation process. To a large extent, early feminist ideas emphasizing the harm of sexual advances caught on because they conformed to a preexisting managerial understanding that sex has no place in the modern workplace. Yet this reasoning should give today's feminists—and everyone else concerned about realizing equality and human flourishing in the workplace—pause. The logic of sanitization, though currently grounded in sexuality, has no easy stopping point. In the name of productivity and order, it grants employers the power to control not only sexuality, but all the other emotional drives and dramas of human life: reproduction and care, birth and death, accident and aging, disease and disability, friendship and solidarity, and even love and romantic partnership.

For the past two decades, feminists have insisted employers acknowledge and respect these fundamental aspects of their

employees' lives. Contemporary feminists have demanded, for example, that employers recognize that many people have important parenting and other caretaking responsibilities that deserve respect.<sup>133</sup> Today, we should also encourage employers to recognize that individual people and groups of employees have diverse sexual norms, styles, and self-understandings that will become manifest in day-to-day life on the job. Rather than trying to stomp out such expressions of human sexuality or drive less privileged ones underground, employers should foster atmospheres of sexual tolerance and understanding and should recognize that sexual expression doesn't inherently undermine equality or organizational goals. After all, rational aims are always carried out in workplace social contexts alive with personality and passion. Human drives and emotions are part of the fabric of organizational life, weaving together people who, for better or worse, have linked fates.

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133. See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 241-62 (2004); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 63-114 (2000); Vicki Schultz and Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in JUDITH FUDGE AND ROSEMARY OWEN, EDS., *PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 131 (Hart Publishing, 2006).