

Sexual Harassment as Sex Discrimination: A Defective Paradigm

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Title VII of the Civil Rights Act of 1964¹ prohibits sex discrimination in employment. During the last fifteen years, the courts have extended this prohibition to include sexual harassment.² While the first plaintiffs to bring Title VII sexual harassment claims met with a good deal of skepticism, current law recognizes that such behavior is actionable under Title VII. In 1980, the Equal Employment Opportunity Commission amended its *Guidelines on Discrimination Because of Sex* to include sexual harassment and helped solidify judicial acceptance of this cause of action.³

In the 1970s and 80s, women entered the workplace in ever increasing numbers, and the women's movement raised the issue of women's putative subjection to men with ever greater vehemence. Not surprisingly, society now considers intolerable everything from sexual threats and reprisals to insults, innuendos, and sexual humor that were once passively borne by women. Women have triggered male resentment by simultaneously assuming new roles of authority in business and the professions and invading the formerly secure blue-collar bastions of men (e.g., coal mines, construction sites, police precincts). This resentment, coupled with the greater interaction between men and women in the workplace, has no doubt added to the incidence of sexual harassment.

Courts and commentators distinguish two types of sexual harassment. The classic form, called *quid pro quo* sexual harassment, involves a male supervisor who extorts sexual favors from a female

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1. Pub. L. No. 88-352, 78 Stat. 241, 253-66 (1964) (codified and amended at 42 U.S.C. §§ 2000e 2000e-17 (1982)).

2. The ensuing discussion will be limited to sexual harassment in the employment context. Relationships other than employer (or agent) and employee that have elicited similar complaints are professor/student and apartment manager/tenant.

3. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1980) [hereinafter Guidelines].

subordinate in exchange for job benefits, and retaliates if she demurs. The other form is *hostile environment* sexual harassment—a situation in which harassing conduct, either by supervisors or co-workers, has the effect of “unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”⁴ Hostile environment sweeps rather broadly. It can encompass anything from the verbal and pictorial (crude language, lewd pictures placed on co-workers’ desks, sexual limericks inscribed on bathroom stalls, off-color jokes) to offensive physical acts (touching, brushing against, grabbing, indecent exposure).

For the purposes of this Article, it will be helpful first to provide a fuller definition of ‘sexual harassment.’ Most commentators assume that sexual harassment involves men doing something objectionable to women—although they usually concede that the genders of harasser and victim could be reversed, or that a member of one sex could harass another of that same sex. Other more zealous partisans, however, inject male abuse of power and economic privilege into the very definition of sexual harassment. Catharine A. MacKinnon⁵ is perhaps the best known proponent of this view. Her hugely influential book, much quoted by judges and commentators, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, begins:

Intimate violation of women by men is sufficiently pervasive in American society as to be nearly invisible. Contained by internalized and structural forms of power, it has been nearly inaudible. Conjoined with men’s control over women’s material survival . . . it has become institutionalized . . . Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another. . . . American society legitimizes male sexual dominance of women and employer’s control of workers. . . . Sexual harassment of women in employment is particularly clear when male superiors on the job coercively initiate unwanted sexual advances to women employees.⁶

4. *Id.* § 1604.11(a).

5. MacKinnon, arguably the leading force in articulating sexual harassment as an illegitimate burden placed upon women in the workplace, will be discussed at greater length in Section II(B). See *infra* notes 62-80 and accompanying text.

6. C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 1-2 (1979). Others advance definitions that incorporate the male-as-offender assumption: See also, L. FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 14-15 (1978):

Sexual harassment is best described as unsolicited nonreciprocal male behavior that asserts a woman’s sex role over her function as worker. . . . The sexual harassment of

A Defective Paradigm

Incorporating abuse of power into the definition, however, seems unduly limiting. While it mirrors accurately what transpires in the classic *quid pro quo* situation, it reflects only uneasily hostile environment sexual harassment by co-workers—unless one accepts the added, debatable, and more global assumption that males occupying any position in the workplace enjoy more power than women. If one favored such a claim, arguing for it directly, rather than importing it into the very definition of sexual harassment (thus begging the question and, perhaps, alienating those who might be sympathetic to the complaint but not the assumption), seems desirable.

I prefer a neutral definition of sexual harassment to MacKinnon's, which injects an ideological bias against men and the capitalist marketplace.⁷ This definition would eschew, as too confining, an implication of abuse of power. The EEOC's *Guidelines* proffer such a neutral definition (in the employment context), and since this regulatory instrument proved so important in shaping the development of sexual harassment claims under Title VII, it will suffice:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment 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 has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.⁸

Without gainsaying that behavior that falls within the rubric of sexual harassment is both reprehensible and widespread, this Article will examine some of the doctrinal anomalies in the sexual harassment as sexual discrimination paradigm. The first section will survey the current legal landscape. Section II will expose some problems with the sexual harassment paradigm, and Section III will adumbrate a more coherent and useful model for handling sexual harassment claims.

This model would replace the defective Title VII paradigm with a new tort remedy for sexual harassment. This tort would have several advantages over Title VII: it would provide damages to a harmed individual as an individual, rather than as a member of a

women at work arose out of man's need to maintain his control of female labor. This tactic of nonreciprocal aggression is a major element in the maintenance of job segregation by sex.

7. See *infra* note 63 and accompanying text.

8. *Guidelines*, *supra* note 3, at § 1604.11(a).

protected group, thus preserving the nexus between offender and victim; it would place liability for the harm on the responsible party, not on a usually non-blameworthy employer, as "deep pockets" considerations and Title VII doctrine currently do; and, finally, it would provide damages more robust than Title VII permits.

This proposal emanates from the 'individual-rights perspective,' which differs markedly from the 'group-rights perspective' MacKinnon endorses. Focusing on individual rights is more compatible with our political and constitutional heritage and more congruent with the "color-blind" ideal embodied in the Civil Rights Act of 1964.

I. The Legal Landscape

Title VII prohibits employers of fifteen or more workers from discriminating in their hiring, promotion, and firing procedures. It reads:

It shall be an unlawful employment practice for an employer—(1) to fail 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 origin⁹

Title VII established the Equal Employment Opportunity Commission (EEOC) and charged it with investigating complaints of discrimination and then attempting conciliation. The EEOC may bring a civil suit against an employer¹⁰ when it cannot otherwise resolve the issue, or it may issue a "right to sue" letter to the aggrieved individual who may then pursue his or her complaint in the courts.¹¹ If the court finds that the employer has "intentionally engaged in or is intentionally engaging in an unlawful employment practice," the

9. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982).

10. This power of repairing to the courts was given to the Attorney General in the original title. However, in 1972 Congress amended Title VII, and one result was that the EEOC also received the power to pursue "pattern or practice" suits in the courts. Civil Rights Act of 1964, Pub. L. No. 88-352, § 707, 78 Stat. 241, 311-12 (codified as amended at 42 U.S.C. § 2000e-5(f) (1982)).

11. It should be noted that sexual harassment cases reach the federal courts—as in all other Title VII litigation by individual plaintiffs—only after an unsuccessful attempt by the EEOC (or an appropriate state equal employment agency) to eliminate the problem through "informal methods of conference, conciliation, and persuasion." EEOC Procedural Regulations, 29 C.F.R. § 1601.24(a) (1989). If the EEOC itself declines to pursue the matter in court, it issues a "right to sue" notice to the complainant, who is then permitted to bring a civil suit. *Id.* § 1601.28.

A Defective Paradigm

court may enjoin the offending practice and order appropriate “affirmative action,” including reinstatement, back pay, or other appropriate equitable relief. Punitive damages, however, are not currently available.¹²

As Title VII litigation progressed in the courts, judges articulated two theories of analysis: *disparate treatment* and *disparate impact*. Disparate treatment requires proof of *intentional* discrimination, and is tied intimately to the language of Title VII and the amelioration of infractions against individual members of a protected group. Disparate impact theory attempts to eliminate practices that appear facially neutral but work to the disadvantage of protected groups. For both quid pro quo and hostile environment sexual harassment, courts use disparate treatment theory.

The Supreme Court sketched out the framework for establishing a Title VII disparate treatment claim in *McDonnell Douglas Corp. v. Green*,¹³ a 1973 racial discrimination case brought by a black man. The plaintiff first must establish a prima facie case of discrimination by showing:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.¹⁴

The Court noted that, in Title VII cases, the facts may vary, and thus the specifications for proof of a prima facie case may also vary.¹⁵

The burden then shifts to the employer “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”¹⁶ If the defendant succeeds in articulating such a reason, the plaintiff then can show that the employer’s stated reason was pretextual. After some confusion in the lower courts about the precise burden that “to articulate” places on defendants, the Court, in a 1981 sexual discrimination case, attempted to clarify the shifting burdens placed on the two parties, and particularly the “intermediate” burden placed on the defendant. In *Texas Dep’t of Community Affairs v.*

12. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g). The Civil Rights Act of 1990, H.R. 4000 and S.2104, 101st Cong., 2d Sess. See CONG. REC. 1018 (daily ed. Feb. 7, 1990) seeks to change this by allowing for punitive and compensatory damages under Title VII. *Id.* at § 8.

13. 411 U.S. 792 (1973).

14. *Id.* at 802.

15. *Id.* at 802, n.13.

16. *Id.* at 802.

Burdine,¹⁷ Justice Powell, writing for a unanimous Court, emphasized that “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”¹⁸ By establishing a prima facie case, the plaintiff creates a presumption that the employer unlawfully discriminated against her. The burden then shifts to the defendant to rebut this presumption by presenting evidence that the employment decision was made for legitimate, nondiscriminatory reasons. If the defendant carries this “burden of production” (i.e., not a stronger burden of persuasion as the Court of Appeals had erroneously imposed¹⁹), the plaintiff must then persuade the court that the proffered reason was merely pretextual.²⁰

Quid pro quo sexual harassment emerged earliest as a legitimate cause of action under Title VII’s ban on sexual discrimination in employment. Initially, however, the courts did not recognize even quid pro quo scenarios—the most egregious instances of sexual malfeasance by supervisory employees. District courts that heard the early cases almost unanimously said that sexual harassment fell outside practices proscribed by the Civil Rights Act.²¹ Many judges did not believe that employers should be held liable—as employers are held liable for the acts of their agents under Title VII—for sexual overtures by their supervisory employees that the judges viewed as essentially personal in nature.

Corne v. Bausch & Lomb,²² decided in 1975, is typical of the early breed. Two female plaintiffs claimed that they were forced to resign when verbal and physical sexual advances from their supervisor became too onerous to tolerate. Judge Frey held that even if their allegations were true, the plaintiffs failed to state a cause of action under Title VII. Previous unlawful employment practice cases all raised issues of objectionable policies that “arose out of company policies,” where these policies—job assignment, fringe benefits, pregnancy restrictions, or limitations on the employment of married

17. 450 U.S. 248 (1981).

18. *Id.* at 253.

19. *Burdine v. Texas Dep’t of Community Affairs*, 608 F.2d 563, 567 (5th Cir. 1979), *vacated*, 450 U.S. 248 (1980) (defendant must prove, by a preponderance of evidence, that legitimate, nondiscriminatory reasons existed for the discharge).

20. *Burdine*, 450 U.S. at 256-57.

21. *See, e.g.*, *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976); *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976); *Corne v. Bausch & Lomb*, 390 F. Supp. 161 (D. Ariz. 1975); *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974). *But see Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

22. 390 F. Supp. 161 (D. Ariz. 1975).

A Defective Paradigm

women—in some sense benefited the employer. The instant case, he argued, departed from this established pattern:

[The] conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. . .satisfying a personal urge. Certainly no employer policy is here involved; rather than the company being benefited in any way by the conduct of Price [the supervisor], it is obvious it can only be damaged by the very nature of the acts complained of.²³

The court noted that the legislative history did not indicate an intent to include sexual harassment under Title VII; indeed, “sex” was a last minute addition to the Title.²⁴ Nothing in the Act, Judge Frey continued, could reasonably be construed to cover verbal and physical sexual advances even by a supervisor to another employee, “where such complained of acts or conduct had no relationship to the nature of the employment.”²⁵ If a supervisor directed his sexual advances equally at men and women, clearly no basis for suit under Title VII would exist. Thus, he found it “ludicrous” to assume that the Act was designed to cover the instant activities. Deciding otherwise, he feared, would open the floodgates to federal lawsuits “every time any employee made amorous or sexually oriented advances towards another.”²⁶

Corne sounded themes common to the early cases: (1) nothing in its legislative history would justify reading Title VII to include sexual harassment; (2) employers ought not be held liable for the actions of supervisors that fall outside the scope of their employment and may even be proscribed by the employer;²⁷ (3) sexual advances and propositions by supervisors are essentially private acts;²⁸

23. *Id.* at 163.

24. The amendment was added by an opponent of the act who intended thereby to torpedo the entire business. One judge would later remark that the amendment was intended as a “joke.” *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984).

25. *Corne*, 390 F. Supp. at 163.

26. *Id.*

27. *E.g.*, *Miller v. Bank of America*, 418 F. Supp. 233, 235-36 (N.D. Cal. 1976) (court declined to find employer liability where employer had policy of disciplining employees for sexual abuses and plaintiff failed to notify company).

28. *E.g.*, *id.* at 234. The court asked “whether Title VII was intended to hold an employer liable for what is essentially the isolated and unauthorized sex misconduct of one employee to another (citations omitted).” It concluded that:

The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the Court to refrain from delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination on a definable employee group.
Id. at 236.

(4) sexual harassment of a female is not sex discrimination as contemplated by Title VII because the same actions could have been made by a woman to a man or a man to a man, and thus the gender of each party is "incidental to the claim of abuse";²⁹ and (5) a contrary reading of Title VII would invite numerous, and by implication, frivolous suits.³⁰

The *Corne* trend proved short lived. The next year, in *Williams v. Saxbe*,³¹ the district court for the District of Columbia accepted the claim of sexual harassment as sex discrimination. The court rejected the notion that gender was irrelevant to the sexual harassment complaint of a female employee who declined the sexual advances of a supervisor and consequently was dismissed. Analogizing sexual harassment to employment practices previously condemned under Title VII, such as discrimination against married women or women with school-age children, Judge Richey argued that the employment "rule" (i.e., the harassment) created an artificial barrier to the employment of one gender and not the other.³² The judge rejected as well the contention that the supervisor's acts did not constitute a policy or practice of the company but rather an isolated personal incident: "If this was a policy or practice of plaintiff's supervisor, then it was the agency's policy or practice, which is prohibited by Title VII."³³

The circuit courts now agree that *quid pro quo* sexual harassment suits fall under the Title VII 'disparate treatment' model. The plaintiff first must establish a *prima facie* case³⁴ of unlawful discrimination; the employer may then produce evidence of a legitimate

29. *Tomkins v. Pub. Serv. Elec.*, 422 F. Supp. 553, 556 (D.N.J. 1976). Judge Stern argued that the purpose of Title VII was to remove artificial barriers to employment that resulted from "unjust and long-encrusted prejudice": "It is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley." *Id.*

30. Four of these themes enunciated in *Corne*, will be treated at greater length in Section II: legislative intent in Section II(A), *see infra* notes 59-60 and accompanying text; employer liability in Section II(C), *see infra* notes 81-96 and accompanying text; private acts versus group injury in Section II(B), *see infra* notes 61-74 and accompanying text; whether gender is incidental in Section II(B), *see infra* notes 76-80 and accompanying text.

31. 413 F. Supp. 654 (D.D.C. 1976).

32. *Id.* at 659. This reasoning seems strained since the sexual harassment was, clearly, not a "rule," as the judge argued it was.

33. *Id.* at 663.

34. The elements that a plaintiff must establish for a *prima facie* case of sexual harassment have been variously described. In *Horn v. Duke Homes*, 755 F.2d 599, 603 n.1 (7th Cir. 1985), the court said that the "burden is not onerous" in making out a *prima facie* case, and that Horn had done so by showing that "she was discharged under circumstances that raised an inference of unlawful discrimination." More elaborate

A Defective Paradigm

reason for the offending action (usually a discharge in these sexual harassment cases); and the plaintiff finally must rebut that presumption of legitimacy and establish that she (or he) was discharged for refusing sexual advances.³⁵ Plaintiffs must show that they suffered a tangible economic detriment as a result of the harassment (e.g., discharge, constructive discharge, demotion, etc.). Remedies are limited, as in all Title VII suits, to equitable relief, such as back pay, an injunction (perhaps directing the employer to establish a grievance procedure), and reinstatement. In accordance with the EEOC *Guidelines*, courts hold employers strictly liable for quid pro quo sexual harassment by their supervisory personnel.³⁶

Courts recognized hostile environment sexual harassment later than the more clear-cut quid pro quo variety. Modeled after cases involving racially hostile environments,³⁷ this type of harassment results in a claim of psychological rather than directly pecuniary harm—although many plaintiffs contend that as a result of the harassment they felt pressured to quit their jobs. The objectionable behavior can be perpetrated either by supervisors (but without the direct causal nexus of offensive conduct to economic loss seen in quid pro quo harassment) or co-workers. Plaintiffs have complained of the following sorts of acts: sexual inquiries of a personal nature, vulgarities, requests for sexual relations;³⁸ nonconsensual touching,

schemes have been suggested. Note, *The Aftermath of Meritor: A Search For Standards in the Law of Sexual Harassment*,” 98 YALE L.J. 1717, 1721 (1989). Vinciguerra, the author of the note, describes five elements to be established for a prima facie case: the plaintiff belongs to a protected class; she was subject to unwelcome sexual harassment; the harassment was based on sex; the harassment affected a term, condition, or privilege of employment; and her employer is liable. This scheme was clearly stated with the same five prongs in *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).

35. E.g., *Horn*, 755 F.2d at 603 n.1.

36. *Id.* at 604. “Every circuit that has reached the issue has adopted the EEOC’s rule imposing strict liability on employers for the acts of sexual harassment committed by their supervisory employees.”

37. The first case to recognize hostile environment sexual harassment as a legitimate cause of action under Title VII was *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). In *Bundy*, Judge Wright explicitly tied the hostile environment sexual harassment claim to the racially hostile environment model first recognized in *Rogers v. Equal Employment Opportunity Comm’n*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). Judge Wright wrote: “Bundy’s claim . . . is essentially that ‘conditions of employment’ include the psychological and emotional work environment. . . . This claim invokes the Title VII principle enunciated by Judge Goldberg in *Rogers v. Equal Employment Opportunity Com’n*. [sic]” 641 F.2d at 944. See also *Henson*, 682 F.2d at 901-02 (the court opined, after quoting *Rogers*, that “[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality”); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66-67 (1986) (Court applied racial hostile environment analysis to sexual harassment).

38. *Henson*, 682 F. 2d at 899.

rubbing, and grabbing, and harassing telephone calls;³⁹ occasional displays of pictures of nude or partially clad women in the office;⁴⁰ obscene cartoons of the victim displayed in the men's room;⁴¹ obscene drawings, crude language, and indecent exposure.⁴²

Henson v. City of Dundee,⁴³ decided by the Eleventh Circuit in 1982, became the leading case (prior to the Supreme Court's single venture into the sexual harassment domain some five years later) to set out the parameters of the hostile environment cause of action under Title VII. The *Henson* court established five elements that the plaintiff must prove: (1) she (or he) belongs to a protected group; (2) she was subjected to unwelcome sexual harassment in the sense that she did nothing to solicit or incite the conduct and found it "undesirable and offensive";⁴⁴ (3) the harassment was based on sex ("but for" her sex she would not have been harassed);⁴⁵ (4) the harassment affected a "'term, condition, or privilege of employment'";⁴⁶ (5) the employer knew or should have known of the harassment and failed to take prompt remedial action.⁴⁷ The sexual harassment suffered must be "sufficiently pervasive" and must seriously affect the psychological well-being of the victim to satisfy the fourth prong.⁴⁸

39. *Barrett v. Omaha Nat'l Bank*, 584 F. Supp. 22, 24-25 (D. Neb. 1983) (company was not liable for co-worker sexual harassment that occurred on a business trip because, once apprised, the employer acted swiftly to rectify the problem with disciplinary action).

40. *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419 (E.D. Mich. 1984).

41. *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 105 (5th Cir. 1988).

42. *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984).

43. 682 F.2d 897 (11th Cir. 1982).

44. *Id.* at 903.

45. Here the judge makes the point that if a supervisor makes sexual overtures towards members of both sexes, the sexual harassment would not be based on sex and hence would not fall under Title VII. *Id.* at 904.

46. *Id.* The language is drawn directly from Title VII. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

47. The court in *Henson* delineated a knowledge requirement for employer liability in hostile environment cases:

Where, as here, the plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiff's supervisor or co-worker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment, or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge.

682 F.2d at 905 (citations omitted).

Henson stands for a different standard of employer liability in quid pro quo cases (strict liability) than in hostile environment cases (liability when management knew or should have known). *Id.* at 910. The elements of a prima facie case have been stated somewhat less rigorously in other circuits, but they are roughly equivalent. *Katz v. Dole*, 709 F.2d 251, 255-56 (4th Cir. 1983).

48. *Henson*, 682 F.2d at 904.

A Defective Paradigm

In contrast to the "strict liability" imposed on employers under *quid pro quo* theory, the fifth prong incorporates a knowledge standard: either the employer must have been informed of the offensive conduct and failed to take remedial action, or the employer is presumed to have constructive knowledge of the behavior because the conduct is so pervasive as to permeate the workplace.⁴⁹ The shifting burdens of proof in hostile environment cases emulate the standard Title VII disparate treatment formula: the plaintiff establishes a *prima facie* case (as outlined above), the employer produces evidence that the harassment either never took place or was trivial and infrequent, and the plaintiff bears the ultimate burden of persuasion.

In *Meritor Savings Bank v. Vinson*⁵⁰ the Supreme Court gave official blessing to what had been going on in the lower courts for a decade. The Court declared that sexual harassment is sex discrimination, which is actionable under Title VII when it is "sufficiently severe or pervasive 'to alter conditions of employment and create an abusive working environment.'"⁵¹

Although embracing most of the EEOC's *Guidelines*, the Court in *Vinson* declined to settle differences among the lower courts over the appropriate standard for employer liability in hostile environment cases in which the perpetrator is a supervisor.⁵² Justice Rehnquist noted the debate between the district court and the Court of Appeals over the appropriate liability standard. The former concluded

49. Some courts have found the EEOC *Guidelines* too harsh in their treatment of employer liability for sexual harassment of the hostile environment sort in those instances where the harasser is the employee's supervisor. Rather than strict liability, as the *Guidelines* instruct, these courts prefer that the more lenient standard for co-workers' harassment be applied to supervisors: a standard of knowledge or constructive knowledge. The reasons, although never clearly stated, seem to be that courts think that hostile environment suits are more likely to be frivolous and that the employer is less likely to know what is going on in these instances. Neither reason seems particularly persuasive. The EEOC *Guidelines* on hostile environment harassment read as follows: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." *Guidelines, supra* note 3, at § 1604.11(d).

50. 477 U.S. 57 (1986).

51. *Id.* at 67 (quoting *Henson*, 682 F.2d at 904).

52. Compare *Ferguson v. E. I. DuPont de Nemours*, 560 F. Supp. 1172, 1198-9 (D. Del. 1983) (court rejected EEOC *Guidelines* and found that "on the facts presented" employer must have actual or constructive knowledge in order to be held liable for hostile environment sexual harassment by supervisors) and *Henson*, 682 F.2d at 910 with *Vinson v. Taylor*, 753 F.2d 141, 149-52 (D.C. Cir. 1985). In *Vinson v. Taylor* the court accepted the *Guidelines* on employer liability and, thus, rejected a knowledge or constructive knowledge standard for hostile environment sexual harassment by supervisors. The court argued that the latter standard would eviscerate Title VII by encouraging employers to remain oblivious to offenses and would limit vicarious liability only to employers who failed to take action against a known evil.

that since the bank did not have notice of the alleged offensive conduct, it could not be held liable; the latter said that the employer should be held strictly liable for the hostile environment harassment perpetrated by its supervisor, despite the fact that the employer neither “knew nor reasonably could have known of the alleged misconduct.”⁵³ Given that the facts in the case were too inconclusive for the Court to issue a “definitive rule” on employer liability, the Court urged, instead, that lower courts look to common-law agency principles.⁵⁴ Justice Rehnquist cited relevant portions of the *Restatement of Agency*. Section 219, which states that employers are not liable for the torts of their “servants acting outside the scope of their employment,” seems most pertinent.⁵⁵ Employers could argue (as they have from the earliest cases) that the harassment occurred outside the scope of employment: either the venue was non-business related or the supervisor exceeded his authority or contravened company policy.

Curiously—or perhaps not so curiously given the changes in both party and ideology that transpired between 1980 and 1986—the EEOC in its amicus brief argued for a knowledge standard for all hostile environment cases, both when the offender is a supervisor and when he is a co-worker. The Commission took this position despite its own rule that employers are strictly liable for hostile environment acts by supervisors and only liable on a lesser knowledge or constructive knowledge standard when co-workers perpetrate such acts. The Court, while declining to issue a definitive rule on employer liability, held that the Court of Appeals erred in concluding that employers are always strictly liable for sexual harassment by their supervisors, but that absence of notice by the plaintiff to the employer does not necessarily preclude employer liability.⁵⁶

The Court, however, did articulate a distinction that the lower court had not grasped fully. Justice Rehnquist, consistent with the EEOC *Guidelines*, contended that the “gravamen” of sexual harassment claims is that the sexual advances were *unwelcome*. While the district court had found the plaintiff’s actions to be *voluntary* because the plaintiff had had intercourse with her supervisor forty to

53. *Vinson*, 477 U.S. at 69-70.

54. *Id.* at 72.

55. RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

56. The reason for the latter conclusion was that grievance procedures can be faulty; in this case, for example, *Vinson* would have had to complain first to her supervisor who happened to be her harasser. *Vinson*, 477 U.S. at 72-3.

A Defective Paradigm

fifty times,⁵⁷ Justice Rehnquist argued that succumbing to sexual threats ought not bar the plaintiff from claiming that the ensuing sexual activity was unwelcome.⁵⁸

In short, then, sexual harassment is now a well-established cause of action under Title VII. Courts follow—with modifications to fit the peculiar circumstances that set sexual harassment cases apart from standard sexual discrimination suits—the disparate treatment framework for establishing employment discrimination. Sexual harassment cases fall into two broad and sometimes overlapping categories: quid pro quo harassment, in which the victim suffers an economic deprivation as the direct result of refusing the sexual advances of her supervisor; and hostile environment harassment, in which the victim endures various sorts of abuse of a sex-charged nature from either a supervisor or co-workers. While the courts have imposed strict liability on employers for quid pro quo misconduct by supervisors, they still are debating the precise standard of liability, whether strict or knowledge, for cases of hostile environment harassment by supervisors. The EEOC *Guidelines* have prevailed on a knowledge or constructive knowledge standard for hostile environment sexual harassment by co-workers.

II. Anomalies

The behavior that women challenge under the rubric of sexual harassment is usually despicable by any reasonable person's standards. Women should not be subjected to threats of firing or denial of promotions based on refusals to have sexual relations with their supervisors. Nor should they have to endure a general working environment suffused with verbal abuse, offensive physical contacts, or obscene portrayals of themselves. However, to acknowledge the outrageousness of much of the conduct that women find intolerable is not to concede that a Title VII remedy is the apposite one. Several anomalies in the present treatment of sexual harassment as Title VII sex discrimination are worth exploring: (1) legislative intent, that is, whether the framers of Title VII contemplated how the statute would be used; (2) the contention that sexual harassment is sexual discrimination, both theoretically and within the meaning of

57. *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

58. *Vinson*, 477 U.S. at 68-9. Some commentators are disturbed that in articulating the unwelcome/voluntary distinction, the Court stated that evidence of the victim's sexually provocative speech or behavior would be relevant to determining welcomeness. They view this as a likely means of discrediting the victim of sexual harassment, much as rape victims are victimized further by trials which focus on their sexual history or dress.

Title VII; (3) employer liability for sexual harassment by supervisory personnel and co-workers; and (4) the difficulty of distinguishing legitimate intimate relations from sexual harassment in the workplace.

A. *Legislative Intent*

As the judges who rejected the earliest sexual harassment suits pointed out, the legislative history of Title VII does not indicate that Congress intended to address sexual abuses in the workplace.⁵⁹ Indeed, the record is almost silent as to Congress' intent regarding the ban on sexual discrimination itself: "sex" was added at the eleventh hour by an opponent of the entire act, who intended thereby to scuttle the Title, and received no relevant discussion. In all likelihood, the members of that Congress would have been quite surprised to learn that they had contemplated including sexual harassment within the confines of sex discrimination—especially since the term 'sexual harassment' did not come into currency until the late 1970s.⁶⁰ They were fashioning a *civil rights* law—that is, one addressing impediments to individuals as a result of discriminatory acts—not a law proscribing just any kind of oppressive act that one person might commit against another.

B. *Sexual Harassment as Sex Discrimination*

One should not place much credence on the absence of legislative intent. If sexual harassment logically belongs within the broader category of Title VII sex discrimination, then judges and commentators should be commended—not faulted—for making an astute connection. This inclusion, however, seems an uneasy one at best. The subsumption of sexual harassment under Title VII's ban on sex discrimination in employment, though now accepted by courts as self-evident, merits further consideration.⁶¹ The pioneers for a Title VII sexual harassment cause of action, Catharine A. MacKinnon principal among them,⁶² conceptualized sexual harassment as a wrong to women as members of an oppressed and legally protected group.

59. See *supra* notes 26-28 and accompanying text.

60. C. MACKINNON, *supra* note 6, at 27 & n.13. In the note, she attributes early use of the term to several sources, all writing in the period 1975-1976.

61. A good example of assertion rather than argument can be found in *Vinson*, 477 U.S. at 64: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."

62. See also, L. FARLEY, *supra* note 6.

A Defective Paradigm

This section will reexamine these arguments and question the assumptions behind the inclusion of sexual harassment under Title VII.

The early partisans used sexual harassment as a metaphor for the position of women in our male-dominated, capitalistic (i.e., exploitative) society, and thus tended to view virtually all women as victims. These partisans, often substantiating their claims with highly questionable statistical studies,⁶³ regard sexual harassment, like rape, as a reification of male perfidy. While undeniably serving a useful and necessary function in raising people's consciousness about offensive behavior, these pioneers, as is the wont of pioneers in most things, overstated their case.

MacKinnon's argument for sexual harassment as a metaphor for capitalism is a case in point. For MacKinnon, sexual harassment is "in essence a group injury"⁶⁴ that women suffer because they are women, regardless of their unique qualities, and that men perpetrate because they enjoy economic power over women. She writes:

Sexual harassment perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labor market. Two forces of American society converge: men's control over women's sexuality and capital's control over employees' work lives. Women historically have been required to exchange sexual services for material survival, in one form or another. Prostitution and marriage as well as sexual harassment in different ways institutionalize this arrangement.⁶⁵

Stated more truculently, "Economic power is to sexual harassment as physical force is to rape."⁶⁶

According to MacKinnon, women's roles in society are defined largely by their sexuality. She therefore finds spurious the argument advanced in an early case that sexual harassment is a matter of

63. See Note, *Meritor Savings Bank v. Vinson: Clarifying the Standards of Hostile Working Environment Sexual Harassment*, 25 Hous. L. Rev. 441, 441 n.3 (1988), for citations to studies on the prevalence of sexual harassment among women workers; Comment, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 Wis. L. Rev. 1061, for a sexual harassment study in housing; L. FARLEY, *supra* note 6, at 18-27; C. MACKINNON, *supra* note 6, at 25-32. In the *Redbook* study (Safran, *Redbook Magazine*, Nov. 1976 at 149), which MacKinnon used as an illustration of the prevalence of sexual harassment, 92 percent of the respondents claimed to be victims of sexual harassment. The inference of near universal victimhood seems highly questionable due to the self-selectivity of the respondents. MacKinnon herself points this out—"That respondents were self-selected is this study's most serious drawback." She does so, however, only in a footnote, leaving the less industrious reader to draw an inference that almost every woman has suffered this travail. C. MACKINNON, *supra* note 6, at 25 & n.1, 28-29.

64. C. MACKINNON, *supra* note 6, at 172.

65. *Id.* at 174-75.

66. *Id.* at 217-18.

sexuality rather than gender, and thus does not qualify as sex discrimination.⁶⁷ "Sexual harassment," she argues, "makes of women's sexuality a badge of female servitude."⁶⁸ She thus considers it ludicrous to contend that a woman fired for refusing to have sex with her supervisor is discharged for that refusal rather than for being a woman. If particular women, whom men find attractive, are especially likely to trigger sexual harassment, this does not defeat the argument that the harassment is essentially sex-based, and thus sex discrimination. In MacKinnon's analysis, attractiveness is a "sex-plus" criterion that merely serves to select some as victims and exempt others.⁶⁹ Moreover, since women tend to be the victims of sexual harassment, only women and not men must choose between tolerating the harassment or suffering the consequences. MacKinnon concludes that sexual harassment is discrimination in employment—it has an impact both on employment decisions and on the general atmosphere of the workplace—and a "condition of work" within the meaning of Title VII.

MacKinnon's argument comes freighted with excess ideological baggage. Casting women in the guise of helpless victims, economically dependent upon men and thus pawns to men's sexual desires, does little to bolster women's self-image or to inspire them to breach male bastions. It casts women in a deterministic nexus of economic powerlessness and physical weakness that, curiously, gives them no recourse but to throw themselves on the mercy of male judges enforcing legislation enacted by a male Congress. The argument seems vulnerable as well to a *reductio ad absurdum* in which males, as well as females, could be viewed as the victims of roles impressed upon them by the same capitalist system that allegedly circumscribes women's choices: they are forced always to maintain an aura of invincibility and machismo; to shoulder responsibility for dependent women and children; to be enslaved to economic necessity for most of their adult lives; and to die early for their efforts.⁷⁰

67. *Id.* at 189 (discussing *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974)).

68. *Id.*

69. By "sex-plus," MacKinnon means an added feature—attractiveness—in addition to gender, the possession of which makes one more likely to end up as a victim of sexual harassment. Her point is that "[t]he addition of the criterion of attractiveness does not, as a doctrinal matter, defeat the argument that the treatment is sex-based." *Id.* at 190-91.

70. For a fuller exposition of the problems of "victimology," see E. PAUL, EQUITY AND GENDER: THE COMPARABLE WORTH DEBATE 127-29, 131-32 (1989).

A Defective Paradigm

“Victimology” serves no purpose other than the propagandistic. MacKinnon’s argument, however, bereft of this ideological excrescence, does raise two points that merit scrutiny: sexual harassment is essentially a group injury,⁷¹ and sexual harassment is sex discrimination within the scope of Title VII.

The “group injury” contention is questionable both on Title VII and theoretical grounds. Disparate treatment lawsuits under Title VII typically raise issues of discrimination in the policies of corporations or in the practices of key personnel that adversely affect particular plaintiffs simply because they fall within a protected group. Rather than being judged on individual merit in the hiring or promotion process, individuals are treated differently, and worse, than others simply because of their race, color, religion, sex, or national origin. The standard *McDonnell Douglas* evidentiary scheme assumes situations where the claimant is denied a job or job benefit “due to the bare fact of the claimant’s membership in a disadvantaged group.”⁷² Employers attempting to defend their practices and to rebut a plaintiff’s prima facie case of discrimination often will raise issues bearing on the uniqueness of the particular person. Employers may argue, for example, that their refusal to hire or to promote was the result not of a discriminatory animus against this person but of a legitimate business judgment that she was not the most qualified candidate.⁷³

Does sexual harassment conform to this disparate treatment paradigm? The typical quid pro quo sexual harassment plaintiff complains about behavior (i.e., practices) that a particular supervisor directs at *her*. The complaint is never about a general policy of the employer; indeed, what employer would be so foolish as to issue a policy encouraging its supervisors to extort sexual favors for job benefits? Thus, the typical quid pro quo incident needs to be compared to the typical disparate treatment/practices incident. In the former, a supervisor demands sexual favors in return for job benefits because of sexual desire, and he selects his target because he

71. Others have argued for the group-injury contention. See Hughes & May, *Sexual Harassment*, 6 SOC. THEORY & PRAC. 249, 266 (1980).

72. *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981).

73. For a recent case, see *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). In this case a woman was denied a partnership in an accounting firm, and the firm contended that this denial was reached for legitimate reasons. The Court held that in such “mixed-motives” cases—in which some of the reasons for denial may be legitimate and others discriminatory—the defendant may prevail if he can show (after the plaintiff has established her prima facie case) by a preponderance of the evidence that the same decision would have been reached absent the discriminatory element.

finds her sexually attractive. In the latter, the supervisor refuses to hire, to promote, or to reward a female employee as he would a comparable male, because he has an animus of some sort against women.

What is missing from the former and is present in the latter is an essential attribute of discrimination: that is, that *any* member of the scorned group will trigger the response of the person who practices discrimination. Nazis despised all Jews, not just those with certain attributes; South African apartheid is directed at all Blacks, not just those with certain features; Jim Crow laws were aimed at all Blacks. Discrimination, concededly, is difficult to define, but one of its essential attributes is that it fastens upon all members of the group to be scorned (or devalued by a negative stereotype). Thus, something essentially different from discrimination in this classic sense seems to be occurring in *quid pro quo* sexual harassment. Attempting to overcome this difference, as MacKinnon tries, with the device of "sex-plus," does not eliminate the fact that the discriminator scorns or devalues all members of a group, while the sexual harasser only targets someone whom he finds attractive. While it is undoubtedly true that many practitioners of sexual harassment are recidivists, their targets are not just any female simply because she is female.

Hostile environment plaintiffs complain of offensive overtures, comments, or gestures of a sexual nature directed at them by supervisors or co-workers. While they sometimes allege that other women in the workplace also are abused, behavior that reaches the threshold of pervasiveness and seriousness for Title VII purposes is limited to discrete individuals. Admittedly, this becomes a bit murky in factories, for example, where only one or two women have breached a formerly male enclave; if they suffer harassment, then *all* women suffer harassment. These unique (or what philosophers call the "lifeboat") cases are not paradigmatic; typically, many women work together and only one or some may suffer flagrantly intolerable treatment.⁷⁴

As late as 1985, Judge Bork voiced a similar criticism of the sexual harassment paradigm. He favored the line of argument taken in the

74. Curiously, the above argument for the denial of hostile environment sexual harassment as sex discrimination seems to be weaker than the *quid pro quo* argument. The objectionable conduct in hostile environment may be more widespread, may affect more than one woman (especially when perpetrated by co-workers), and possibly may have more than one offender. Also, while employers never have policies encouraging this type of behavior, they are more likely to be aware of it than in *quid pro quo* cases. This is an odd outcome, given that courts recognized *quid pro quo* cases earliest, and courts

A Defective Paradigm

earliest sexual harassment cases: "Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender,"⁷⁵ when it enacted Title VII. He found it peculiar that the Court of Appeals for the District of Columbia had stated twice before that Title VII does not prohibit sexual harassment by a bisexual supervisor if he demanded sexual favors of both males and females.⁷⁶ In Judge Bork's view, the classification of sexual advances as discrimination was awkward. While he considered harassment to be reprehensible, he noted that "Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove."⁷⁷

Indeed, the bisexual supervisor does raise a perplexing doctrinal anomaly. The identical offense is sex discrimination under Title VII when perpetrated by a man against a woman, by a man against a man, by woman against a woman, or by a woman against a man; yet, if a bisexual of either sex preys equally upon men *and* women, he (or she) is beyond the reach of Title VII. The law is supposed to look to acts, whether criminal or tortious, to determine culpability and not to the individual characteristics of the perpetrators: that is precisely what is meant by the rule of law.⁷⁸ Yet, if sexual harassment is sexual

still seem to be most comfortable with them. Perhaps judges are reacting more to the outrageousness of the quid pro quo offenders' conduct than to doctrinal niceties.

Some hostile environment cases seem closer to quid pro quo, in that co-workers harass one woman with unwelcome sexual overtures, and would, thus, succumb to the arguments made against quid pro quo. *See, e.g., Barrett v. Omaha Nat'l Bank*, 584 F. Supp. 22 (D. Neb. 1983). In this case the plaintiff alleged that two co-workers repeatedly subjected her to physical and verbal abuse while all three were at a weekend training session. These kinds of cases fall afoul of the same objections as the quid pro quo cases: they do not fit well under the rubric of sex discrimination. There are some fact patterns, however, that seem closer to classic Title VII sex discrimination. *See, e.g., Zabkowitz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984). Here, co-workers in a factory used sexual innuendos, exposed body parts, and displayed sexually derogatory posters apparently in an effort to drive a woman worker from their male bastion. It seems at least debatable that they would have treated *any* woman in the same fashion (although the company argued otherwise, contending that the incidents arose from a personality clash among the workers, for when Zabkowitz first was hired she was not so treated, and the harassment occurred only after her brother-in-law joined the workforce). If so, this would fulfill the universality criterion of discrimination. Thus, curiously, hostile environment cases of the latter sort are more compatible with Title VII analysis than quid pro quo, even though the latter is the classic sexual harassment paradigm that the courts accepted earlier and with more certainty.

75. *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting) (denial of en banc rehearing).

76. *Id.* The cases were *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) and *Bundy v. Jackson*, 641 F.2d at 942 n.7. The same point was made in *Henson v. City of Dundee*, 682 F.2d 897, 905 n.11 (11th Cir. 1982).

77. *Id.* at 1333 n.7.

78. A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, 114 (1885, 1982):

discrimination under Title VII, why are some perpetrators insulated? A savvy harasser need only note this anomaly and become an equal opportunity harasser.

Taking the point one step further, it also seems peculiar to call sexual harassment of a male by a male, or a female by a female, sex discrimination.⁷⁹ In these scenarios a male (or a female) is selecting a member of his (or her) own sex (*i.e.*, his or her own group on the group-injury model) for harassment. How can this be discrimination? Discrimination, as this Article has defined it, is harming someone or denying someone a benefit because that person is a member of a group that the discriminator despises. What the harasser is really doing is *preferring or selecting* some one member of his gender for sexual attention, however unwelcome that attention may be to its object. He certainly does not despise the entire group, nor does he wish to harm its members, since he is a member himself and finds others of the group sexually attractive. Virtually all Title VII suits deal with intergroup discrimination,⁸⁰ and not, as here, with complaints within a group. Homosexual sexual harassment—viewed as in some sense a preference phenomenon in which the harasser prefers, first, his own sex, and then a particular member—raises the larger issue of whether it makes sense to characterize the archetypical case of male to female harassment as discrimination, rather than as a preference, albeit misguided and objectionable.

Individual acts of sex discrimination fall into the following pattern: *A* refuses to do *X* for *B* because *B* is a member of group *Y* (where *X* stands for hire, promote, etc. and *Y* stands for blacks, women, etc.). Sexual harassment of the classic, quid pro quo type does not fit this pattern, but another: *A* refuses to do *X* for *B* unless *B*

We mean . . . when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.

79. Homosexual sexual harassment has been recognized judicially as sex discrimination within the purview of Title VII. See *Wright v. Methodist Youth Services*, 511 F. Supp. 307 (N.D. Ill. 1981).

80. A black woman of light skin has brought suit recently under Title VII against a darker skinned supervisor, claiming racial discrimination. Even this is more like traditional intergroup discrimination with the simple addition that there can be disfavored subgroups within larger despised groups. "Attractiveness," however, is too subjective and, hence, variable, to provide a stable sub-group within the female sex.

A Defective Paradigm

provides *A* with sexual favors. In sexual harassment, it is not simply the “bare fact” of *B*’s existence as a *Y* that triggers *A*’s oppressive conduct, but *B*’s unwillingness to do something, namely to provide sexual favors. Thus, sexual harassment seems to be hitched uneasily to Title VII’s sex discrimination cart. One need not be convinced entirely of this disanalogy to realize that there may be a more doctrinally felicitous means of remedying sexual harassment than the present jury-rigged arrangement.

C. Employer Liability

In *Meritor Savings Bank v. Vinson* the Supreme Court declined an invitation to hand down a definitive ruling on the issue of employer liability. Instead, the Court suggested, as the EEOC had in its *amicus curiae* brief, that lower courts look to traditional agency principles. Apparently, the Court intended that lower courts apply this inquiry in all categories of sexual harassment, not only the hostile-environment-harassment-by-a-supervisor type treated in the *Vinson* case.⁸¹ An examination of agency principles, however, reveals a striking anomaly in the current liability rules:⁸² namely, the current Title VII paradigm holds employers liable for damages even though they are ancillary victims to sexual harassment.

The EEOC *Guidelines* form the backdrop for judicial decisions on employer liability. For infractions by supervisory personnel, they state:

Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of

81. The EEOC in its *amicus* brief contended that in formulating all employer liability rules regarding sexual harassment agency principles ought to be consulted. The Court’s language is not altogether clear on whether it intended the examination of agency principles to apply just to settling the liability issue with respect to hostile environment sexual harassment by supervisors or to all categories of sexual harassment. “We therefore decline the parties’ invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area,” Justice Rehnquist wrote. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986). This wording suggests that the Court, like the EEOC in its *amicus* brief, intended the examination of agency principles to apply to all categories of sexual harassment.

82. See *supra* notes 47-56 and accompanying text for discussion of the current rules and the controversy over strict liability versus knowledge in regard to sexual harassment of the hostile environment type when perpetrated by supervisors.

the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.⁸³

The *Guidelines* impose a less rigorous standard of employer liability for the harassing conduct of co-workers: the employer is liable when it "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."⁸⁴ Courts generally have followed the EEOC's lead, although some judges have balked at imposing strict liability for hostile environment harassment by supervisors. The Supreme Court in *Vinson* found the facts in the case to be too unsettled to warrant a definitive ruling on employer liability. Thus, the majority merely noted its agreement with the EEOC's amicus brief's position that Congress intended for courts to look to agency principles for guidance.

The *Restatement (Second) of Agency*⁸⁵ hinges employer liability on whether or not the servant's act falls within the "scope of employment." Not every act committed by an employee in an authorized place and within working hours falls within the scope of employment. The act will trigger employer liability only if the employer has authorized it, or if it somehow furthers the employer's business.⁸⁶ Prosser remarks that the term "scope of employment" is "highly indefinite" and "so devoid of meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions."⁸⁷ The modern tendency, he continues, is to view even intentional torts of servants as the employer's responsibility where the purpose of the misdeed "is wholly or in part to further the master's business."⁸⁸ However, if the agent acts from purely personal motives that are in no way connected to the business, the employer is not liable, unless the agent appears to be acting within the scope of the employer's authority.

In *Horn v. Duke Homes*,⁸⁹ a quid pro quo case, the Seventh Circuit explained its use of *respondeat superior*, the practice of holding employers liable for certain employee acts, in sexual harassment cases. Duke Homes contended that it was not responsible, unless notified, for an intentional act of sex discrimination for private gratification. The court rejected this argument as a "reification of the company."

83. *Guidelines*, *supra* note 3, at § 1604.11(c).

84. *Id.* § 1604.11(d).

85. *See supra* note 55, at § 29.

86. *Id.*

87. W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 70 (1984).

88. *Id.*

89. 755 F.2d 599 (7th Cir. 1985)

A Defective Paradigm

Although courts routinely impose liability on principals for the intentional torts of their agents, the court acknowledged that the practice is “rarely justified.” The modern cases implicitly rely on a “risk allocation theory” of the corporation as the most efficient risk avoider or risk insurer. The company, rather than an innocent party, should bear the costs of employees’ torts as an incident to doing business when these acts are reasonably foreseeable. This is essentially an efficiency argument, for which the court proffered a policy justification:

[S]ex discrimination can best be eradicated by enforcing a strict liability rule that ensures compensation for victims and creates an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and retention of sexist supervisors (citation omitted).⁹⁰

From there it is a short step to adopting Title VII’s and the EEOC’s strict liability rule for supervisory employees. The same risk allocation theory that has prompted modern courts to adopt *respondeat superior* also justifies shrinking the scope-of-employment exception. When the employer delegated supervisory power to the future harasser, it merged with him “as long as the tort complained of was caused by the exercise of this supervisory power.”⁹¹ Therefore, the *Horn* court dismissed the countervailing argument that the harasser’s conduct was unauthorized and unconnected to the well-being of the business.

Respondeat superior—which encourages plaintiffs to seek defendants with deep pockets—is a doctrine that has caused much havoc, particularly in the arena of product liability.⁹² Modern infatuation with it results from judicial sympathy for victims and from a view of corporations as virtually bottomless money pits. The original common law notion was that *respondeat superior* imposed liability on employers for the acts of their servants (or agents) because the servants acted, in a certain sense, in the employer’s stead. The modern view, however, as articulated in *Horn*, has drifted far from the philosophical moorings of agency principles in individual rights. From an individual-rights perspective, each person is free to make choices and is responsible for those choices. In addition, each person ought to be held responsible for the natural consequences of his acts and of the acts of others whom he delegates to function in his place. In contrast, he ought not to be held liable for those acts of others that he

90. *Id.* at 605 (citation omitted).

91. *Id.*

92. See P. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

has not authorized, or acts that are not reasonably foreseeable from the acts that he has authorized. Traditional agency principles incorporate this individual-rights perspective—specifically, in their notions of responsibility, delegation of responsibility, and “scope of employment.”

More recently, however, utilitarianism—or efficiency, a modern variant⁹³—has replaced rights as the foundation and rationale for *respondeat superior*, thus greatly enlarging its sweep. The judges who heard the earlier cases remained unpersuaded that sexual harassment was anything but a “personal proclivity.”⁹⁴ Harassment provided no conceivable benefit to the employer, as did discriminatory policies that employers defended in typical Title VII cases.⁹⁵ Contemporary judges see the matter in an entirely different light.

Perhaps the early judges grasped something that has eluded their successors. When a supervisor threatens a subordinate with reprisals if she declines his sexual advances, there is one obvious victim of his threat: the woman. But the employer is another, almost universally unacknowledged victim. If a supervisor uses his delegated, discretionary powers to assess, to promote, and to reward the company's employees on a purely extraneous criterion—sexual acquiescence—he impairs the efficiency of the company, discredits the company's name, and damages company morale. The manager, in making a promise of unjustified reward for sex, attempts to bribe the woman with the employer's assets. What justice is there in imposing a further burden on one of the victims (the company) to compensate the other victim (the female employee) for the unauthorized and counter-productive actions of the sexually harassing supervisor?

93. Judge Richard A. Posner, of course, has been instrumental in promoting economic (i.e., efficiency) considerations in the law. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972). See also E. PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* 218-24 (1987) (analysis of Posner's more recent writings).

94. *Corne v. Bausch & Lomb*, 390 F. Supp. 161, 163 (D. Ariz. 1975).

95. See, e.g., *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (Employer policy of unequal pension contributions by male and female workers violated Title VII despite employer's rationale that actuarial tables show that women live longer); *Torres v. Wisconsin Dept. of Health and Social Services*, No. 86-2161 (7th Cir. Oct. 17, 1988) (en banc), cert. denied, 109 S.Ct. 1133 (1989) (state successfully defended prison policy of requiring use of only women guards in the living quarters of female prisoners against Title VII challenge); *Wislocki-Goin v. Mears*, 45 Fair Empl. Prac. Cas. (BNA) 216 (7th Cir. 1987); *LeBeau v. L.O.F. Co.*, 41 Fair Empl. Prac. Cas. (BNA) 1054 (7th Cir. 1986) (employer's policy of only hiring hourly factory workers over 5'4" tall and at least 110 pounds was held to be a violation of Title VII); *Bellissimo v. Westinghouse Electric Corp.*, 37 Fair Empl. Prac. Cas. (BNA) 1862 (3rd Cir. 1985) (employers successfully defended conservative dress codes).

A Defective Paradigm

Only a utilitarian or efficiency principle—such as cheapest cost avoider—would lead to imposing a liability-without-knowledge standard on the employer. From an individual-rights perspective, the employer is an ancillary victim of the harassment. Once apprised of the offense by the primary victim, an employer, out of pure self-interest, ought to investigate the matter, discipline the supervisor, and fire him for further violations. Only if the employer fails to do this may the company reasonably be viewed as sharing complicity in the offensive behavior.

The current liability rules, as embodied in the EEOC *Guidelines* and accepted in large part by the courts, contain one particularly odd anomaly. While strict liability for sexual harassment by supervisors is the rule, employers are least likely to know of this kind of behavior since quid pro quo threats are seldom announced over the company loudspeaker. For hostile environment harassment, which is often more public, employers are held to the lesser standard of knowledge or constructive knowledge.⁹⁶

It seems bizarre to interpret the power that an employer gives a manager to hire, fire, and promote employees to include such flagrant abuses of trust as sexual harassment—the use of company resources in an entirely unauthorized manner for one's own personal pleasure. Victims, too, must realize that a supervisor is not pursuing company policy when he makes such threats. If there is any meaning left in the "scope of employment" exception, it should exempt the employer from liability for sexual harassment of which he has had no notice.

D. *Intimate Private Relations or Sexual Harassment*

Some sexual overtures in the workplace are perfectly legitimate. It is often difficult, if not impossible, to predict beforehand whether an invitation for intimacy is going to be welcome or not. Mixed signals, gamesmanship (or gameswomanship), and changes of heart are features of male-female relations. Office romances are commonplace, especially now that women increasingly populate the workforce. Frustrated, would-be, jilted, and jealous lovers all have been known to behave in the ways that plaintiffs complain of in sexual harassment suits. Thus, sexual harassment stands as a correlate to legitimate behavior of a private and sexual nature that could be initiated in the workplace.

96. See *supra* note 74, which discusses an analogous anomaly in the sexual harassment as sex discrimination paradigm.

Commentators have wrestled with the problem of distinguishing sexual harassment from legitimate sexual overtures, but their efforts have not been particularly successful. Susan Dodds, in proposing a behavioral account, writes that, "There is something intrinsically different about the two kinds of activity."⁹⁷ She urges that one ought to be alert to risks and seek appropriate evidence from the other person's behavior when making sexual offers. Her argument, however, is circular: if actions typical of a sexual harasser define sexual harassment, then how does one determine in the first instance what these actions are? Hughes and May offer a more concrete distinction between coercive and "sincere" sexual offers: the latter promise benefits that are not a condition of employment success. Given the difficulty of separating "sincere" offers from coercive offers in the business environment, the authors recommend that one err on the side of avoiding potentially harassing conduct; one should refrain from making any overtures at work if one is in a relationship of unequal power.⁹⁸ This recommendation might be feasible in a world populated by asexual creatures, but it is of limited use in drawing a bright line between harmless office flirtations and sexual harassment.

Nancy Brown points to another difficulty in the task of line-drawing.⁹⁹ Men and women diverge in their perceptions of what constitutes acceptable behavior and what slips over the line into harassment. A man accused of sexual harassment typically either denies that the event occurred or admits to the conduct but claims that it was harmless and that the woman misinterpreted his intent. When the offensive behavior is of the hostile environment sort—e.g., sexual overtures without explicit threats of reprisal, lewd comments, language laden with sexual innuendos, sexual jokes—men may believe sincerely that their conduct falls within the bounds of generally acceptable male deportment.

Concerns such as these have prompted some commentators to suggest that the courts ought to adopt an objective victim standard in assessing cases of sexual harassment, particularly those of the hostile environment genre: "The standard would assess behavior

97. Dodds, Frost, Pargetter, & Prior, *Sexual Harassment*, 14 SOC. THEORY AND PRAC. 111, 121 (1988). See also Comment, *Employer: Beware of "Hostile Environment" Sexual Harassment*, 26 DUQ. L. REV. 461, 473-4 (1987).

98. Hughes & May, *supra* note 71, at 253, 272.

99. Note, *supra* note 63, at 449.

A Defective Paradigm

from the viewpoint of the ordinary reasonable person in the particular employment setting of the plaintiff.”¹⁰⁰ This proposal would respond to the problems of distinguishing acceptable from unacceptable behavior.

In addition to these epistemological questions there is another problem: what about workplace environments that have been and still are infused with sexual banter and crude language that is inoffensive to male workers but disconcerting to their new female associates? As the district judge observed in *Rabidue v. Osceola Refining Co.*:¹⁰¹

[T]he standard for determining sex harassment would be different depending upon the work environment. Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversation and girlie magazines may abound. Title VII was not meant to—or can—change this. . . . [Title VII was not designed] to bring about magical transformation in the social mores of American workers.¹⁰²

The court recommended applying an objective test of the “average female employee” in order to assess whether a working environment is “offensive.” Yet, as the quotation above indicates, even under an “objective” standard, judges will have to make close judgment calls about when they think women ought to be offended and when not. Thus, an objective victim standard cannot eliminate entirely the need for discretion on the part of judges. They must determine when behavior constitutes actionable sexual harassment and when it is only a harm without any available legal remedy.

III. Is There a Better Way?

In recent years, some plaintiffs have appended tort claims to their Title VII suits, and federal courts have exercised pendent jurisdiction to hear these state, common law grievances. Torts that have accompanied Title VII sexual harassment claims include wrongful

100. Comment, *supra* note 97, at 478. See also Holtzman & Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 St. Louis U.L.J. 239, 259 (1987). *Contra* Comment, *supra* note 63 (recommending a subjective standard).

101. 584 F. Supp. 419 (E.D. Mich. 1984) (a hostile environment case in which the plaintiff complained of vulgar language and occasional displays of pictures of nude or partially clad women).

102. *Id.* at 430. The judge recommended an objective test for determining the “offensive work environment” prong of the prima facie case, that is, a standard of the “average female employee.” *Id.* at 433.

discharge,¹⁰³ invasion of the right to privacy,¹⁰⁴ interference with contract, intentional assault and battery, interference with a contractual relationship, and intentional infliction of emotional distress.¹⁰⁵ Given the problems in the sexual-harassment-as-sexual-discrimination theory indicated in Section II, a tort may have two advantages: (1) it offers greater doctrinal coherence; and (2) it offers plaintiffs compensatory and punitive damages, which are currently unavailable under Title VII.¹⁰⁶

Some commentators oppose tort remedies for sexual harassment because they consider the problem societal—not personal. Not surprisingly, Catharine A. MacKinnon spearheaded this resistance. “[B]y treating the incidents as if they are outrages particular to an individual woman,” she wrote, “rather than integral to her social status as a woman worker, the personal approach on the legal level fails to analyze the relevant dimensions of the problem.”¹⁰⁷ Another commentator agrees, arguing that under tort law sexual harassment would be viewed merely as an affront to an individual’s dignity. Such an approach would overlook the primary affront, that “sexual harassment injures a discrete and identifiable group by subjecting its victims to demeaning treatment and relegating them to inferior status in the workplace.”¹⁰⁸

These objections, once again, highlight the differences between a group-discrimination approach and an individualist approach that stresses the victim’s rights to privacy, to freedom from physical assault or the threat of it, and to freedom from the infliction of severe emotional distress.¹⁰⁹ An individual-rights perspective calls for vindicating these rights, while a group-rights approach subsumes the victim’s rights under a diffuse claim of affront to all of womankind.

103. See *Clay v. Quartet Manufacturing*, 644 F. Supp. 56 (N.D. Ill. 1986) (plaintiff’s claim failed because she was at-will employee).

104. See *Rogers v. Loews L’Enfant Plaza Hotel*, 526 F. Supp. 523 (D.D.C. 1981) (Title VII case that recognized claim for invasion of privacy).

105. See *Bowersox v. P.H. Glatfelter Co.*, 677 F. Supp. 307 (M.D. Pa. 1988); *Porta v. Rollins Environmental Services*, 654 F. Supp. 1275 (D.N.J. 1987); *Clay v. Quartet Manufacturing*, 644 F. Supp. 56 (N.D. Ill. 1986); *Lucas v. Brown & Root, Inc.*, 736 F. 2d 1202 (8th Cir. 1984) (cases involving claims of intentional infliction of emotional distress as the result of sexual harassment).

106. Some state employment discrimination laws provide victims with compensatory and punitive damages in addition to equitable remedies. California, Michigan, Wisconsin, and Minnesota are examples. See also Civil Rights Act of 1990 *supra* note 12.

107. C. MACKINNON, *supra* note 6, at 88.

108. Note, *Sexual Harassment Claims of Abusive Work Environment under Title VII*, 97 HARV. L. REV. 1449, 1463 (1984).

109. These rights are logical corollaries, embodied in the tort law, from the traditional, Lockean natural rights of life, liberty, and estate (property), or in the Jeffersonian formulation, life, liberty, and happiness.

A Defective Paradigm

This group-rights approach, if carried to its logical extreme, would make of each of us a victim of every criminal act—every robbery, assault, murder—thus vitiating the rights of the *actual* victim.

By contrast, a tort approach would remain true to an individual-rights perspective by focusing on the individual harm to the victim and the individual liability of the harasser. The tort approach would also place all similar behavior under the same theoretical umbrella. Sexually offensive behavior occurs in settings other than the workplace—in universities, housing, and ordinary social situations of all sorts. When such behavior becomes egregious, plaintiffs should have a remedy, and a tort would allow courts to treat all sexual harassment alike. Moreover, a new state tort of sexual harassment, created by judicial construction or legislative craftsmanship, would be preferable to the doctrinal and theoretical confusion that the sexual-harassment-as-sexual-discrimination theory has engendered.¹¹⁰ Rather than forcing sexual harassment to lie on the Procrustean bed of Title VII disparate-treatment sexual discrimination, a new tort could be crafted to the dimensions of the victims.

A tort of sexual harassment could be patterned after the tort of intentional infliction of emotional distress, which in most states parallels Section 46 of the *Restatement (Second) of Torts*.¹¹¹ “[M]ere insults, indignities, threats, annoyances, petty oppression, or other trivialities” will not suffice to generate liability, for plaintiffs must be “hardened to a certain amount of rough language” and the occasional inconsiderate or unkind remark.¹¹²

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, “Outrageous.”¹¹³

Emotional distress must be “so severe that no reasonable man could be expected to endure it.”¹¹⁴ To trigger liability, the “extreme and outrageous” conduct must be committed either intentionally or recklessly; the perpetrator is then responsible for any emotional distress or bodily harm that may result. Thus, as one district judge put

110. Sexual harassment would be exclusively a *state* question, removing the federal courts from involvement, as discussed below.

111. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

112. *Id.* at § 46 comment a.

113. *Id.*

114. *Id.* at § 46 comment j.

it, the tort has three elements: the conduct must be extreme and outrageous; it must be done intentionally or recklessly; and it must cause severe emotional distress.¹¹⁵

A tort of sexual harassment, patterned on the tort of intentional infliction of emotional distress, would look something like this:

- (1) Sexual harassment is comprised of
 - (a) unwelcome sexual propositions incorporating overt or implicit threats of reprisal, and/or
 - (b) other sexual overtures or conduct so persistent and offensive that a reasonable person when apprised of the conduct would find it extreme and outrageous.
- (2) To be held liable, the harasser must have acted either intentionally or recklessly and the victim must have suffered, thereby, economic detriment and/or extreme emotional distress.
- (3) In the employment context,
 - (a) the employer is liable when the plaintiff had notified an appropriate officer of the company (not himself the alleged harasser) of the offensive conduct, and the employer failed to take good faith action to forestall future incidents;
 - (b) The employer is liable, also, when he should have known of the offending incident(s) (that is, when he failed to provide an appropriate complaint mechanism).

Element (1) defines sexual harassment to include both the *quid pro quo* and the hostile environment types. The new tort would use a reasonable person standard for hostile environment claims, which would prevent ultra-sensitive plaintiffs from prevailing on evidence of conduct that is generally acceptable, although not particularly desirable, in the prevailing social milieu.¹¹⁶ The requirement in (1)(b) that the conduct be "persistent and offensive" would eliminate suits based on casual or incidental insults; it would be difficult for offensive language, dirty jokes, or displays of pictures of naked women to rise above this threshold. A threshold is desirable, for it curtails frivolous suits and dissuades those who encourage virtually all women to view themselves as victims. To see all women as victims of

115. *Bowersox v. P.H. Glatfelter*, 677 F. Supp. 307, 309 (M.D. Pa. 1988).

116. This "reasonable person" standard (termed an "objective standard" by the commentators) is nothing more than the old "reasonable man" standard transmuted into nonsexist language. "Reasonable person" is preferable in any case to reasonable man, since women, obviously, form the bulk of the victims. A subjective standard, in which the court would have to assess the sensitivity of the victim before it in each case, lends itself to greater arbitrariness—that is, case-by-case fluctuations in which some victims recover damages and others do not even though the harassment they suffered looks almost identical. An objective standard conforms better to the rule of law notion that like cases ought to be treated the same. A "reasonable woman" standard would rule out the claims of male victims of sexual harassment, thus again violating the rule of law principle that demands equal justice irrespective of persons.

A Defective Paradigm

sexual harassment is, in effect, to see none. As one commentator wrote: "each insult or sexist remark should not create a cause of action. . . . Suffice it to say that a small degree of thick skin is probably required, on the part of everyone."¹¹⁷

Element (2) holds the harasser liable if he (or she) acts intentionally or recklessly. In *quid pro quo* cases, a court should infer such motivation or lack of care from the act itself; in hostile environment cases, the court should infer it if the act breaches the "extreme and outrageous" threshold. Also, the victim must show that she (or he) has sustained verifiable harm. The final element, (3), attempts to remedy the various theoretical problems with employer liability in the sexual harassment arena raised earlier.¹¹⁸ Employers would be liable under (3)(a) if, once given notice, they failed to take reasonable measures to insure that the outrageous conduct would not be repeated. The employer can escape liability if it makes good faith efforts, since no one can predict the proper deterrent for every harasser. Placing the onus on the victim to notify her employer may seem harsh, but it has a side benefit: the notification requirement tells women to take responsibility for their own lives and not to fall into a "helpless victim syndrome." Naturally, if the employer has neither an officer charged with receiving such complaints nor a review process, the company is more likely to be held liable; under such circumstances, (3)(b) holds the employer to a constructive knowledge standard.

The new scheme would encourage companies to provide an effective mechanism for dealing with sexual harassment. A few large compensatory and even punitive damage awards would send a louder message than EEOC conciliation sessions or a few small awards of back pay after years of litigation. And in contrast to Title VII, the new tort would place the onus for sexual harassment squarely on the perpetrator. It thus would send a clear, unmixed message that such conduct is unacceptable in our society and that those who practice such behavior will suffer the full consequences. Finally, the new tort, which emanates from the individual-rights perspective, would encourage victims to object vigorously to acts of sexual harassment to their employers and, if this fails to remedy the problem, to vindicate their rights in court.

117. Comment, *supra* note 97, at 469-70.

118. See *supra* Section II(C), notes 82-96 and accompanying text.

IV. Conclusion

Including sexual harassment claims under the ban on sex discrimination in Title VII of the Civil Rights Act of 1964 is problematic for several principal reasons. No legislative history warrants such an interpretation. Sexual harassment differs in fundamental ways from disparate treatment sex discrimination. Strict employer liability for sexual harassment perpetrated by supervisory employees is inequitable because it punishes one of the victims (the employer) rather than placing the responsibility on the perpetrator. Finally, sexual harassment is sometimes difficult to distinguish from acceptable sexual overtures.

Years of judicial interpretation have transformed Title VII. In the process it has strayed from its original philosophical moorings in the vindication of individual rights and in the goal of a color-blind society.¹¹⁹ The victims and perpetrators of sexual harassment are discrete, identifiable individuals. Unless a group-injury model of sexual harassment (with all of its ideological ramifications) is defensible—and this Article has argued it is not—the courts, by accepting such suits as cognizable under Title VII, have unwittingly imported philosophical assumptions from a radical agenda that characterizes all women as victims and all men as oppressors.

These defects in Title VII call out for an alternative. Tort law could offer a more propitious remedy for unwelcome sexual impositions in the workplace (and elsewhere). The new tort of sexual harassment proposed in this Article has several advantages over the present Title VII doctrinal muddle: (1) it is theoretically consistent, always a good thing in itself; (2) it gets the federal courts out of what is essentially a personal matter between individuals; (3) it provides more compelling incentives to employers to both discourage such conduct and discipline transgressors; (4) it places fault where fault truly lies—with the perpetrator—rather than with the employer; (5)

119. This evolution is ably explicated in H. BELZ, *REDEFINING EQUALITY: AFFIRMATIVE ACTION FROM KENNEDY TO REAGAN* (forthcoming 1990). Preferential treatment of designated groups—Blacks, women, Latinos, Asians, etc.—is defensible only on a group-injury model, and as Belz demonstrates, the original proponents of the Civil Rights Act of 1964 did not endorse such a philosophical underpinning. Rather, they wanted to promote a society in which all individuals would enjoy civil rights equally, irrespective of race, nationality, or creed (and as an incidental inclusion, gender). One had civil rights, according to the original understanding of equality, because one was a person, not because one was a member of a formerly oppressed and now legally protected and preferred group. For another discussion of the meaning of equality in discrimination law, see Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 *YALE L. & POL'Y REV.* 223 (1990).

A Defective Paradigm

it discourages frivolous suits and compensates more completely true victims of outrageous conduct; (6) it signals to women, the usual victims of sexual harassment, that they should take responsibility for their lives by bringing complaints to the attention of their employers; (7) it names the offense appropriately as sexual harassment rather than as sex discrimination, an awkward appellation at best; and, finally, (8) it handles like conduct alike regardless of its social setting.