

Sexual Harassment by Any Other Name

Brian Soucek[†] and Vicki Schultz^{††}

INTRODUCTION

Last year, the *New York Times* won a Pulitzer for its reporting on sexual harassment.¹ Yet the *Times* does not seem to understand what “sexual harassment” actually means. In both the definition it employs and its choices of what stories to cover, the nation’s newspaper of record continues to spread an overtly sexualized conception of sexual harassment that, from a legal and social sciences perspective, is twenty years out of date.

This Essay’s goal is, first, to call attention to this misdirection and its harms. By defining away and often failing to report on the endless ways employees are undermined, excluded, sabotaged, ridiculed, or assaulted because of their sex—even if not through words or actions that are “sexual” in nature—the *Times* neglects the forms of sexual harassment at work that researchers repeatedly find most pervasive.²

In this, the *New York Times* is hardly alone. However legally outdated it may be, the sexualized conception of sexual harassment—the view that equates sexual harassment with unwanted sexualized advances, remarks, and misconduct—is so widespread that even agencies charged with protecting against sexual harassment sometimes fail to

[†] Professor of Law and Martin Luther King, Jr. Hall Research Scholar, University of California, Davis School of Law. My thinking on these issues always benefits from conversations with Vicki Schultz, Courtney Joslin, Jessica Clarke, and Tristin Green. Many thanks also to everyone at the 2018 University of Chicago Legal Forum Symposium, to the editors of *The University of Chicago Legal Forum* for their patient and skillful editing, to Meghan Brooks at Yale Law School, and to Dean Kevin Johnson and the UC Davis School of Law for supporting this project through the Martin Luther King, Jr. Hall Research Fund.

^{††} Ford Foundation Professor of Law and Social Sciences, Yale Law School. I would like to thank the University of Chicago Legal Forum 2018 Symposium attendees for helpful feedback on the ideas expressed here. I am grateful to my co-author Brian Soucek, my research assistant Meghan Brooks, and the Symposium editors for their insight and work on this Essay.

¹ *The 2018 Pulitzer Prize Winner in Public Service: The New York Times, for Reporting Led by Jody Kantor and Megan Twohey, and The New Yorker, for Reporting by Ronan Farrow*, PULITZER (last visited Jan. 18, 2019), <https://www.pulitzer.org/winners/new-york-times-reporting-led-jodi-kantor-and-megan-twohey-and-new-yorker-reporting-ronan> [<https://perma.cc/HS8E-ESQ9>].

² See *infra* text accompanying notes 32–47.

define it clearly in their public pronouncements.³ Indeed, the sexualized conception is so tenacious that scholars and legislators sometimes feel the need to coin a different name for harassment that lacks sexualized content.⁴ Phrases like “gender harassment” get used to distinguish sexist comments and actions from the sexualized come-ons and assaults that many, like the *Times*, still exclusively associate with the term “sexual harassment.”⁵

Readers might wonder, what difference does it make? This Essay’s second aim is to show how much is at stake in what might otherwise seem like an academic debate over words. The news media may have its own reasons for clinging to the sexualized view of harassment, but reporters who are serious about exposing sexual harassment (and reformers who are serious about eliminating it) cannot afford to cling to a narrow sexualized definition. Rather, overcoming harassment and related injustices at work requires a reconceptualized account of sexual harassment—something Vicki Schultz first offered fully two decades ago.⁶ In the current #MeToo era, more than ever, we must rethink and reinvigorate the term “sexual harassment,” not some new term put in place of, or alongside, the one that is finally getting the public attention it has long deserved. To do otherwise risks disaggregating sexual and non-sexual forms of harassment, thus obscuring the larger patterns of hostility and exclusion that include both forms.

Instead of trying to change the subject, this Essay aims to guide the contemporary conversation unleashed by activists and media to bring it in line with insights gained in the law, in social science, and in the everyday experience of workers. Amidst all the attention the #Me Too movement has generated, too many women and men are facing forms of sexual harassment that the media still ignores.

I. “AGREE ON DEFINITIONS”

A. The *New York Times*’s Definition

In April 2018, the *New York Times* won a Public Service Pulitzer for reporting that “uncovered the secret histories of prominent men across industries who were accused of sexual harassment and misconduct that affected women ranging from actresses to factory workers to

³ See *infra* text accompanying notes 65–75.

⁴ See *infra* note 38.

⁵ See *infra* text accompanying notes 11–15.

⁶ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998). For an updated account that discusses recent developments, see Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 24 (2018), <https://www.yalelawjournal.org/forum/reconceptualizing-sexual-harassment-again> [<https://perma.cc/2ZLB-LU8S>].

food servers.” According to the *Times*: “These articles . . . set off workplace investigations, criminal inquiries—and the #MeToo movement.”⁷

Powerful and influential, these articles were largely limited to one common narrative: a prominent man (like Harvey Weinstein) is revealed to have made unwanted sexual advances, or even committed sexual assaults, against women who worked for him or depended on him for career advancement. The reported harassment is almost always male-to-female, top-down, and sexualized in nature; it occurs in influential industries that receive heavy media coverage.⁸ The stories were mostly exposés about powerful bosses or benefactors in prominent companies preying on female subordinates for sex. Thus, a year into its reporting, a headline in the *Times* could trumpet, “#MeToo Brought Down 201 Powerful Men,” before going on to encapsulate the facts of each downfall.⁹

More than just a theme that emerges in its selection of stories, the *New York Times*’s sexualized conception of sexual harassment is literally definitional.¹⁰ In a January 2018 article containing a lesson plan to help teachers use the paper’s #MeToo coverage to educate students

⁷ *Harassed*, N.Y. TIMES (last visited Jan. 18, 2019), <https://www.nytimes.com/spotlight/harass> [<https://perma.cc/4Z2Q-F9HC>].

⁸ Among the fourteen articles that the *Times* identifies as connected to its Pulitzer, the subjects are Harvey Weinstein (four articles), Bill O’Reilly of Fox News (two articles), the comedian Louis C.K., the “power restaurateur” Ken Friedman, the “top-down ethos of male entitlement” at Vice Media, and the “lopsided” relationship between largely male venture capitalists and female entrepreneurs in the tech industry. Daniel Victor, *The Times Just Won 3 Pulitzers. Read the Winning Work*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/business/media/new-york-times-pulitzers.html> [<https://perma.cc/5ANJ-83XF>]; Emily Steel, *At Vice, Cutting-Edge Media and Allegations of Old-School Sexual Harassment*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/business/media/vice-sexual-harassment.html> [<https://perma.cc/XW4F-6Q2U>]; Katie Brenner, *Women in Tech Speak Frankly on Culture of Harassment*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/technology/women-entrepreneurs-speak-out-sexual-harassment.html> [<https://perma.cc/A35G-NFC9>]. One article that does not fit the pattern is Susan Chira and Catrin Einhorn’s powerful investigation of sexual harassment at two Chicago Ford plants. *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html> [<https://perma.cc/EZ8J-BWAR>]. Alongside the stories of sexualized harassment told in that article are others about the non-sexualized harassment female workers faced by fellow (male) workers who thought women “belonged at home in the kitchen.” Female workers were physically blocked from doing their jobs, had their tires slashed, and were denied bathroom breaks. *Id.*; cf. Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J. F. 67 (2018), <https://www.yalelawjournal.org/forum/queering-sexual-harassment-law> [<https://perma.cc/DH8R-NPDL>] (describing how harassment of women in largely male workplaces often takes both sexualized and non-sexualized forms); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6. Notably, complaints against Ford, settled for over \$10 million in August 2017, included both sexual and racial harassment allegations. See *Ford Motor Company to Pay up to \$10.125 Million to Settle EEOC Harassment Investigation*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Aug. 15, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/8-15-17.cfm> [<https://perma.cc/Q78Y-LGHZ>].

⁹ Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/98NM-FGUJ>].

¹⁰ See Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at 3132.

about sexual harassment, the *Times* adopted an official definition of sexual harassment that limits it to sexual conduct. In a section near the start, entitled “Agree on Definitions,” the country’s paper of record says:

The *Times* defines sexual harassment in the workplace this way:

‘Sexual harassment in the workplace is an umbrella term that encompasses a range of unwanted behaviors. This includes non-physical harassment, including suggestive remarks and gestures, or requests for sexual favors. Physical harassment includes touches, hugs, kisses and coerced sex acts.’¹¹

In a later section styled a note to teachers, the article clarifies: “The *Times* uses the terms ‘sexual harassment’ and ‘sexual misconduct’ to refer to a range of behaviors that are sexual in nature and nonconsensual. The term ‘sexual assault’ usually signifies a felony sexual offense, like rape.”¹² This is not the only time the *New York Times* has adopted a sexual definition of harassment. A November 10, 2017 *New York Times* article used the same definition.¹³

The *Times* thus limits “sexual harassment” to nonconsensual behaviors “that are sexual in nature”¹⁴—not to all harassment “based on sex,” as the legal definition does. This limitation is all the more surprising because the *Times* supports it with a cite to the broader legal definition. The 2018 article sends those seeking “more information” to an Equal Employment Opportunity Commission (EEOC) website on “Sexual Harassment,” which broadly prohibits all harassment based on sex, regardless of whether it is sexual in nature.¹⁵ After noting in the first paragraph that harassment *can* include unwanted sexual conduct, the EEOC’s second paragraph explicitly provides: “Harassment does not

¹¹ Natalie Proulx, Christopher Pepper & Katherine Schulten, *The Reckoning: Teaching About the #MeToo Moment and Sexual Harassment with Resources from the New York Times*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/learning/lesson-plans/the-reckoning-teaching-about-the-metoo-moment-and-sexual-harassment-with-resources-from-the-new-york-times.html> [<https://perma.cc/NR78-UL5Y>].

¹² *Id.*

¹³ Valeriya Safronoya, *When You Experience Sexual Harassment at Work*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/style/sexual-harassment-work-advice-lawyers.html> [<https://perma.cc/5745-4NSM>] (adopting the same narrow sexual definition in an earlier piece).

¹⁴ Proulx et al., *supra* note 11.

¹⁵ *Id.* (linking to *Laws, Regulations and Guidance: Sexual Harassment*, U.S. EQUAL OPPORTUNITY EMP. COMM’N, https://www.eeoc.gov/laws/types/sexual_harassment.cfm [<https://perma.cc/DJM7-69PW>] (“It is unlawful to harass a person (an applicant or employee) because of that person’s sex.”)).

have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general."¹⁶

Last year, we asked about the discrepancy between the *Times's* definition and the legal definition the *Times* itself references. A staff member responded that, according to its Standards Editor, the *Times* "defers to the dictionary definition of sexual harassment."¹⁷ "[W]e don't see it as our role to define sexual harassment for the world," she added.¹⁸

There is an irony in the *New York Times* disclaiming any role in defining sexual harassment even as the paper itself publishes lesson plans that include (and promote) an official *Times* definition of sexual harassment. And there is some circularity in deferring to the dictionary definition of "sexual harassment" when descriptive dictionaries look to authoritative cultural sources like the *Times* when tracing such terms' usage and meaning.¹⁹

Whatever the *Times* might say, its definition and use of the term "sexual harassment" matters. And today's almost unprecedented focus on sexual harassment by the *Times*, among other media sources, makes it crucial to ask, perhaps now more than ever, whether they are focused on the right thing.

B. The Broader Definition

Over twenty years ago, Vicki Schultz began challenging what was then—and in the *New York Times*, apparently still is—the prevailing view of sexual harassment. Schultz explained that, according to what she called the "sexual desire paradigm," the quintessential case of harassment "involves a more powerful, typically older, male supervisor, who uses his superior organizational position to demand sexual favors from a less powerful, typically younger, female subordinate."²⁰ She documented the way this prevailing sexualized view of harassment had shaped, and adversely affected, legal and cultural responses.

¹⁶ *Laws, Regulations and Guidance: Sexual Harassment*, U.S. EQUAL OPPORTUNITY EMP. COMM'N, *supra* note 15.

¹⁷ Email from Lara Takenaga, Reader Center, N.Y. TIMES, to Brian Soucek (May 14, 2018, 09:17 EST) (on file with authors).

¹⁸ *Id.*

¹⁹ For example, the *Oxford English Dictionary* cites to a 2002 *New York Times Magazine* usage in its entry defining "quid pro quo." *Quid pro quo*, *Oxford English Dictionary* (3d ed. 2007) (citing Margaret Talbot, *Men Behaving Badly*, N.Y. TIMES (Oct. 13, 2002), ("A lot of workplace harassment consisted not of bluntly quid pro quo sexual solicitations . . . but of sexual jokes and vulgarity."))

²⁰ Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1692; *see also id.* ("This sexual desire-dominance paradigm governs our understanding of harassment. Its influence is reflected in the very fact that the category is referred to as 'sexual' harassment rather than, for example, 'gender-based' or 'sex-based' harassment.").

Schultz offered a broader understanding of harassment as a means of undermining the competence, authority, and inclusion of women, and some “lesser” men, in favored, male-dominated jobs and spaces. Harassment of this sort serves to “reinforce gender difference and to claim work competence and authority as masculine preserves.”²¹ By driving away women and gender-nonconforming men, or labeling them as “different” and inferior, Schultz theorized, dominants could shore up their superior economic position, social status, and sense of masculine identity. On this conception, sexual harassment is both a consequence and further cause of sex-segregated or gender-unbalanced workplaces.²²

Schultz’s theory was one of the first to characterize sexual harassment as primarily a means of policing gender boundaries, not securing sexual liaisons.²³ In this new approach, law and policy should focus on eliminating gender hierarchies and discrimination, not on prohibiting sexuality *per se*. For this reason, the reconceptualized view defines sexual harassment both more broadly and in some respects more narrowly than the traditional sexualized paradigm. “Sexual harassment,” reconceptualized, includes derogatory comments and actions that are directed at people because of their sex or gender but have no sexualized content; yet it does *not* extend to benign sexual remarks and actions that have no harmful gender-based motivations or effects, but which many employers are nonetheless often eager to ban.²⁴ Trying to suppress all hints of sexuality risks reinforcing dominant but unacknowledged sexual hierarchies, thus punishing people of color, lesbians and gay men, and others stereotyped as sexual deviants.²⁵

In the reconceptualized view, then, sexual harassment law should aim at gender hierarchy, not sexuality alone. But, of course, sexual behavior can be used to foster gender disadvantage. Schultz noted that, particularly in traditionally male-dominated settings, sexual assault and ridicule are often used as weapons to exaggerate women’s or gay men’s difference and reinforce the dominants’ superiority. She argued that “nonsexual forms of harassment frequently are accompanied by more sexual ones, such as crude sexual overtures, or sexual taunting

²¹ *Id.* at 1755, 1759.

²² *See id.* at 1760.

²³ *Id.* at 1762 (describing harassment as “conduct that is rooted in gender-based expectations—not simply conduct that is sexual in nature”); *see also* Katherine M. Franke, *What’s Wrong with Sexual Harassment*, 49 STAN. L. REV. 691 (1997) (characterizing sexual harassment as a “technology of sexism”).

²⁴ *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003); *see also* Vicki Schultz, *Open Statement on Sexual Harassment on Behalf of Employment Discrimination Law Scholars*, STANFORD L. REV. ONLINE (2018), <https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars/> [<https://perma.cc/9RF7-FFNU>].

²⁵ Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1729, 1784–85, 1789 n.540.

and mockery.”²⁶ Sexual misconduct is often a telltale sign of a larger pattern of gender-based hostilities.²⁷

Writing two decades apart, each of us has described in disturbing and depressingly similar detail the varied ways both sexual and non-sexual behaviors have been used to harass women in East Coast fire departments.²⁸ Lawsuits against New York City and Providence, Rhode Island, revealed sexually crude comments, sexual advances, invasions of privacy, and sexual assaults that were inflicted by male firefighters on their female colleagues.²⁹ But equally pervasive and pernicious were the non-sexualized ways in which men tried to undermine female firefighters and drive them out of their departments. In New York City in the early 1980s, female firefighters were denied the training given to men and were then blamed for their lesser ability to perform the tasks for which they had been denied training. Equally humiliatingly, male firefighters deprived the women of meals, cooperation, and “the unique forms of communal living that are characteristic of the firefighters’ workplace.”³⁰ In Providence, twenty years later, a lesbian lieutenant in the fire department was actually poisoned during the communal meals. More than one male subordinate flicked the pin signifying her rank and said they would never take an order from her. One man under her command so resented the lieutenant’s orders that he snapped off his rubber gloves in the back of a rescue vehicle, flinging a patient’s blood and brain matter onto his superior’s face.³¹

All of this is sexual harassment. Regardless of whether the harassment involved sexual advances or taunts, gender-specific slurs, or acts of hostility and exclusion, the antagonistic actions, assaults, ridicule, ostracism, marginalization, and sabotage these women endured all served the same aim: policing gender boundaries and preserving the gendered character of firefighting. All of this was done to shore up the men’s gendered—which is to say heterosexual and stereotypically masculine—position, status, image, and sense of identity.

²⁶ *Id.* at 1766.

²⁷ *See id.* at 1755–62, 1764–66; *see also* Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at n.32 and accompanying text.

²⁸ *See* Soucek, *Queering Sexual Harassment*, *supra* note 8; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1769–73.

²⁹ *See Berkman v. City of New York*, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff’d*, 755 F.2d 913 (2d Cir. 1985) (described in Schultz, *Reconceptualizing Sexual Harassment Law*, *supra* note 6, *passim*); *see also Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018) (described in Soucek, *Queering Sexual Harassment*, *supra* note 8, *passim*).

³⁰ Schultz, *Reconceptualizing Sexual Harassment Law*, *supra* note 6, at 1771 (quoting *Berkman v. City of New York*, 580 F. Supp. at 232).

³¹ Soucek, *Queering Sexual Harassment*, *supra* note 8, at 71–72.

These women, these types of stories, are hardly unique. Research has repeatedly found that the most pervasive forms of workplace harassment are not sexual advances and attention, but rather non-sexual hostile or offensive behaviors directed at women (and gender-nonconforming men) because of their sex or gender performance.³² In light of these findings, today, many social scientists have moved away from the older sexual desire paradigm in favor of a broader gender-policing theory like the one proposed by Schultz.³³ In this view, harassment is more about gender-based put-downs than about sexual come-ons.³⁴ Evidence suggests that unwanted sexual attention and advances typically do not occur in isolation, but instead co-occur with broader gender-based or other hostilities.³⁵ Thus, even the come-ons often prove to be less about sexual desire than a desire to “devalue women or punish those who violate gender norms.”³⁶

Reviewing recent research, a 2016 report by an EEOC task force concluded that “sexist or crude/offensive behaviors” that are “devoid of

³² See Jennifer Berdahl & Jana L Raver, *Sexual Harassment*, 3 AM. PSYCHOLOGICAL ASS'N HANDBOOK OF INDUS. & ORGANIZATIONAL PSYCHOL. 641, 646 (2011); EEOC REP., *infra note 37* (collecting recent studies). See also Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at 33–42 (discussing recent research and examples involving women); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 731–738, 744–760 (2014); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6 (discussing early research and examples).

³³ See George Akerlof & Rachel Kranton, *Economics and Identity*, 3 Q. J. ECON. 715, 733 & n.37 (2000); Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641 (2007); Emily A. Leskinen, Lilia M. Cortina & Dana B. Kabat, *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, 35 J. L. & HUM. BEHAV. 25, 36 (2010); Sandy Welsh, *Gender and Sexual Harassment*, 25 ANN. REV. SOC. 169, 175 (1999) (citing Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, to acknowledge broader, nonsexual forms of harassment, and calling on social science researchers to take account of harassment that does not fit the “top-down, male-female sexual come-on image of harassment” paradigm).

³⁴ See Emily A. Leskinen et al., *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, *supra* note 33, at 36 (“Taken together, our empirical results support the legal theory that ‘much of the time, harassment assumes a form that has little or nothing to do with sexuality but everything to do with gender’”) (citing Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1687). For the origin of the “put downs” versus “come ons” distinction, see Louise F. Fitzgerald, Michele J. Gelfand & Fritz Drasgow, *Measuring Sexual Harassment: Theoretical and Psychometric Advances*, 17 BASIC & APPLIED SOC. PSYCHOL. 425, 431–32 (1995) (“[I]t is sometimes difficult to determine whether a sexualized conversation is a come on or a put down (the essential distinction between unwanted sexual attention and gender harassment.”).

³⁵ See, e.g., Berdahl & Raver, *Sexual Harassment*, *supra* note 32 (collecting studies showing that unwanted sexual attention and sexual coercion co-occurs with gender-based harassment, as well with other types of harassment); Sandy Lim & Lilia M. Cortina, *Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment*, 90 J. APPLIED PSYCHOL. 483, 487, 490 (2005); see also Louise F. Fitzgerald et al., *Measuring Sexual Harassment: Theoretical and Psychometric Advances*, *supra* note 34, at 438.

³⁶ Paula A. Johnson et al., *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine*, NAT'L ACADS. OF SCI., ENG'G, MED. 49 (2018) (hereinafter “NAT'L ACADS. REP.”).

sexual interest”³⁷—behaviors the literature sometimes refers to as “gender harassment”³⁸—are far more common than acts of unwanted sexual attention and sexual coercion.³⁹ In surveys based on probability samples, the report notes, 25 percent of women say they have experienced “sexual harassment” at work,⁴⁰ and 40 percent say they have experienced one or more specific sexual behaviors.⁴¹ But in similar surveys asking about broader forms of gender-based hostility and harassment toward women, a much higher 60 percent of women report experiencing such harassment.⁴² The figures are even higher for some women in male-dominated settings. Large-scale studies of women working in the military and in law firms reported, for example, that nine in ten harassment victims had experienced sex-based or gender-harassment “in the absence of unwanted sexual attention or coercion.”⁴³

A 2018 report from the National Academies of Sciences, Engineering, and Medicine similarly found that “gender harassment ([defined as] behaviors that communicate that women do not belong or do not merit respect) is by far the most common type of sexual harassment.”⁴⁴ Indeed, according to this report, “unwanted sexual attention and sexual

³⁷ *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 9, 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686302 [<https://perma.cc/Z2KP-77CZ>] (hereinafter “EEOC REP.”).

³⁸ *Id.* at 9. The widely used Sexual Experiences Questionnaire developed by psychologist Louise Fitzgerald and her colleagues coined the term “gender harassment” to refer to hostile or offensive behaviors conveying negative attitudes toward women but devoid of sexual interest. Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOC. BEHAV. 152, 157 (1988). Many social scientists have adopted this term, treating it as a subset of a larger body of sexual or sex-based harassment that includes gender harassment, sexual coercion, and unwanted sexual attention. See, e.g., Emily A. Leskinen et al., *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, *supra* note 33.

³⁹ *Id.*

⁴⁰ *Id.* at 8 & n.15.

⁴¹ *Id.* at 8 & n.16.

⁴² *Id.* at 8–9 & n.21. See also NAT’L ACADS. REP., *supra* note 44, at 31 (“[W]omen who experience the gender harassment type of sexual harassment are more than 7 times less likely to label their experiences as ‘sexual harassment’ than women who experience unwanted sexual attention or sexual coercion. This illustrates what other research has shown: that in both the law and the lay public, the dominant understandings of sexual harassment overemphasize two forms of sexual harassment, sexual coercion and unwanted sexual attention, while downplaying the third (most common) type—gender harassment.”).

⁴³ Emily A. Leskinen et al., *Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, *supra* note 33, at 36.

⁴⁴ NAT’L ACADS. REP., *supra* note 36.

coercion are almost never experienced by women without simultaneously experiencing gender harassment.”⁴⁵ Notably, gender harassment more commonly comes from peers than superiors.⁴⁶

Despite the greater prevalence of these non-sexual acts of sexism and hostility, many women do not understand them to be actionable sexual harassment. The public conversation that highlights sexual advances, while neglecting less salacious forms of sexism, undoubtedly limits employees’ understanding of what counts as sexual harassment. Disturbingly, the National Academies Report also found that:

Women who experience the gender harassment type of sexual harassment are more than 7 times less likely to label their experiences as ‘sexual harassment’ than women who experience unwanted sexual attention or sexual coercion. This illustrates what other research has shown: that in both the law and the lay public, the dominant understandings of sexual harassment overemphasize two forms of sexual harassment, sexual coercion and unwanted sexual attention, while downplaying the third (most common) type—gender harassment.⁴⁷

The *New York Times* is surely a contributor to this limited lay understanding, given the paper’s narrow sexual definition and coverage. But the *Times* would not have to look far to broaden its horizons. Ironically, the paper’s own recent survey of full-time male workers revealed a greater prevalence of sexual harassment that lacks sexual designs. In December 2017, the *Times* asked 615 men whether they had engaged in any sort of sexist “objectionable behavior or sexual harassment” at work during the previous year.⁴⁸ Of the ten behaviors listed in the survey, the two that are most consistent with what the literature terms “gender harassment” received the highest responses. One—“[t]old sexual stories or jokes that some might consider offensive”—got the highest response, at 19%. The second highest response came from the 16% of men who admitted to making “remarks that some might consider sexist or offensive.” The options more clearly involving sexual advances, assaults, or coercion—those involving dates, sexual discussions, gestures or body language “of a sexual nature,” uncomfortable touching, uninvited fondling or kissing, and sexual quid pro quo offers—all received

⁴⁵ *Id.* at 171.

⁴⁶ *Id.*

⁴⁷ *Id.* at 31.

⁴⁸ Jugal K. Patel, Troy Griggs & Claire Cain Miller, *We Asked 615 Men About How They Conduct Themselves at Work*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/interactive/2017/12/28/upshot/sexual-harassment-survey-600-men.html> [<https://perma.cc/BS2Z-M5YSJ>].

lower responses in the range of one to four percent.⁴⁹ According to the *Times's* official definition, however, the sexist and offensive remarks to which more men admitted would count only as objectionable behavior—not sexual harassment.

C. The Law's Definition

The law prohibits all harassment based on sex, regardless of whether it is sexual in motivation or means. Authoritative judicial decisions have made this clear for twenty years. Writing for the Supreme Court in 1998, Justice Scalia emphasized both that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex,”⁵⁰ and that workplace behavior is not “automatically discrimination because of sex merely because the words used have sexual content or connotations.”⁵¹ What matters, the Court said in *Oncale v. Sundowner Offshore Services*, is not the sexualized nature of certain words or actions, but the way words and actions affect working conditions for some people because of their sex or gender.⁵² *Oncale* and other decisions clarify that sexual harassment is actionable whenever it amounts to sex discrimination in the terms and conditions of employment—not under some special offshoot of Title VII that pertains specifically to sexual conduct.

U.S. law did not always take this clear stance. Feminist scholars and lawyers had to fight for judicial recognition of non-sexual but still sex-based forms of sexual harassment.⁵³ Since *Oncale*, however, nearly all the federal courts of appeals have similarly clarified that “sexual harassment” encompasses actions that are, in the Seventh Circuit’s words, “sexist rather than sexual.”⁵⁴ Increasingly—and crucially for claims brought by LGBT workers—the courts of appeals have also

⁴⁹ *Id.*

⁵⁰ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

⁵¹ *Id.*

⁵² *Id.* *Oncale* also clarified that same-sex sexual harassment is fully actionable under Title VII, regardless of the sexual orientation of the harasser.

⁵³ See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at nn.81, 82; Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at nn.194–199, and accompanying text.

⁵⁴ *Boumehdi v. Plastag Holdings, LLC*, 489 F. 3d 781, 788 (7th Cir. 2007). See also *O'Rourke v. City of Providence*, 235 F.3d 713, 730 & n.5 (1st Cir. 2001); *Howley v. Town of Stratford*, 217 F.3d 141, 154–55 (2d Cir. 2000); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 149 (3d Cir. 1999); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 327 (4th Cir. 2003); *Beard v. Southern Flying J, Inc.*, 266 F.3d 792 (8th Cir. 2001); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864 (9th Cir. 2001); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999). But see *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 & n.3 (9th Cir. 2002) (relying on fact that the alleged misconduct was sexual in nature to hold same-sex harassment actionable). The D.C. Circuit was the first to hold that actionable harassment need not be sexual in nature, see *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985), but the decision was widely ignored, as Schultz demonstrated. *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1732–38.

acknowledged in recent years that workers harassed for deviating from gender-based stereotypes and expectations have an actionable sexual harassment claim under Title VII.⁵⁵ These cases show the continuity between claims rooted in gender stereotyping and those sounding in sexual orientation or gender identity.⁵⁶ LGBT employees who are harassed because of their partners' sex or gender or their display of gender-atypical interests or clothing,⁵⁷ like women who dare to invade fields dominated by men,⁵⁸ or men who openly use wet wipes on a construction site⁵⁹—all face hostility because they have violated their employers' or coworkers' views of how "real" men and women should behave.⁶⁰ They have run afoul of the gender police at work. Protecting them from such gender policing, at least when it becomes severe or pervasive, is among Title VII's aims—as most courts now recognize.⁶¹ This is true regardless of whether the harassment is predominantly "sexual."

Despite the formal judicial consensus on this question, however, some confusion over whether sexual harassment refers only to sexual conduct still appears in certain public pronouncements by the EEOC and the Department of Justice (DOJ), the two leading agencies charged with enforcing federal employment discrimination law.

⁵⁵ Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VI*, *supra* note 32, at 748–760.

⁵⁶ See Brief of Anti-Discrimination Scholars as Amici Curiae in Support of the Employees, *Bostock v. Clayton Cnty., Ga.*, No. 17-1618 (U.S., July 3, 2019), at 8–16; Soucek, *Queering Sexual Harassment Law*, *supra* note 8, at 72–75. *But see* Brief of U.S. as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. Jul. 26, 2017) (ECF No. 281) (arguing that a gay plaintiff's Title VII discrimination claim is impermissibly based on his sexual orientation, rather than his sex); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 154 (2d Cir. 2018), (Lynch, J., dissenting) (acknowledging the government's *amicus* argument, and concluding similarly), *cert. granted*, 2019 WL 1756678 (2019) (consolidated with *Bostock v. Clayton Cnty. Ga.*, *cert. granted*, 2019 WL 1756677 (2019)); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 361 (7th Cir. 2017) (Sykes, J., dissenting) (arguing that discrimination on the basis of sexual orientation is not discrimination "because of sex" under Title VII); *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1254–5 (11th Cir. 2017) ("[T]he lower court erred because a gender non-conformity claim is not 'just another way to claim discrimination based on sexual orientation,' but instead, constitutes a separate, distinct avenue for relief under Title VII.")

⁵⁷ *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759 (6th Cir. 2006) (where plaintiff's friendship with a gay man sparked harassment); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009) (where plaintiff's "effeminate" style of dress and mannerisms made him a target for harassment). See also Soucek, *Perceived Homosexuals*, *supra* note 32; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1777–89.

⁵⁸ *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018); Soucek, *Queering Sexual Harassment Law*, *supra* note 8, at 75.

⁵⁹ *EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444, 450 (5th Cir. 2013).

⁶⁰ See Brian Soucek, *Hively's Self-Induced Blindness*, 127 YALE L.J. F. 115, 123 (2017), <https://www.yalelawjournal.org/forum/hivelys-self-induced-blindness> [<https://perma.cc/6D8Z-7C36>].

⁶¹ *Supra* notes 54–56.

A search for “sexual harassment” on the EEOC’s website points in different directions. A page on “Types of Discrimination”⁶² links to an excellent page titled simply “Harassment.”⁶³ Commendably, the latter page treats harassment as something that can be based on sex, race, religion, or any of the other protected categories; all are treated as equivalent. As a result, the examples given are, by necessity, not sexualized; they include “offensive jokes, slurs, . . . physical assaults or threats, intimidation, ridicule . . . , insults or put-downs, offensive objects or pictures, and interference with work performance.”⁶⁴ Further, the website makes clear that harassment need not be top-down. Harassers can be co-workers or even non-employees, too.

By contrast, the EEOC devotes a separate link on the “Types of Discrimination” page to a page on “Sexual Harassment”—the site to which the *Times* linked in its lesson plan.⁶⁵ That page makes clear that harassment may include but “does not need to be of a sexual nature,” as discussed above. Yet, it confusingly also seems to limit “sexual harassment” to sexualized conduct, stating that “[h]arassment can include ‘*sexual harassment*’ or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.”⁶⁶ Put in quotes and defined in overtly sexualized terms, “sexual harassment” is presented as a subset of the sex-based harassment that is the subject of the page as a whole. Worse, links on the side direct readers to pages offering “Facts about Sexual Harassment,”⁶⁷ a March 1990 “Policy Guidance on Current Issues of Sexual Harassment,”⁶⁸ and the Code of Federal Regulations section on sexual harassment.⁶⁹ All three use now-obsolete language from 1980 that says: “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment. . . .”⁷⁰

⁶² *Discrimination by Type*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (last visited Jan. 20, 2019), <https://www.eeoc.gov/laws/types/> [<https://perma.cc/RC28-DC5M>].

⁶³ *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (last visited Mar. 8, 2019), <https://www.eeoc.gov/laws/types/harassment.cfm> [<https://perma.cc/PTP8-MM6R>].

⁶⁴ *Id.*

⁶⁵ *See Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (last visited Jan. 20, 2019), https://www.eeoc.gov/laws/types/sexual_harassment.cfm [<https://perma.cc/8SNB-9LA9>].

⁶⁶ *Id.* (emphasis added).

⁶⁷ *Id.* (linking to *Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (last visited Jan. 20, 2019), <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> [<https://perma.cc/8JHR-WG4W>]).

⁶⁸ *Id.* (linking to *EEOC-N-915-050 Policy Guidance on Current Issues of Sexual Harassment*, U.S. Equal Emp. Opportunity Comm’n (Mar. 19, 1990), <https://www.eeoc.gov/policy/docs/currentissues.html> [<https://perma.cc/8ZLA-MEZC>]).

⁶⁹ *See* Sexual Harassment, 29 C.F.R. § 1604.11 (2018).

⁷⁰ *Id.* § 1604.11(a).

This narrow description comes from the EEOC's 1980 Guidelines on Discrimination Because of Sex,⁷¹ which codified the sexualized definition that some feminist theorists, and eventually most courts, reacted against in the following two decades. The law has since moved on, but the original guideline and the Code of Federal Regulations remains unchanged. The EEOC has not updated either, but only issued policy pronouncements reflecting the broader understanding. In a Policy Guidance released in March 1990, for example, the agency took note of a 1985 D.C. Circuit decision and acknowledged that “[a]lthough the Guidelines specifically address conduct that is sexual in nature, sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability.”⁷²

This lack of clarity creates an opening that those who wish to return to the older, sexualized definition of harassment can exploit. Indeed, it is the language of the 1980 Guidelines that officials and managers often import into policy statements. Take, for example, the DOJ's latest memorandum on sexual harassment, released in April 2018 after an internal investigation by the DOJ's Inspector General led to a department-wide working group, convened to address the problem.⁷³ Not only does DOJ's memo adhere to the 1980 Guidelines in defining sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,”⁷⁴ it goes on to illustrate the targeted misconduct through a series of exclusively sexualized examples, which include: “displaying ‘pinup’ calendars or sexually demeaning pictures, telling sexually oriented jokes, making sexually offensive remarks, engaging in unwanted sexual teasing, subjecting another employee to pressure for dates, sexual advances, or unwelcome touching.”⁷⁵ The DOJ's important, newly implemented reporting and tracking procedures thus get triggered only by actions that fit the now obsolete, sexualized conception of sexual harassment.

⁷¹ *Guidelines on Discrimination Because of Sex*, 45 Fed. Reg. 74, 677 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11) (“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment . . .”).

⁷² EEOC-N-915-050, *supra* note 68, at § C.4.

⁷³ Rod Rosenstein, *Memorandum on Sexual Harassment and Sexual Misconduct* (Apr. 30, 2018), <https://www.justice.gov/jmd/page/file/1059401/download> [https://perma.cc/7H2Y-KADG]. See also Katie Benner, *Justice Department Releases New Sexual Harassment Guidelines*, N.Y. TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/us/politics/justice-department-sexual-harassment.html> [https://perma.cc/7788-CKUP].

⁷⁴ *Id.* In fact, the DOJ goes further than the 1980 Guidelines in sexualizing “sexual harassment”: where the Guidelines said verbal or physical conduct of a sexual nature et cetera constitute sexual harassment—at least leaving open the possibility that other non-sexualized activity might also constitute sexual harassment—the DOJ says that “sexual harassment” refers to verbal or physical conduct of a sexual nature (et cetera).

⁷⁵ *Id.*; see also *Prevention of Harassment in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (last visited Jan. 24, 2019), <https://www.justice.gov/jmd/eos/sexual-harassment> [https://p

Notably, the definition of “sexual harassment” in these internal policies that the DOJ applies to its own employees is narrower than the definition the agency uses in litigation efforts on behalf of employees generally. DOJ’s Civil Rights Division recently launched a major initiative against “Sexual Harassment in the Workplace,” focusing on public sector employers.⁷⁶ The initiative began with a lawsuit against the Houston Fire Department, alleging that male firefighters had engaged in hostile work environment harassment by directing brutal insults, threats, pranks, property damage, and sabotage—but no sexual advances—against the only two female firefighters at Houston’s Station 54.⁷⁷ The men made the workplace hellish for the two women who dared to enter their domain.⁷⁸ Though no sexual activity was involved, the harassment was surely based on sex. The federal courts should have no difficulty condemning their behavior as unlawful sexual harassment; they have long done so in other cases, as discussed above.⁷⁹ But fact patterns like these would not qualify as sexual harassment under the DOJ’s own new internal policies, under the EEOC’s old 1980 guideline, or under language on some of the governmental websites meant to instruct the public on the meaning of sexual harassment.

There is, in sum, a split in the way sexual harassment is defined and understood. On one side is a broad gender-based conception reflected in federal caselaw and the extensive social science documenting the varied forms of workplace harassment experienced by both women and men, especially those who deviate from dominant gender stereotypes. On the other side is the exclusively sexualized, implicitly male-to-female notion of sexual harassment offered by the 1980 EEOC Guidelines, the DOJ’s internal policy, and the *New York Times*.

erma.cc/3EFM-KLKL]. The examples are derived from a June 1993 memorandum from then-Attorney General Janet Reno on the “Prevention of Sexual Harassment in the Workplace.” Memorandum to Dep’t of Just. Emps. (June 29, 1993). A follow-up memo released after *Oncala* noted that DOJ had reviewed that case and found its policies “consistent” with it. Janet Reno, *Memorandum on the Prevention of Sexual Harassment* (Dec. 14, 1998).

⁷⁶ *Justice Department Launches Initiative to Fight Sexual Harassment in the Workplace*, U.S. DEPT OF JUSTICE (Feb. 28, 2018), <https://www.justice.gov/opa/pr/justice-department-launches-initiative-fight-sexual-harassment-workplace> [https://perma.cc/5GSZ-XEEJ].

⁷⁷ *U.S. v. City of Houston*, No. 4:18-cv-00644 (S.D. Tex. Feb. 28, 2018) (ECF No. 1), <https://www.justice.gov/opa/press-release/file/1040081/download> [https://perma.cc/5JQ8-JDGN].

⁷⁸ *Id.* at 3–14.

⁷⁹ Numerous courts have condemned similar patterns of behavior as hostile work environment harassment that violates Title VII, as discussed above. See *supra* note 29 and accompanying text; see also *supra* note 54.

II. WHY THE DEFINITION MATTERS

It matters which conception of sexual harassment the *New York Times* and other media adopt—especially now, as the #MeToo movement itself teeters between the two conceptions. The movement’s name derives from an earlier effort to combat sexual abuse.⁸⁰ Its resurgence was spawned by a tweet that gave voice to millions who have been “sexually harassed or assaulted.”⁸¹ Yet, after the initial emphasis on sexualized harms, the movement began to focus attention on wider forms of workplace sexism. For example, #MeToo activists helped create “Time’s Up,” an initiative designed to address “the systemic inequality and injustice in the workplace that have kept underrepresented groups from reaching their full potential.”⁸² And some prominent supporters urged a broad gender lens for analyzing sexual violations, in line with the reconceived view of harassment.⁸³ Thus, #MeToo encompasses *both* the older sexual desire paradigm that emphasizes male-to-female sexual misconduct predation as the quintessential problem *and* the reconceived view that focuses more broadly on gender-based harassment and discrimination against women, LGBT people, and others who challenge gender norms.

The question is which version will—or more importantly, should—capture the public imagination going forward. Are there good reasons for re-embracing the older sexualized view in the current era?

To answer this question, we first speculate on why the *New York Times* might have adopted an exclusively sexual definition and view of harassment. The point is not to figure out the *Times*’s actual motiva-

⁸⁰ See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [https://perma.cc/ULT8-MD4J] (describing activist Tarana Burke’s efforts to create the #MeToo campaign).

⁸¹ “Me too. Suggested by a friend: ‘If all the women who have been sexually harassed or assaulted wrote ‘Me too.’ as a status, we might give people a sense of the magnitude of the problem.” Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 3:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976/photo/1?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetbed%7Cwterm%5E919659438700670976&ref_url=https%3A%2F%2Fwww.ntimes.com%2F2017%2F10%2F20%2Fus%2Fme-too-movement-tarana-burke.html [https://perma.cc/48KW-BP22] (emphasis added).

⁸² *About TIME’S Up*, TIME’S UP, https://www.timesupnow.com/about_times_up [https://perma.cc/B49D-C4K2] (last visited Feb. 1, 2019). For discussion of similar reform efforts generated by #MeToo, see Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at 61.

⁸³ Melissa Gira Grant, *The Unsexy Truth About Harassment*, N.Y. REV. BOOKS DAILY (Dec. 8, 2017), <http://www.nybooks.com/daily/2017/12/08/the-unsexy-truth-about-harassment> [https://perma.cc/FN8U-86LZ]; Anna North, *What I’ve Learned Covering Sexual Misconduct This Year*, VOX (Dec. 27, 2017), <https://www.vox.com/identities/2017/12/27/16803610/sexual-misconduct-harassment-reckoning-metoo> [https://perma.cc/2DKA-2P7N]; Rebecca Traister, *This Moment Isn’t (Just) About Sex. It’s Really About Work*, CUT (Dec. 10, 2017), <https://www.thecut.com/2017/12/rebecca-traister-this-moment-isnt-just-about-sex.html> [https://perma.cc/FEC9-GPRH].

tions, but rather to ask why any responsible media outlet that is apparently committed to exposing workplace harms against women would adopt such a view. We then discuss some of the harms of the sexualized view.

A. Reasons for Adopting a Sexual Definition

1. Publicity. Perhaps part of the answer has to do with the fact that salacious stories generate publicity. Sex sells.⁸⁴ Stories like those told about movie mogul Harvey Weinstein are the stuff of tabloids. Searingly personal, and painful as they are to read, the revelations made by actors such as Ashley Judd,⁸⁵ Gwyneth Paltrow,⁸⁶ Salma Hayek,⁸⁷ and Lupita Nyong'o⁸⁸ are also stories of sex, stars, and movie deals, set in exotic locations from Hollywood to Cannes. These stories are destined to find a wide audience that similarly disturbing descriptions of harassment on Ford's factory line⁸⁹ likely never will.⁹⁰

2. Effectiveness. A more charitable explanation may lie in a belief that reporting on the wrongs committed by powerful figures like Harvey Weinstein, Matt Lauer,⁹¹ and Louis C.K.,⁹² can lead to greater change than stories about more entrenched cultures of harassment, often carried out by coworkers or subordinates. After all, Harvey Weinstein's sexual demands and assaults stopped when the *New York Times* exposed them.⁹³ The top-down, sexualized paradigm of harassment allows

⁸⁴ See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1693–96 (describing outside media focus on the sexualized details of harassment cases).

⁸⁵ Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://nyti.ms/2xVPfVW> [<https://perma.cc/3Y4H-GFTB>].

⁸⁶ Jodi Kantor & Rachel Abrams, *Gwyneth Paltrow, Angelina Jolie and Others Say Weinstein Harassed Them*, N.Y. TIMES (Oct. 10, 2017), <https://nyti.ms/2gapaOJ> [<https://perma.cc/4BJ8-22L3>].

⁸⁷ Salma Hayek, *Harvey Weinstein Is My Monster, Too*, N.Y. TIMES (Dec. 12, 2017), <https://nyti.ms/2nXntXL> [<https://perma.cc/F346-E68T>].

⁸⁸ Lupita Nyong'o, *Speaking Out About Harvey Weinstein*, N.Y. TIMES (Oct. 19, 2017), <https://nyti.ms/2l0MXCm> [<https://perma.cc/AL2F-X28N>].

⁸⁹ Chira & Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, *supra* note 7.

⁹⁰ Maggie Adams, Ari Isaacman Bevacqua & Anna Dubenko, *The Most-Read New York Times Stories of 2017*, N.Y. TIMES (Dec. 8, 2017), <https://nyti.ms/2BNssfH> [<https://perma.cc/9H74-J2GH>] (noting that the stories cited in the previous four footnotes were, respectively, the 10th, 45th, 9th, and 80th most-read *New York Times* stories in 2017).

⁹¹ Ellen Gabler et al., *NBC Fires Matt Lauer, the Face of 'Today'*, N.Y. TIMES (Nov. 29, 2017), <https://nyti.ms/2k93ZOW> [<https://perma.cc/C8D8-VR8W>] (this was the 7th most read *New York Times* article of 2017, Adams, Bevacqua & Dubenko, *supra* note 90).

⁹² Melena Ryzik, Cara Buckley & Jodi Kantor, *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://nyti.ms/2ho0aE0> [<https://perma.cc/S3E2-CXA6>] (this was the 16th most read *New York Times* article of 2017, Adams, Bevacqua & Dubenko, *supra* note 90).

⁹³ *Supra* notes 85–88.

for this kind of immediate, dramatic resolution: the guy at the top gets fired (an event which is often itself an important news story that generates more publicity).

Collecting such stories, the *Times's* infographic about the “201 Powerful Men” brought down by #MeToo in its first year⁹⁴ stands as a symbol of the movement’s—and reporters’—effectiveness. A similar follow-up to the *Times's* reporting about the sexually and racially hostile work environment at Ford plants is harder to imagine. Indeed, the 2017 reporting on Ford was itself a follow-up to stories (and lawsuits) that emerged from the same Chicago-area plants in the 1990s.⁹⁵ Depressingly little had changed in twenty years. The problem could not be fixed with a single well-publicized personnel change.

But it remains to be seen whether the harassment problems in industries such as Hollywood and Silicon Valley can be fixed by firing individual harassers. In industries and workplaces plagued by harassment, deeper structural problems, such as entrenched sex segregation, unchecked supervisory authority, and informal “who-you-know” hiring, give dominants the upper hand.⁹⁶ As Schultz wrote recently after surveying these entrenched problems in both industries: “Sooner or later, other harassers will take their place—unless the underlying conditions that foster harassment in the first place are addressed.”⁹⁷ In other words, focusing on the traditional, sexualized, male boss/female subordinate(s) vision of sexual harassment may not end up being as effective in the long run as it is dramatic in the short term.

3. Pervasiveness or Seriousness. Perhaps, however, the *Times* and other media focus on workplace sexual abuse out of a belief that that it is more pervasive, or its harms more serious, than other types of sexist misconduct. Such a view has long been promoted by some strands of feminism.⁹⁸ Early in the development of sexual harassment law, for example, some feminists argued that “harassment is problematic precisely *because* it is sexual in nature—and because heterosexual sexual relations are the primary mechanism through which male dominance and female subordination are maintained.”⁹⁹ Early sexual

⁹⁴ Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [https://perma.cc/4C3D-Z4KA].

⁹⁵ *U.S. and Ford Settle Harassment Case*, N.Y. TIMES (Sept. 8, 1999), <https://nyti.ms/2IYFTgw> [https://perma.cc/83GA-AYQY].

⁹⁶ Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at 48–53.

⁹⁷ *Id.* at 26.

⁹⁸ For a discussion of such feminist thought and its influence on the development of sexual harassment law, see Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1697–1705.

⁹⁹ *Id.* at 1705 (discussing Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 59–77 (1979); Kathleen Barry, *Female Sexual Slavery* 164–65 (1979); Andrea Dworkin, *Intercourse* 126 (1987)).

harassment cases challenged “precisely the sort of top-down, supervisor-subordinate, male-female sexual extortion” decried by these feminists.”¹⁰⁰

Some journalists may simply take this point of view for granted, but this is not the only feminist perspective on sexual harassment law. Members of the media should educate themselves and the public about the rich variety of feminist and progressive thought on the subject. Many writers reject the notion that sexuality is uniquely harmful, or that heterosexuality itself somehow generates harmful structures of gender, race, class, and homophobia in the workplace and other social realms.¹⁰¹

Theoretical debate aside, it turns out that some key factual assumptions used to defend the sexualized view of harassment are not well grounded. We discuss some of these inaccuracies, and associated harms, below.

B. Counterarguments: The Harms of a Sexualized Definition.

1. Pervasiveness. First of all, it is simply wrong to think that sexualized forms of harassment are more pervasive than the types of sexual harassment sometimes referred to as “gender harassment.” (More on this term in Part III.) To the contrary, non-sexual, sex-based harassment is far more common than sexual advances and attention, as discussed above.¹⁰² Defining it out of existence vastly underestimates the amount of harassment and discrimination facing working women, and many men, and leaves them ill-informed about their rights.

2. Harmfulness. There is little if any evidence that overtly sexual harassment is more harmful than other forms. To the contrary, research suggests that non-sexual harassment causes harm similar to that caused by more sexual forms.¹⁰³ Indeed, in the workplace, the former may be even *more* harmful, precisely because it is not widely

¹⁰⁰ *Id.* at 1705.

¹⁰¹ See e.g., Schultz, *The Sanitized Workplace*, *supra* note 24, at 2136–2139 (arguing that sexuality is not inherently subordinating or degrading, but rather sexualized behavior is used as only one tool among many for maintaining masculine superior status and identity); Ann C. McGinley, *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99 (2018), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-McGinley.pdf> [<https://perma.cc/JJ7H-9ET9>] (extending the analysis of the pervasiveness of non-sexual, sex-based harassment to school settings); Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. F. 105 (2018), <https://www.yalelawjournal.org/forum/what-about-ustoo> [<https://perma.cc/68N6-4N8C>] (discussing the often overlooked racialized dimensions of sexual harassment and sex-based harassment); Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J. F. 85 (2018), <https://www.yalelawjournal.org/forum/of-power-and-process> [<https://perma.cc/5RNW-RA7C>] (discussing class-based dimensions of sexual harassment law).

¹⁰² *Supra* notes 39–46, and accompanying text.

¹⁰³ See Leskinen et al., *supra* note 34, at 37; M. Sandy Herscovis & Julian Barling, *Comparing*

acknowledged as a social problem. Thus, “unlike with overtly sexual harassment, women and other victims may also be more likely to internalize and blame themselves for nonsexual harassment, rather than attributing it to sexism and gender bias for which they are not responsible.”¹⁰⁴

3. Skewed Focus. Focusing solely on sexualized forms of harassment not only underestimates the incidence and harm of sexual harassment generally: it also disproportionately neglects the types most often faced by women in supervisory positions and male-dominated job settings,¹⁰⁵ and by LGBT workers.¹⁰⁶ According to the National Academies’ study, LGBT employees working in higher education report experiencing “gender harassment” at two-and-a-half times the rate reported by heterosexual employees.¹⁰⁷ These are people who by definition are crossing traditional gender boundaries about their “proper place” or defying gender stereotypes about how proper “women” and “men” should behave. Harassment is a way of punishing them for gender non-conformity.¹⁰⁸

Indeed, neglecting non-sexualized harassment and ignoring harassment against people who violate gender norms are dynamics that reinforce each other in a self-perpetuating cycle. Focusing only on *New York Times*-type stories in which a powerful heterosexual man makes sexual advances on the beautiful women who work for him makes a desire-based account of sexual harassment all too easy to accept. After all, readers may think, what man wouldn’t want these women? Foregrounding less visible stories in which the person harassed is not a beautiful ingenue but a butch lesbian, harassed because she is the

Victim Attributions and Outcomes for Workplace Aggression and Sexual Harassment, 95 J. APPLIED PSYCH. 874, 875 (2010).

¹⁰⁴ Schultz, *Reconceptualizing Sexual Harassment Again*, *supra* note 6, at 43 & n.101 (citing sources).

¹⁰⁵ Heather McLaughlin et al., *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77 AM. SOC. REV. 625, 634 (2012) (finding that female supervisors “report a rate of harassment 73 percent greater than that of nonsupervisors”); *see also* Jennifer Berdahl, *The Sexual Harassment of Uppity Women*, 92 J. APPL. PSYCH. 425, 425 (2007) (finding that women with more “masculine” personality traits like aggressiveness are sexually harassed more than “women who meet feminine ideals.”).

¹⁰⁶ *See generally* Soucek, *Queering Sexual Harassment Law*, *supra* note 8.

¹⁰⁷ In a study of 629 employees in higher education, nearly 76.9 percent of sexual minorities (of both genders) experienced gender harassment, whereas only 30 percent of heterosexuals (of both genders) experienced gender harassment. Julie Konik & Lilia M. Cortina, *Policing Gender at Work: Intersections of Harassment Based on Sex and Sexuality*, 21 SOC. JUSTICE RESEARCH 313, 324 (2008).

¹⁰⁸ Schultz, *Open Statement*, *supra* note 24, at 19; Soucek, *Queering Sexual Harassment Law*, *supra* note 7, at 72–72; Soucek, *Perceived Homosexuals*, *supra* note 32, at 748–760; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1774–1777.

boss,¹⁰⁹ makes it easier to see something other than sexual interest and opportunism as harassment's cause.¹¹⁰

At the same time, rooting sexual harassment in sexual desire rather than gender policing makes it much more difficult to see the harassment of LGBT and other gender non-conforming people as a form of sex discrimination.¹¹¹ By focusing only on sexual desire, we miss the common thread linking a male boss's sexual advances, a co-worker's homophobic slurs, and the insubordination faced by a female authority figure from the men who work for her: All are attempts to police gender and reinforce gendered spaces, professions, and prerogatives. Disrupting such gender boundaries has *always* been part of the contested meaning of Title VII.¹¹²

4. Misunderstood Motivations. This last observation suggests another cost of ignoring non-sexualized forms and causes of sexual harassment: Doing so can lead observers to misunderstand and downplay even the sexualized forms.¹¹³

Consider, for example, one of Donald Trump's standard defenses against allegations of predatory sexual advances and assaults: "She's not my type."¹¹⁴ Or, as his then-lawyer Michael Cohen said of the accusers, "they're not somebody that he would be attracted to, and therefore,

¹⁰⁹ *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018); Soucek, *Queering Sexual Harassment Law*, *supra* note 8.

¹¹⁰ As commentators have recognized, expanding the stories that are told about sexual harassment helps shift social and legal understanding of its causes and effects. See, e.g., Tristin K. Green, *Was Sexual Harassment Law A Mistake? The Stories We Tell*, 128 *YALE L.J. F.* 152 (2018), <https://www.yalelawjournal.org/forum/was-sexual-harassment-law-mistake> [<https://perma.cc/DW2U-AWC9>].

¹¹¹ See Soucek, *Queering Sexual Harassment Law*, *supra* note 8.

¹¹² Soucek, *Hively's Self-Induced Blindness*, *supra* note 60, at 125 (citing Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 *HARV. L. REV.* 1307, 1328, 1331, 1377–80 (2012); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 *DENVER U. L. REV.* 995, 1014–46 (2015)). This insight is especially crucial now that the Supreme Court has taken up the question of whether Title VII prohibits discrimination based on sexual orientation and gender identity. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 2019 WL 1756678 (2019); *Bostock v. Clayton Cty. Bd. of Commissioners*, 723 F. App'x 964 (11th Cir. 2018), *cert. granted*, 2019 WL 1756677 (2019) (consolidated with *Zarda*); *R.G. & G.R. Harris Funeral Homes Inc. v. E.E.O.C.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 2019 WL 1756679 (2019); Brief of Anti-Discrimination Scholars, *supra* note 56.

¹¹³ For an example in addition to those that follow, see Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at 46–47 (discussing this point and supporting research). In this piece, Schultz shows how even famed sexual predator Harvey Weinstein engaged in a pattern of non-sexual misogyny and homophobic insults against female and male employees, in addition to his sexual assaults and advances. Despite the lack of media attention to these broader forms of sexual harassment and discrimination, Schultz argues, analyzing them helps illuminate Weinstein's motivations and reveals that he wasn't just a sex-crazed pervert, but an industry kingpin bent on displaying a variety of gendered prerogatives. *Id.* at 34–38.

¹¹⁴ Peter Baker & Neil Vigdor, *'She's Not My Type': Accused Again of Sexual Assault, Trump Resorts to Old Insult*, *N.Y. TIMES* (June 24, 2019), <https://www.nytimes.com/2019/06/24/us/politics/jean-carroll-trump.html> [<https://perma.cc/FGK8-G5FR>]; see also Ryan Teague Beckwith, *Read Donald Trump's Speech Attacking His Accusers*, *TIME* (Oct. 14, 2016), <http://time.com/4532181/do>

the whole thing is nonsense.”¹¹⁵ This defense only makes sense if misplaced sexual desire is the sole reason men sexually harass women. But it is not. Unwanted sexual advances can also serve to maintain masculine status in the eyes of other men—not just by carrying them out, but also, often, by boasting about them, lording them over other men, or using them as a means of bonding.¹¹⁶

This point helps explain a crucial but unappreciated moment in the recent confirmation hearings of now-Justice Brett Kavanaugh. Senator Patrick Leahy asked Dr. Christine Blasey Ford about her strongest memory from the day she was attacked. Her answer is now famous:

FORD: Indelible in the hippocampus is the laughter, the laugh—the uproarious laughter between the two, and their having fun at my expense.

Senator Leahy continued:

LEAHY: You’ve never forgotten that laughter. You’ve never forgotten them laughing *at you*.

FORD: They were laughing *with each other*.

LEAHY: And you were the object of the laughter?

FORD: I was, you know, underneath one of them while the two laughed, two friend[s]—*two friends having a really good time with one another*.¹¹⁷

Despite his sympathetic questioning, Senator Leahy was unable to see what Dr. Ford instantly realized. The laughter was not at her or about her, just as the attack she described was not about sexual gratification. Before all else, the whole thing was a form of homosocial bonding: two privileged boys from an all-male school showing off for each

nald-trump-north-carolina-accusers-speech-transcript/ [https://perma.cc/JX6Y-DNBU] (“Believe me, she would not be my first choice.”).

¹¹⁵ See also Bryan Logan, *Donald Trump’s Attorney: Trump’s Sexual-Assault Accusers “Aren’t Even Women He’d Be Attracted to,”* BUSINESS INSIDER (Oct. 18, 2016), <https://www.businessinsider.com/michael-cohen-donald-trump-accusers-sexual-assault-trump-lawyer-2016-10> [https://perma.cc/HWF5-NECM].

¹¹⁶ See *Transcript: Donald Trump’s Taped Comments about Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html> [https://perma.cc/B3PR-WTTC].

¹¹⁷ *Kavanaugh Hearing: Transcript*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.102e203ecf30 [https://perma.cc/JY6P-T66T] (emphases added).

other, abusing alcohol and a young woman in order to “hav[e] a really good time.”¹¹⁸

Dr. Ford’s insight into what she endured helps explain the relevance of other stories told about Brett Kavanaugh around the same time—ones typically dismissed as irrelevant because they did not involve sexual misconduct. The stories of aggression and blackout-level drinking at his all-male high school and his notorious all-male fraternity at Yale College all fit the pattern.¹¹⁹ They illustrate the antics men often use to compete, bond, and prove themselves to each other, especially in sex-segregated settings. These stories in no way contradict the counternarrative of ambition and success that Kavanaugh himself told. Instead, demonstrative masculinity—the beer and sports and yearbook jokes about girls—provided the path to success in the single-sex environments where Kavanaugh thrived.¹²⁰

Thus, any alleged misconduct by Kavanaugh toward Dr. Ford was in service of his social ambition among other young men, not just teenage lust. Kavanaugh distanced himself from the latter explanation, perhaps truthfully, claiming that he remained a virgin until well after college.¹²¹ But he doubled down on his embrace of the male-dominated institutions where he came of age. Focusing on solely his sexual intentions obscures just how aggressively gendered those institutions were and are. To deny sexual intent is *not* to deny sexual harassment. Even sexual misconduct and assault can be motivated by things other than, or in addition to, a desire for sexual contact.

The selective focus of Kavanaugh’s denials at the hearings was mirrored in written answers to questions Senator Chris Coons asked about another important homosocial relationship in Kavanaugh’s life: his clerkship and later friendship with Alex Kozinski, former judge on the Ninth Circuit. When asked whether he had ever witnessed Kozinski behaving badly toward a law clerk, Kavanaugh understood each question and framed each answer to refer only to *conduct of a sexual nature*.¹²²

¹¹⁸ *Id.*

¹¹⁹ See Stephanie Saul et al., *In a Culture of Privilege and Alcohol at Yale, Her World Converged with Kavanaugh’s*, N.Y. TIMES (Sept. 25, 2018), <https://www.nytimes.com/2018/09/25/us/politics/dborah-ramirez-brett-kavanaugh-allegations.html> [<https://perma.cc/E7KJ-C2HK>]; Eren Orbey, *The Long Decline of DKE, Brett Kavanaugh’s Fraternity at Yale*, THE NEW YORKER (Sept. 25, 2018), <https://www.newyorker.com/culture/culture-desk/the-long-decline-of-dke-brett-kavanaughs-fraternity-at-yale> [<https://perma.cc/MU9U-TQNV>].

¹²⁰ For discussions of the important role of such sex-segregated, mostly-male environments as both a cause and consequence of sexual harassment, see Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at 49–50.

¹²¹ Emily Birnbaum, *Kavanaugh: I Was a Virgin Through High School and College*, THE HILL (Sept. 24, 2018), <https://thehill.com/homenews/senate/408172-kavanaugh-i-was-a-virgin-through-high-school-and-college> [<https://perma.cc/AHH7-UVSW>].

¹²² See text accompanying note 70.

Asked whether he had ever witnessed Kozinski “engaging in inappropriate behavior,” for example, Kavanaugh replied, “Judge Kozinski was known to be a tough boss, but I did not witness him engaging in inappropriate behavior of a sexual nature.”¹²³

COONS: Did you ever see Judge Kozinski mistreat a law clerk or law clerk candidate? Please explain any such incident(s).

KAVANAUGH: Over the course of my relationship with Judge Kozinski, I never saw him *sexually harass* a law clerk or law clerk candidate.

COONS: Did Judge Kozinski ever use demeaning language when discussing women?

KAVANAUGH: I do not remember hearing Judge Kozinski use demeaning language of a sexual nature when discussing women.

COONS: Did anyone ever raise concerns with you about Judge Kozinski’s behavior? Who? When?

KAVANAUGH: To the best of my memory, no one ever raised concerns with me regarding *inappropriate behavior of a sexual nature* on the part of Judge Kozinski.¹²⁴

Even assuming that Kavanaugh never observed any sexualized behavior by Kozinski, as others claim to have done,¹²⁵ Kavanaugh’s answers are still remarkably unresponsive.¹²⁶ They evade the questions

¹²³ *Responses of J. Brett Kavanaugh, Nominee, Associate Justice of the Supreme Court of the United States, to Questions for the Record from Sen. Christopher Coons, Senate Judiciary Committee*, 115th Cong. 157–58 (Sept. 10, 2018), <https://www.judiciary.senate.gov/download/kavanaugh-responses-to-questions-for-the-record> [<https://perma.cc/VK3W-5WF5>] (emphases added).

¹²⁴ *Id.*

¹²⁵ See Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.ed3e9e8ebdb7 [<https://perma.cc/D3TD-2885>]; Heidi Bond, *I Received Some of Kozinski’s Infamous Gag List Emails. I’m Baffled by Kavanaugh’s Responses to Questions About Them*, SLATE (Sept. 14, 2018), <https://slate.com/news-and-politics/2018/09/kavanaugh-kozinski-gag-list-emails-senate-hearings.html> [<https://perma.cc/M6A4-WKZF>]; Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017), <https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html> [<https://perma.cc/2BKJ-JEJT>].

¹²⁶ The worst instance: asked if he had received emails from Judge Kozinski’s sexually explicit email list, Kavanaugh said he didn’t “remember receiving inappropriate emails of a sexual nature from Judge Kozinski.” Then asked, “[h]ave you conducted a search of your email accounts and/or correspondence with Judge Kozinski in an effort to provide an accurate response to the preceding question? If not, why not?,” Kavanaugh just repeated: “I do not remember receiving inappropriate emails of a sexual nature from Judge Kozinski.” *Responses of J. Brett Kavanaugh to Sen. Patrick Leahy’s Questions for the Record*, *supra* note 124, at 73.

by reducing all mistreatment to sexual harassment, and all sexual harassment to language and behavior “of a sexual nature.”

Yet, a superior or peer can demean women, mistreat them, undermine their work or reputations, and even drive them from a workplace, job, or social space through harassing conduct and language *not* “of a sexual nature.” To leave this kind of harassment or motive out of the discussion is to ignore a major part of the sexual harassment clerks like Kozinski’s have said they endured. Indeed, it is to misunderstand the broader underlying harms of even the sexualized forms of harassment. Furthermore, it minimizes the problem of sexual harassment by limiting it to a few sex-crazed bad apples.

In the wake of the Kozinski scandal, a working group appointed by Chief Justice Roberts to help “protect all court employees from inappropriate conduct in the workplace,” largely avoided this trap. The group’s June 2018 report focused on harassment in all its forms, with the goal of promoting “an inclusive and respectful workplace.”¹²⁷ It recommended that the Judicial Conference issue clearer proscriptions on sex-based harassment, including harassment based on sexual orientation and gender identity,¹²⁸ and similarly clarify its Model Employment Dispute Resolution Plan.¹²⁹ Commentary to subsequently enacted amendments to the Judicial Code of Conduct make clear that “harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct.”¹³⁰

Yet even in this admirable report and the reforms it spurred, the sexualized conception of sexual harassment retains a foothold. Amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings enacted in March 2019 identify and address “unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault” separately from what Rules refer to as “intentional discrimination on the basis of race, sex, gender, gender identity, pregnancy, sexual

¹²⁷ *Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States* 1–2 (June 1, 2018), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [<https://perma.cc/PWA7-XZXX>] [hereinafter WORKING GROUP REPORT]. See also *id.* at n.15 (“[H]arassment for any reason is problematic, and the Working Group’s references to harassment are therefore not limited to harassment of a sexual nature”); *id.* at 27 (“[N]or should [confidentiality requirements] discourage[] an employee from revealing abuse or reporting misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person . . .”).

¹²⁸ *Id.* at 24, 30.

¹²⁹ *Id.* at 34.

¹³⁰ *Guide to Judiciary Policy, Vol. 2: Ethics and Judicial Conduct, Pt. A: Codes of Conduct, Ch. 2: Code of Conduct for United States Judges*, Canon 3(B)(4) 11 (Mar. 2019), <https://www.uscourts.gov/file/document/code-conduct-us-judges-effective-march-12-2019> [<https://perma.cc/3D29-L429>].

orientation, religion,¹³¹ national origin, age, or disability.”¹³¹ The concern here is that decision makers might limit sex- or gender-based “discrimination” to tangible employment decisions, while limiting broader concerns about hostile workplaces to complaints about “sexual conduct.” Such a process of disaggregation would limit responsibility for both, and allow non-sexual but still sex-based harassment to evade scrutiny altogether.¹³²

III. WHY THE NAME MATTERS

Even if we all agreed that non-sexual but still gendered forms of harassment are harmful and should be eliminated, the question remains: What is at stake in calling them “sexual harassment”? Must we insist on reconceptualizing the very term “sexual harassment,” instead of replacing it with another overarching term that includes both sexual and non-sexual misconduct—perhaps “sex-based harassment,” as some have proposed?¹³³ Or alternatively, could we preserve the sexualized definition of “sexual harassment” but add to it another term, such as “gender harassment,” to capture all the sexism and abuse that the sexualized notion of sexual harassment leaves out?¹³⁴

Were we writing on a blank slate, substituting an umbrella term like “sex-based harassment” might well be better: more accurate, less easily misleading than the term “sexual harassment.” But the slate isn’t blank; it bears the marks of one of the most widespread popular legal education efforts in the country. Aside from traffic laws and drivers’ education, perhaps no topic is the subject of more mandatory legal trainings than sexual harassment. Furthermore, in major media outlets like the *New York Times*, as well as on social media, “sexual harassment” is

¹³¹ *Guide to Judiciary Policy, Vol. 2: Ethics and Judicial Conduct, Pt. E: Judicial Conduct and Disability Act and Related Materials, Ch. 3: Rules for Judicial-Conduct and Judicial-Disability Proceedings*, Rule 4(a)(2)(A) and 4(a)(3) (Mar. 2019), <https://www.uscourts.gov/file/document/judicial-conduct-and-disability-rules-effective-march-12-2019> [<https://perma.cc/YW79-NTPW>]. For criticism of this aspect of the reforms, see Comment of Yale Law Student Working Group, *Proposed Changes to the Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules* 11–12, (Nov. 13, 2018), <https://www.uscourts.gov/file/24922/download> [<https://perma.cc/4Q3C-FEHE>].

¹³² See *infra* notes 156–158 and accompanying text.

¹³³ See, e.g., Berdahl, *The Sexual Harassment of Uppity Women*, *supra* note 105, at 435 (using “sex-based harassment”). When we, alongside other antidiscrimination scholars, circulated an Open Statement on Sexual Harassment, see Schultz, *supra* note 24, one thoughtful response we received from a potential signatory asked “why the choice was made to call this a statement on ‘sexual harassment,’ rather than a statement on ‘sex-based harassment’? It seems to be in tension with many of the points in the statement itself,” she continued, “which make clear that sexualized harassment is just one type of sex-based harassment, and that all forms of sex-based harassment work together to create barriers in the work place.” This Part can be understood as a response to her question—an explanation of why we use a term that has so often been misunderstood.

¹³⁴ *Supra* note 38.

the term most often deployed. The terminological train having left the station, the best we can do is to guide its tracks.

To step back a moment: there are three possibilities for describing the varieties of harassment described in the previous two parts. First, we could take the route offered by the *New York Times*, defining “sexual harassment” to encompass only behaviors “of a sexual nature,” and using another term such as “gender harassment” to cover everything else that is sex-based but not sexualized. Second, we could follow the recent EEOC task force, whose 2016 report follows many social scientists in relying on “sex-based harassment” or “harassment based on sex” as its descriptively accurate umbrella term, and then uses “unwanted sexual attention,” “sexual coercion,” and “gender harassment” as sub-categories under that umbrella.¹³⁵ Third, we could follow the National Academies report, which adopts the same three sub-categories, but treats them all as types of sexual harassment.¹³⁶

To see all three of these approaches in action, we can look to the biggest economy and labor pool in the country: California, whose non-discrimination laws, although progressive, still hedge on the meaning of “sexual harassment.” That ambiguity creates an opening for those who, for their own purposes, may prefer to limit the term to its narrower sexualized meaning, as shown below.

Overall, California law contains a broad definition of sexual harassment, much like the one for which we advocate. California courts, like their federal counterparts, have long recognized that “[s]exual harassment does not necessarily involve sexual conduct. It need not have anything to do with lewd acts, double entendres or sexual advances.”¹³⁷ In addition, the dozen or so bills recently enacted in California in response to the #MeToo movement have largely avoided singling out sexual harassment for special treatment in comparison to other forms of sex discrimination—though media reporting on those bills often misses this fact. The *Sacramento Bee*, for example, has described Senate Bill 820 as “prohibit[ing] secret settlements and non-disclosure agreements in sexual harassment cases.”¹³⁸ In fact, the bill, which became law in September 2018, applies not only to sexual harassment in professional relationships outside the workplace (those defined in Civil Code § 51.9),

¹³⁵ EEOC REP., *supra* note 37, at 10. *See also supra* note 38.

¹³⁶ NAT'L ACADS. REP., *supra* note 44, at 28–29.

¹³⁷ *Accardi v. Superior Court*, 17 Cal. App. 4th 341, 345 (1993); *see also* Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121, 123–124 (2018), <https://www.yalelawjournal.org/forum/sexual-harassment-law-after-metoo> [<https://perma.cc/XA8K-S63F>].

¹³⁸ *See, e.g.,* Alexei Koseff, *California Bans Secret Settlements in Sexual Harassment Cases*, SACRAMENTO BEE (Sept. 30, 2018), <https://www.sacbee.com/news/politics-government/capitol-alert/article218830265.html> [<https://perma.cc/YPE6-9GSW>].

but also to harassment *or discrimination based on sex* in workplaces and housing as defined in Government Code Sections 12940 and 12955.¹³⁹ Confidential settlements are thus banned in *all* cases involving sex discrimination. Newly enacted bills banning retaliation against whistleblowers,¹⁴⁰ and bonuses or raises contingent on liability waivers,¹⁴¹ have a similarly broad sweep. The latter bill also expands liability for harassment, formerly just sexual harassment, by non-employees.¹⁴²

Civil Code § 51.9, the California state law that provides a cause of action for people sexually harassed by their teachers, accountants, lawyers, directors, and others with whom they have a professional relationship, defines sexual harassment capaciously to include “sexual advances, solicitations, sexual requests, demands for sexual compliance . . . or . . . other verbal, visual, or physical conduct of a sexual nature *or of a hostile nature based on gender*.”¹⁴³

But California’s employment discrimination law terms things differently. The statute defines the umbrella term as “‘harassment’ because of sex,” which, it says, “includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.”¹⁴⁴ In 1993, when this language was added, the Legislature noted that the state’s “prohibitions against harassment because of sex *have always included* sexual harassment, gender harassment, and pregnancy harassment.”¹⁴⁵ The Legislature only made the subcategories explicit, it said, “to more clearly identify them, for purposes of education and training, as harassment because of sex.”¹⁴⁶ This approach is thus similar to the one employed by the EEOC task force which uses sex-based harassment as the overarching term and enumerates specific subsets of conduct within it.

¹³⁹ See Settlement Agreements, Confidentiality, S.B. 820 2017–2018 Leg. Sess. (CA 2018), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB820 [<https://perma.cc/RVR4-GJPD>].

¹⁴⁰ See Whistleblowers, S.B. 419, 2017–2018 Leg. Sess. (CA 2018), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB419 [<https://perma.cc/9VHY-FEBS>], (defining “discriminatory harassment” as “harassment based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status” and protecting those who report it from retaliation by state legislators).

¹⁴¹ See Unlawful Employment Practices, S.B.1300, 2017–2018 Leg. Sess. (CA 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1300 [<https://perma.cc/G7UN-FQXY>] (protecting the right to “right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment”).

¹⁴² *Id.*

¹⁴³ CAL. CIV. CODE § 51.9(a)(2)–(3) (West 2018).

¹⁴⁴ CAL. GOV. CODE § 12940(j)(4)(C) (West 2018).

¹⁴⁵ CAL. ASSEMB. BILL 675 § 1(c) (1993) (emphasis added).

¹⁴⁶ *Id.*, at § 1(d).

Despite the progressive intent of this final approach, the California example shows how it can be unduly limited. For even though the overarching definition of harassment is broad, California's increasingly robust education and training requirements do *not* mandate training about "harassment because of sex." What California law actually requires is that employers display posters and offer training on *sexual harassment*.¹⁴⁷

The California example illustrates a key danger of placing "sexual harassment" alongside "gender harassment" (and other terms). Treating sexual harassment and gender harassment as subsets of some larger category with a different name, even an accurate name like "harassment because of sex," creates ambiguity that can prove harmful. The danger is that the awareness built up around sexual harassment—through media coverage, through the #MeToo movement, and not least, through employers' practices under laws like those in California, which mandate legal training for nearly every employee in the state—will focus on a narrow sexualized conception of sexual harassment that distinguishes it from gender harassment, instead of threatening them together.

This is not merely a theoretical concern. There is evidence that California employment discrimination law, the language of which was drafted to clarify the many forms sex-based harassment can take, instead ends up not only separating the terms, but devoting vastly more attention to one form of harassment—the sexualized variety, termed "sexual harassment"—over the others. Consider, for example, the sexual harassment posters and brochures distributed by the California Department of Fair Employment and Housing. They lead with a list of six "behaviors that may be sexual harassment," all of which reinforce a sexualized definition.¹⁴⁸

- 1) Unwanted sexual advances
- 2) Offering employment benefits in exchange for sexual favors

¹⁴⁷ See CAL. GOV. CODE §§ 12950, 12950.1 (West 2018). Senate Bill 1343 expanded the training requirement to employers with five or more employees rather than fifty or more, as before. The Bill also instructs the state's Department of Fair Employment and Housing to develop its own online training courses "on the prevention of sexual harassment in the workplace." S.B. 1343, 2017–2018 Leg. Sess. (CA 2018). Notably, the law requires that sexual harassment training include coverage of "harassment based on gender identity, gender expression, and sexual orientation." See CAL. GOV. CODE § 12950.1(c).

¹⁴⁸ *Sexual Harassment*, CAL. DEP'T OF FAIR EMPL. & HOUSING (Dec. 2018), https://www.dfeh.ca.gov/wpcontent/uploads/sites/32/2018/12/DFEH_SexualHarassmentPoster.pdf [<https://perma.cc/Y8YC-ZEVW>]; *Behaviors That May Be Sexual Harassment*, CAL. DEP'T OF FAIR EMPL. & HOUSING (Dec. 2018), https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/12/DFEH_SexualHarassmentPamphlet.pdf [<https://perma.cc/UPJ8-K5XE>].

- 3) Leering; gestures; or displaying sexually suggestive objects, pictures, cartoons, or posters
- 4) Derogatory comments, epithets, slurs, or jokes
- 5) Graphic comments, sexually degrading words, or suggestive or obscene messages or invitations
- 6) Physical touching or assault, as well as impeding or blocking movements.

The fourth and sixth of these behaviors *could* be interpreted to extend beyond sexualized content. But the Department’s online “Sexual Harassment FAQs” page, which expands on some of the categories, emphasizes that they refer to “[v]erbal abuse of a sexual nature, graphic verbal commentaries about an individual’s body, [and] sexually degrading words used to describe an individual.”¹⁴⁹ The Department goes on to emphasize: “State regulations define sexual harassment as unwanted sexual advances, or visual, verbal or physical conduct of a sexual nature,” removing any lingering doubt about what kinds of behavior the Department seeks to target under its training requirements.¹⁵⁰

Thus, the regulatory approach uses, and encourages California employers to use, an explicitly sexualized definition of harassment in their policies and training programs, notwithstanding the broader reach of California law.

Insofar as California employers are adopting and promulgating a sexualized notion of sexual harassment in their policies and trainings, they are not alone. Sixteen years ago, Schultz comprehensively analyzed the content of employers’ sexual harassment policies reported in research surveys or otherwise publicly available.¹⁵¹ She found that U.S. companies had almost universally adopted policies prohibiting sexual harassment and that these policies “define harassment exclusively in terms of sexual conduct (as opposed to conduct that discriminates on the basis of sex more generally).”¹⁵² At that time, “most of the . . . policies track[ed] the language of the EEOC guidelines, which, as we saw earlier, define harassment in terms of “[u]nwelcome sexual advances,

¹⁴⁹ *Sexual Harassment FAQs*, CAL. DEP’T OF FAIR EMPL. & HOUSING (last visited Feb. 12, 2019), <https://www.dfeh.ca.gov/resources/frequently-asked-questions/employment-faqs/sexual-harassment-faqs/> [https://perma.cc/2TJ9-G558].

¹⁵⁰ *Id.*

¹⁵¹ Schultz, *The Sanitized Workplace*, *supra* note 24, at 2094 & n.96 (citing policies reflected in surveys); *id.* at 2098 (discussing other published policies).

¹⁵² *Id.* at 2094 & n.97 (noting that, in those days, employers and the researchers who surveyed them defined sexual harassment exclusively in sexual terms).

requests for sexual favors, and other verbal or physical conduct of a sexual nature.”¹⁵³ The policies proscribed a wide range of sexual talk and behavior, and referred to sexualized examples¹⁵⁴ that would not necessarily amount to legally actionable harassment.

This analysis is not obsolete; a similar finding emerges in a recent study also. In an extensive content analysis of sexual harassment trainings offered by employers between 1980 and 2016, Elizabeth Tippett found that even after the Supreme Court’s 1998 decision in *Oncale*, 59 percent of the sampled training programs continued to define sexual harassment in sexual terms, often including among their examples of prohibited harassment sexual jokes, flirting, relationships, and comments about appearance that would not be counted as sexual harassment in any court.¹⁵⁵ Only half of these trainings even mention discrimination. Reiterating a point made earlier by Schultz,¹⁵⁶ Professor Tippett writes, “harassment has become unmoored from its larger purpose of ensuring access to equal workplace opportunity.”¹⁵⁷

Recent research also confirms newer iterations of another problem documented years ago by Schultz: “disaggregation” of evidence of sexual and non-sexual forms of misconduct.¹⁵⁸ In a perceptive student note, Eleanor Frisch demonstrates that this problem arises when state laws separately identify sexual harassment as something distinct from non-sexualized harassment on the basis of sex.¹⁵⁹ Looking to cases in Massachusetts, Michigan, and Minnesota, Frisch shows how courts have created entirely bifurcated pleading and evidentiary regimes for the two types of harassment. “[M]erely mentioning ‘sexual harassment’ in pleadings can be fatal to” a case involving non-sexualized harassment, she argues.¹⁶⁰

These examples show only a couple of the pitfalls that may arise when “sexual harassment” is conceptualized exclusively in sexual

¹⁵³ *Id.* at 2094 & n.98 (discussing policies reported in research surveys and citing 1980 EEOC guidelines); *id.* at 2098–2099 (reporting same finding about other reviewed policies).

¹⁵⁴ *Id.* at 2095–2099.

¹⁵⁵ Elizabeth Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 511 (2018) (“Even in current trainings, the large majority of examples are devoted to sexual conduct, equally divided between severe forms of sexual harassment—like physical harassment, or quid pro quo harassment—and relatively less severe conduct—like suggestive jokes, comments about appearance, and inappropriate emails.”).

¹⁵⁶ Schultz, *The Sanitized Workplace*, *supra* note 24, at 2119 (noting that “sexual harassment law has taken on a life of its own, uprooted from the larger project of gender equality that animates Title VII”).

¹⁵⁷ Tippett, *Harassment Trainings*, *supra* note 155, at 511.

¹⁵⁸ Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 6, at 1711 (demonstrating how such disaggregation works to plaintiffs’ disadvantage in the federal courts).

¹⁵⁹ Eleanor Frisch, *State Sexual Harassment Definitions and Disaggregation of Sex Discrimination Claims*, 98 MINN. L. REV. 1943 (2014) (showing the disaggregation problem in state courts).

¹⁶⁰ *Id.* at 1962.

terms. Nice as it might be to use a more generic overarching term like “sex-based harassment” to refer to the full panoply of harassment that occurs because of sex, or to use a parallel term like “gender harassment” to describe certain non-sexual forms, there is no denying that the term “sexual harassment” has achieved a place in legal and popular culture that is unlikely to be rivaled. By now, “sexual harassment” is a familiar category of antidiscrimination law at both the federal and state levels. “Sexual harassment” is what most workers in the country are now trained to avoid and prevent.¹⁶¹ Thanks to #MeToo, “sexual harassment” is part of the national conversation like never before. The important thing, then, is to make sure that within this conversation, within the law, and within the policies and trainings so common in nearly every workplace (and campus), people are talking about the right thing: the entire spectrum of ways that gender is policed through harassment that sometimes is sexualized, but even more often is not.

These days, both the #MeToo movement and major media outlets like the *New York Times* can take credit for shining a spotlight on sexual harassment. People are talking about the problem again, and rightly so. A time when everyone is talking about sexual harassment is not the best time to change the term being used. But it is a crucial time to make sure the term is properly understood, so the problem of sexual harassment can be properly confronted.

CONCLUSION

Two decades ago, *Reconceptualizing Sexual Harassment* prompted scores of women to write letters and emails describing how they recognized in their own lives the range of gendered harassment the article described. The authors were grateful that someone had acknowledged their lived experience—and had called out the harassment they faced as something harmful, and illegal.

In the age of #MeToo, people remain hungry for media representations that accurately reflect their everyday realities. The attention the #MeToo movement has given to sexual assault is necessary and valuable. But to collapse sexual harassment into sexualized advances and assaults is to ignore many of the ways that most women, and many men, experience hostility in the workplace (and beyond). To ignore those stories is to fail to recognize and understand the variety of ways in which gender gets policed, and gendered spaces get maintained.

¹⁶¹ Similar issues are presented under Title IX. See Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 6, at n.19.

This is why what gets named as “sexual harassment” matters, whether it be in the *New York Times* or in mandated workplace trainings. Both help shape popular understanding. Thus, choices about how to define and talk about sexual harassment end up affecting what ordinary employees and others feel they can and should report. And since popular understanding in turn seeps back and shapes the law, media reports and workplace policies on sexual harassment end up affecting the actions bystanders, employers, agencies, and courts feel compelled to stop.

By adopting an outdated conception of sexual harassment—one that most of the legal system and social science have moved beyond—the media misses a chance to educate the public and policy makers about the real scope and causes of sexual harassment. The *New York Times* may be right in urging its readers to engage in discussion about sexual harassment and “agree on definitions.” But when it comes to sexual harassment, the definition shouldn’t be the one used by the *Times* itself.

